ORIGINAL

In the

Supreme Court of the United States

CITY OF LAFAYETTE, LOUISIANA AND
CITY OF PLAQUEMINE, LOUISIANA,

Petitioners,

v.

LOUISIANA POWER AND LIGHT
COMPANY

Respondent.

No. 76-864

C4.

Washington, D. C.
October 4, 1977

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v.	:	No. 76-864
LOUISIANA POWER AND LIGHT COMPANY, Respondent.	:	

Washington, D. C.

Tuesday, October 4, 1977

The above-entitled matter came on for argument at 2:09 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JEROME A. HOCHBERG, ESQ., Rowley, Green, Hochberg & Fairman, 1990 M. Street, N.W., Washington, D.C. 20036, for the Petitioners.

ANDREW P. CARTER, ESQ., 1424 Whitney Building, New Orleans, Louisiana 70130, for the Respondent.

WILLIAM T. CRISP, ESQ., Crisp, Bolch, Smith, Clifton & Davis, 602 BB&T Bldg. P.O. Box 751, Raleigh, North Carolina 27602, as amici curiae, supporting Respondent.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Jerome A. Hochberg, Esq. for the Petitioner	3
Andres P. Carter, Esq. for the Respondent	25
William T. Crisp, Esq. as *amici curiae* supporting Respondent	40

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-864, City of Lafayette, Louisiana and City of Plaquemine, Louisiana, against Louisiana Power and Light Company.

Mr. Hochberg, you may proceed when you are ready.

ORAL ARGUMENT OF JEROME A. HOCHBERG, ESQ.

ON BEHALF OF THE PETITIONER

MR. HOCHBERG: Mr. Chief Justice, and may it please the Court:

The question presented by this case is whether cities, political subdivisions of states, are subject to causes of action and trouble damage liability under the federal antitrust laws.

We are here on a writ of certiorari and the case arises out of a complaint filed by the Petitioners, the Cities of Lafayette and Plaquemine, charging the Respondent, Louisiana Power & Light Company, two other investor-owned utilities and the parent of LP&L with violations of the anti-trust laws in the generation, transmission and distribution of electric power and energy.

LP&L, in turn, filed a counterclaim charging the Cities with antitrust violations in the conduct of the Cities' electric utility systems. The Cities moved to dismiss in the District Court on the ground that Parker v. Brown barred any

action under the federal antitrust laws against them. The District Court, relying on Parker, granted the motion and entered judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure against LP&L. LP&L then appealed to the Fifth Circuit and during the pendency of that appeal this Court came down with the Goldfarb ruling. The Fifth Circuit then reversed the District Court, relying on Goldfarb, and said that the cities were not automatically outside the scope of the antitrust laws and that in order to come within the State Action doctrine they would have to have had legislative approval for the specific conduct under challenge. Certiorari was granted by this Court after a petition by the Cities.

The Cities operate their electric utility systems -- they own and operate them -- pursuant to broad statutory authority from the Louisiana Legislature.

What is involved here is not whether Cities are beyond the law but simply whether Cities, as governmental bodies -- wholly governmental bodies -- are subject to the antitrust laws and the trouble damage judgments that come with them for conduct engaged in by City officials in the official performance of their duties. In addition, we are not here just talking about electric utility service for the Cities, we are talking about the myriad of services and operations that Cities engage in.

In order to make this determination, it seems to me,

this Court has said in Parker v. Brown that because the statute itself does not answer the question in specific words, that we must look to the statutory purpose, the legislative history, the subject matter, in the context of the statute.

I think we should also look to the adverse effects, severe adverse effects, from enforcement of these laws against City officials and City governments and the impingement that it will create on a fundamental policy in this country, the policy of local choice in ordering social and economic needs and providing local choice on governmental matters closest to the people.

In Parker, this Court unequivocably stated in broad language that the statutory purpose of the Sherman Act was to curb concentrations of private economic power. The Court stated that it was clear through pages of legislative history that the Congress was aiming at private individuals and business corporations. And, of course, at that time, there were the great sugar trust, the oil trust and the railroads running rampant and that was the basis for the legislation. The Court further said that there was not a hint in the legislative history of a purpose or effect to apply these laws to state government, state officials or agents of states.

Thirty-four years have gone by since that decision and that clear message and Congress has not seen fit to alter

the decision or the principles that underlie it. And I submit that cities as well as state agents and state officials come within the purview of that decision, for cities are but political subdivisions of states to whom the state delegates power that it gets from the people as a state for the more convenient and effective governance of the people at a level closer to them. In addition, cities, like states, only act for public purposes not for private gain.

QUESTION: Let's suppose a city or, make it more comprehensive, a state, the State of Louisiana, organized an airline, with fifty or seventy-five airplanes, with the usual pattern of airline operations and then engaged in monopolistic or price fixing or other statutory violations.

What would be your view of that?

MR. HOCHBERG: I would say that that would not be subject to antitrust attack. However, it might be subject to other remedies under the Constitution and the commerce power. And the Congress, of course, through the commerce power, could enact legislation to perhaps deal with it.

QUESTION: If it was entirely intrastate do you think they could, too?

MR. HOCHBERG: If it affected interstate commerce I believe they could, yes.

QUESTION: Let me change the question a little bit. Suppose a city conspired with a private entity. Isn't there

language in Parker itself to suggest that a city is then liable under the antitrust laws?

MR. HOCHBERG: I know the one that you refer to, Mr. Justice Blackmun, and I think just the opposite. I think that that language appears in a list of three kinds of conduct in which the Court in Parker was saying the state could not immunize persons from -- they could not authorize illiegal activity by individuals and corporations. They could not endorse it. And a private person who conspired with a governmental body would not be immune from antitrust prosecution.

And I say that because those three items are mentioned in a discussion in the opinion dealing with the defendants who were private members -- who were private individuals, the growers and the handlers who were operating the raisin program under the supervision of the State Prorate Commission. The defendants who were the Prorate Committee, as opposed to Commission, were private persons. And those comments by the court were made in the context of what was being described that the private parties were engaging in under state supervision. So I think it is just the opposite. I might add that at that point the Court in Parker also seemed to equate a state with a city, in that statement.

Now there are severe consequences, it seems to me, from applying laws which were aimed at private enterprise to government. For example --

QUESTION: Are you going -- Is your submission that there may be -- there is absolute antitrust immunity for all municipal governments in respect of municipal conduct by officials of the municipality?

MR. HOCHBERG: Well, my position is that the law absolutely does not apply to cities. It is not a question of immunity but that Congress never intended to apply it to them.

QUESTION: In any event, that the Parker-Brown principle applies to municipalities as it would to state governments, is that it?

MR. HOCHBERG: That's correct, Your Honor.

QUESTION: And no exceptions of any kind?

MR. HOCHBERG: No exceptions unless Congress sees fit to change that.

Applying these laws would have --

QUESTION: May I just ask, for example, I know in the city in which I was born we have a very substantial parking operation, underground parking area, and around the city and all the rest, and much complaint by competitors, private parking, for instance, framed as antitrust charges. You don't suppose there is any exception for that sort of thing?

MR. HOCHBERG: There is a remedy for those private parking --

QUESTION: But you don't think Parker and Brown applies to --

MR. HOCHBERG: I believe it does, that's correct, Your Honor. Rather than use the antitrust laws, there are political remedies and state law remedies if the public feels that what the city is doing, what government is doing at their behest is not appropriate and not consistent with public policy.

QUESTION: You wouldn't inquire whether what the city did is authorized by a state statute or by the state constitution or anything else, just as long as the city is doing it?

MR. HOCHBERG: That's correct, but of course if they weren't doing it pursuant to the constitution or state statute there would be a remedy of state law.

QUESTION: I know. I understand that, but your answer still though is whether legal or illegal under state law the antitrust law doesn't apply.

MR. HOCHBERG: That's right, but right here we have authorization --

QUESTION: I know, but your position is that whether it is legal or illegal under state law the antitrust law doesn't apply.

QUESTION: That's a rather hypothetical question, isn't it, whether it's legal or illegal under state law, because if you were to say that Parker v. Brown did not operate in that situation what you would have is a federal district court in an

antitrust suit deciding a matter of state municipal corporation law.

MR. HOCHBERG: I am not sure whether he would be deciding that, but he would certainly be intruding on the operation of municipal government and second guessing the city, and thereby also second guessing the state legislature which could certainly do something about it if they had a mind to.

QUESTION: Well, I suppose the argument would be that the state legislature didn't give the city the authority to do that.

MR. HOCHBERG: Well, then, it seems to me if you are talking about antitrust prosecution it would not matter under our condition.

For trouble damage liability to be hanging over the heads of city officials and city government would have the effect of making every city official fearful and timid in conducting the business of the city. And precisely what we need right now in city government, in any local government, is decisiveness not inhibition and timidity. Indeed, if judgments were entered, it could bankrupt some cities. And, most important of all, whether it bankrupted them or not it would have to be paid, the judgment would have to be paid by the taxpaying citizens of the city, not from risk-bearing equity owners, as is the case in private corporations.

QUESTION: How many cities are running institutions

like this?

MR. HOCHBERG: Somewhere beetween 1,700 and 2,000, Your Honor. It's a very prevalent mode of delivering electric service through municipally owned systems.

QUESTION: Seventeen hundred?

MR. HOCHBERG: Somewhere close to 2,000. Between 1,700 and 2,000, it is my understanding.

QUESTION: Any big cities?

MR. HOCHBERG: Los Angeles, for one. San Antonio, I believe. Part of Cleveland. Many small towns, however, too.

QUESTION: I thought it was mostly small towns.

MR. HOCHBERG: Cities engage in a wide range of activities and deliver a wide array of services in this day and age. Cities don't just deliver electric service. They operate hospitals, they collect garbage, deliver water, they provide police protection, they provide schools, they operate sports authorities and public parks and recreation. They do numerous things. And in all of these things they operate their governments often in a noncompetitive model. They don't structure their operations and their services along competitive models as private enterprise is required to do. And that has long been the case. By its nature, government acts in a noncompetitive manner. For example, they issue zoning rules and variances which could affect the competitive ability of businesses to function properly in their locations. They grant franchises

for delivery of some services. They may grant one or they may choose to grant one and exclude all other competitors, or they may choose --

QUESTION: How about athletic franchises, when a city tries to get a ball club to move to its community? Is it acting in a competitive way or noncompetitive way?

MR. HOCHBERG: Well, I don't believe the city owns or franchises that ball club, Mr. Justice Stevens.

QUESTION: Suppose it did. Sometimes, I think, they do.

MR. HOCHBERG: Well, I would suppose if they actually franchise it like they franchise a garbage collection company to collect garbage in the city then my principle would apply equally.

QUESTION: I realize your principle would apply, but would you still say they are not engaged in any kind of a competitive activity when they seek to pursuade a ball club to move to one city rather than another, as an example?

MR. HOCHBERG: Well, they may be competing with sister cities, but I don't think that is subject to the anti-trust laws.

If they choose to deliver the services themselves instead of franchising it, they may exclude all competition if they so desire or they may leave some competition in the city, perhaps mass transit competition rather than just exclusive

operation by the governmental authorities. Or, for example, cities can combine with their brother cities to induce lower prices from suppliers. Indeed, that was precisely what was charged in New Mexico v. American Petrofina, the Ninth Circuit case which supports my position completely. There may be public purposes for all of these things. And, indeed, in New Mexico, there was.

All of these approaches differ from antitrust concepts.

QUESTION: What if the state sets up a power district which is a municipal corporation but doesn't have any of the governing powers that a city ordinarily has, would your principle exempt it too?

MR. HOCHBERG: My principle, Mr. Justice Rehnquist, is that if it is a wholly governmental body, as opposed to a private party or a private party given some self-regulatory functions, but private primarily because it is engaged in operations for pecuniary benefit. For example, the Virginia state bar. Those lawyers had private interests at stake and they were just delegated limited functions by the state of a self-regulatory nature. So I would draw the line at exclusively governmental bodies.

If antitrust laws were to apply, given the way in which city operates in franchising and delivering services I have just described, there could be a flood of new litigation

in the courts, particularly a flood of trouble damage litigation by every disgruntled franchise applicant who thought he was the victim of a conspiracy between the city and the winning franchise holder.

QUESTION: Not only a franchise holder, the winning vendor of any commodity, such as parking meters. Wouldn't that be true?

MR. HOCHBERG: That's correct. Or in the Duke case in the Third Circuit which was against us, it was a beer company who wanted to sell beer in Three Rivers Stadium and apparently did not get the franchise, someone else did.

QUESTION: Suppose in one city there is a municipal electric company supplying the power for the community and in a neighboring city there is a city franchise, a private company, and it is the only company they franchise, let into the city. So it has in effect a monopoly. And then the private company in the one city and the adjoining city conspire together to exclude competition. They are doing something that everybody would concede would violate the antitrust laws and they get sued for it. One of them, you would say, would not be exempt and the other one is. Is that correct?

MR. HOCHBERG: That's correct, Justice White.

As I say, every disgruntled franchise applicant is going to be a potential trouble damage claimant. Indeed, every private business that covets the market that the city now

occupies in delivering services would also be a potential trouble damage claimant. And it wouldn't matter whether their claim was valid or not, but threat of the litigation or the actual filing and having to fight it would be severe, and all done by the rule of trouble damages I would suspect.

Now even with Respondent here and the various amici, particularly the Justice Department as amici, recognize, it seems to me, that there are some problems when you are talking about city government and applying laws like the antitrust laws to them, for they all try and draw lines to exclude certain conduct from the reach of the antitrust laws and include others. For example, all of them seem to want to draw a line between proprietary and governmental functions, a line that has been discredited in the past and rejected by this Court in numerous cases, most recently in the Indian Towing case in 1950, I believe, and a line which the lower court, the court below, the Fifth Circuit, equally rejected. The problem there is well described by Mr. Justice Frankfurter in his opinion in Indian Towing.

In addition, the Justice Department proposes a regulatory nonregulatory line. And that line, it seems to me, just like proprietary governmental, won't wash because, to give you an example, if the Cities franchise someone else to deliver a service and instructed it, the private entity, to conduct itself anticompetitively, the City would not -- under the

Justice Department test, the City would not be subject to prosecution under the antitrust laws. But if the citizens of the City decide they would rather deliver the service themselves, because they feel it is more effective that way or responds to their needs, and did the same thing they had told the private entities to do, the Justice Department would want to sue the City for that. I submit that makes no sense and has no logic.

QUESTION: But you still could go against the franchise in your first problem, couldn't you?

MR. HOCHBERG: That might or might not be, it would depend on whether it came within the test in Cantor or in Goldfarb. That's correct, Your Honor.

QUESTION: Would you run that by us again, give an example of what you, the point you --

MR. HOCHBERG: If the City had a private franchisee --

QUESTION: What would be an example of what you are talking about?

MR. HOCHBERG: Transit.

QUESTION: All right.

MR. HOCHBERG: And instructed the transit company, the bus company, to operate in a manner inconsistent with the antitrust laws.

QUESTION: As a monopoly within the City. How is that inconsistent with the antitrust laws to let one transit

company operate in the city?

MR. HOCHBERG: Well, whether that would be or not, perhaps they would instruct the transit company to conduct itself, to do certain things that would be considered a violation of Section 2.

QUESTION: I submit that for your example to be persuasive you have to think of something that would violate the antitrust laws, and you haven't done that yet.

MR. HOCHBERG: Well, if they instruct the bus company to make arrangements with another bus company on the border that serves the metropolitan area to come up with the same price for bus service, so citizens in the adjoining suburb would not howl at the higher price in the city, for example.

QUESTION: Your example is the city says to each of them: "You two agree on the price -- we don't care what it is -- but you agree on the price and charge the same thing." As opposed to saying: "The price in this city for bus fare shall be 10 cents."

You are talking about the first example and you think that should be okay.

MR. HOCHBERG: No. I think the city under the government's test would not be subject to prosecution, but if the city did that, rather than have a private bus system, the city would be subject to antitrust prosecution.

QUESTION: Your example is that if the city operates a bus company and agrees with a private bus company in a neighboring community that "We will both charge $1 a ride," then the city should be immune and the other company should be subject to prosecution. That's your example?

MR. HOCHBERG: That's correct.

QUESTION: Or if the city says to outlying suburbs, "If you don't ride our buses, you can't get city water." That is sort of akin to the facts of this case.

MR. HOCHBERG: One of the charges. There are other charges in the counterclaim. That's just one of them.

QUESTION: Makes a tie-in arrangement, in other words.

MR. HOCHBERG: Right. Under the government's test if the city told a private entity to engage in that tie, the government wouldn't be subject to suit, but if the government did it then it would be subject to suit.

QUESTION: You mean the company that did it would be subject to suit.

MR. HOCHBERG: Right. Something like Cantor. In Cantor the Public Service Commission wasn't sued and I doubt -- my feeling is that I don't think this Court would hold the Public Service Commission subject to antitrust laws for endorsing that tie.

All of these lines that the city and the Justice

Department and the Respondent and the various amici propose are, it seems to me, totally inconsistent with the Parker language, with the statutory purpose of the Sherman Act and with the legislative history of Congress in enacting that law. The only line, I submit, that is consistent with that legislative history and statutory purpose is when wholly governmental bodies are excluded from the antitrust laws and private parties, or private parties with self-regulatory functions granted by the state, would be subject to those antitrust laws.

The reason I say that is that there is not a hint in the legislative history that Congress intended to apply the antitrust laws at some levels of government and not to other levels of government or to some conduct of government and not to other conduct of government. In point of fact, Congress said, "We are passing these antitrust laws to aim at curbing private economic power." And there wasn't a hint that they were aiming thim at government at any level.

QUESTION: Is there as bright a line as you suggest between governmental bodies and nongovernmental bodies -- Let me go back to my example of a power system that's authorized to be formed by the landowners within a particular geographic area and to govern itself and to supply power itself by the state legislature, and it is a nonprofit type of thing. Now, I would think of that as a governmental function in many senses.

Yet your answer was, I think, that that would probably be subject to the antitrust laws.

MR. HOCHBERG: That's not the issue here today because there is no question but these are cities and they are totally governmental. In that situation, it seems to me, this Court, or any federal court, would have to make a determination whether it was truly a wholly governmental body. Just as this Court did in NLRB v. Natural Gas Utility District when it had to determine whether the district was a political subdivision of the state so that it came within the exemption of the labor laws. And there the Court rejecting, of course, local law and state law as a means of governing whether a federal statute applied, decided that that district was, indeed, a political subdivision by looking to various factors, like was it responsible to an elected official or to the legislature ultimately and things like that.

Again, I say in order to hold Cities subject to the antitrust laws here -- and after all they are criminal statutes and it seems to me very doubtful that the Congress would have enacted the Sherman Law to apply to city governments, being criminal as they were, without some indication in the legislative history that that was what they were intending.

In order to subject Cities to antitrust laws, I think this Court would have to repudiate the message of Parker and impute to Congress an intention it never expressed, and to

then go about rationalizing the important public policy of local choice in local governance with the antitrust policy and throw into that mix in addition a weighing of the severe consequences that might occur from application of these laws, and put them all together and try and divine a line or several lines with caveats and subcaveats for holding City subject to the antitrust laws.

I submit that --

QUESTION: On the other hand, you might win on the trial of this case.

MR. HOCHBERG: Well, of course, we certainly hope we will and we think that we very well might, but that's not really why we are here today.

QUESTION: I mean all these horribles you are talking about -- This case was just sent back, wasn't it?

MR. HOCHBERG: A number of cases, Your Honor, have just come up through the courts since Goldfarb --

QUESTION: I know. I know.

MR. HOCHBERG: We have about five circuit courts going against us now.

QUESTION: But the point is that this one has been sent back.

MR. HOCHBERG: My feeling is that if this Court were to put together that mix of rationalizing the various policy conflicts that exist here and the consequences that is the kind

of a procedure which requires careful investigation and review and analysis, most appropriate to a legislature and not to this Court.

I'd like to reserve the rest of my time.

QUESTION: May I ask you a question before you sit down.

What do we do with the language in Cantor and Goldfarb that requires a command or a direction from a state?

MR. HOCHBERG: That language is perfectly appropriate, Mr. Justice Powell, when a private entity is being sued, as was the case in Goldfarb and in Cantor, because the antitrust laws were clearly aimed at private enterprise and private economic power. Therefore, a careful scrutiny is necessary, it seems to me, to make sure that the state has indeed instructed those private entities to do what they are doing. Absent that state instruction, it seems to me, the antitrust laws apply across the board.

QUESTION: You say that here it is just as though the state had done it because the City is the state.

MR. HOCHBERG: The equivalent of the state in terms of the fact that they are a political subdivision to which the state grants its powers. In addition, because there is no legislative history that the Congress intended to treat them differently.

QUESTION: There are instances in the federal law

where cities were treated differently than states.

MR. HOCHBERG: There are. In the Eleventh Amendment they are treated differently and in the Fourteenth Amendment they are treated the same, in terms of state action. The fact of the matter is in each situation, constitutional or statutory, you have to look at the statutory purpose or the constitutional purpose in the context, as Parker said. And when you examine that, it seems to me that the statutory purpose here was aimed at private economic power and not government of any sort.

QUESTION: What do you suppose Congress' purpose was, as you interpret the statute?

MR. HOCHBERG: To curb private economic power. That was what was going on in 1890 when the Sherman Law was passed.

QUESTION: What do you suppose the intention was in excluding, implicitly excluding states and cities?

MR. HOCHBERG: I think they probably never even thought of it, Justice White, but because they weren't even thinking about going after governments. They were concerned with private entities. Given the fact that they were so definitely concerned with private economic power and that was the purpose of their law, absent a clear intention to include government, it seems to me it is up to Congress to remedy that after the Parker case, and given the situation in 1890 it is up to Congress to change that.

QUESTION: So you just think this is an example of ordinary rule of construction: You just don't apply statutes to a sovereign unless there is some clear indication of it. Is that it?

MR.HOCHBERG: That's correct.

QUESTION: In Louisiana, would this apply to the police juries in the parishes?

MR. HOCHBERG: I believe so, Your Honor, parishes, of course, are governmental bodies, wholly governmental bodies.

QUESTION: I said the police jury of the parish.

MR. HOCHBERG: I am not really familiar with the full details of it. It might be or it might not, I just don't know.

QUESTION: Back in the 1890's wasn't municipal ownership thought of as one of the safeguards against monopoly?

MR. HOCHBERG: I believe electric utility got started, in many ways, when municipalities provided it for their citizens before private power got into the picture.

QUESTION: Wasn't that the philosophy that was thought to undergird the TVA development?

MR. HOCHBERG: That's correct. Government has always got to be eventually answerable to the people, and the check of the political process is available. And that's a remedy which is far preferable than applying antitrust laws aimed at private parties to the cities.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Carter.

ORAL ARGUMENT OF ANDREW P. CARTER, ESQ.

FOR THE RESPONDENT

MR. CARTER: Mr. Chief Justice, and may it please the Court:

I am Andrew Carter from New Orleans, Louisiana, here representing Louisiana Power and Light Company, often referred to as LP&L.

I have deeded five minutes of my time to one of the amicus and I hope I won't regret it with my slow talk. I'll try my best to make it through on time.

If it please the Court, the Cities' counsel here has glossed over the four allegations of antitrust conduct and I believe that taking up one of those examples might furnish the Court a little understanding with why LP&L is bothered here.

LP&L is primarily a rural electric utility company engaged in furnishing service in 46 of the 64 county areas which we call parishes. In those parish areas there are some cities and towns and some of those cities and towns have electric, gas and water systems. In recent years, they have been going into the outlying areas with their water, gas and electric services and we run into the proposition now more often increasingly where the cities will tell customers or potential customers that in order for them to get water and gas they will have to take their electricity. This is done

sometimes with a new customer just moving into the area, sometimes with one that LP&L is already serving, or a rural electric co-op, like our friends here on our side of the case.

So this is a practice, it seems to us, to be a classic tie-in arrangement and it is one of the things we are after here to see if we can stop it.

Now I have read the Cities' briefs, of course, and I have listened to counsel today and it seems to me that counsel is, in due deference to him, adding a great deal to what he is advancing to call it a principle. What he is saying here is simply a superficial proposition that if the courts look at the actor involved and they find out that the actor is a state agency or political subdivision then the inquiry stops right there and you are through right at that point. That makes it quite obvious why counsel didn't talk about any of the four pertinent cases in this line of jurisprudence that started with Parker, because every last one of them shoots down that proposition.

QUESTION: I think he did talk about them.

MR. CARTER: Well, he mentioned them, Your Honor. He gave them his blessing as he passed, but he didn't analyze them. And, of course, since they are on my side I want to analyze them.

QUESTION: He analyzed them his way, now you want to analyze them your way.

MR. CARTER: Well, you can look at it that way.

I think mine is actually an analysis, however, because what I want to do is go into each one with the basic content of what happened in that case.

Now the first one, I am sure this Court has heard so much about it it's ad nauseum on Parker v. Brown, but in that case you will recall that the actors there were your state officials and some private individuals who had been made state agents for the purpose of this raisin proration program. And the activity there was the administration of that raisin proration program. And what did this Court do? This Court looked right at what was going on as to the activity. It found out that the activity had been mandated, had been compelled by the state, through its sovereign exercise of the legislature. So it held that there was a state exemption. I think one sentence is the key to the holding in Parker v. Brown, and it reads this way: "The state in adopting and forcing the prorate program made no contract or agreement and entered into no conspiracy in restrain of trade or to establish monopoly, but as sovereign imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."

So what did they do? They looked at the activity and they said that's a sovereign act, mandated activity.

Now, we go along for a number of years and we come onto 1975 and Goldfarb. And in Goldfarb what did we have?

We had the state bar and a county bar that were the actors, and the activity was a minimum fee schedule for lawyers. What did this Court do there? It didn't just stop with the actor, the state bar which was found by the Court to be a state agency by law. It went beyond that and looked at the activity. It found that the activity was not state compelled.

QUESTION: Do you get an implication out of the Goldfarb case that if the Supreme Court of Virginia had ordered that action it would have been exempt?

MR. CARTER: Mr. Chief Justice, I think we would have a base case in that situation, probably. I don't know all of the underlying circumstances in either case, but it would very likely have been a base case and you would have had a sovereign act of one of the three sovereign branches of government and a base case in the Supreme Court. So it could have worked that way. But the fact is that Your Honor, as I recall, was the organ of the Court and wrote the very words that we rely on principally here and we think, really, they resolve this whole matter, and I believe the Court stood firmly behind those words and I just take the liberty of one sentence, actually two sentences, quote: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity" -- the activity -- "is required by the state acting as sovereign."

QUESTION: In Parker v. Brown the legislature didn't mandate the imposition of these raisin quotas. The quota board did, didn't it? The legislature simply authorized it.

MR. CARTER: Your Honor, I think the legislature mandated the whole program, and in fact I believe it went into pretty good detail with it. Naturally, they couldn't go into detail as to the particular price on a given day or anything like that, but --

QUESTION: That had to be approved by the growers, didn't it?

MR. CARTER: Had to be approved by the growers? I don't think the program had to be, Your Honor. I think that perhaps prices at one point or another would have to be.

QUESTION: I thought the very existence -- In other words, if a majority of the raisin growers voted against that sort of thing there wouldn't be any prorating.

MR. CARTER: Oh, no. I don't believe -- You may be right, Your Honor, but that's not my recollection of it.

The Chief Justice went on in Goldfarb to say one more thing: "Here we need not inquire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court rules required the anti-competitive activities of either respondent."

And to us that is so plain and so clear that it is

really a bright line rule.

We come to Cantor which happened shortly after that. What do we see in Cantor? We see what I believe was a state action but not a state action case. Now what do I mean by that? I mean that as the Court pointed out you didn't have a state agency or political subdivision that was a party, so to that extent it wasn't a state action case. On the other hand, the Court reaffirmed Goldfarb and applied the rule that I just read, and determined that the activity -- and by the way the actors there, if you recall, were -- the actor was a private utility company, Detroit Edison, and the activity was their light bulb replacement program. This Court looked at that and it determined that that was an activity that was not state compelled and, therefore, even though there was no state body involved as a party, it applied the Goldfarb-Parker rule and said Detroit Edison is responsible under the Sherman Act.

QUESTION: Of course, all of your analysis, so far, is based upon the premise that the City here, the municipality here, is the equivalent of the bar association in the Goldfarb case, the utility in the Michigan case and of the marketing association in the California case.

If, on the other hand, one takes the view of your brother that the City is the equivalent of the state itself then your analysis collapses.

MR. CARTER: It surely would, Your Honor, but so would

a whole bunch of law cases all standing for the proposition that the city is not to be equated with the state.

QUESTION: Well, there are a whole bunch of cases, if I may use your phrase, the other way too. All the cases under the Fourteenth Amendment are.

MR. CARTER: Well, that's right, Your Honor, but I have in mind the Commerce Clause and antitrust cases, and I think the state and the city are not to be equated. At least that's our position.

QUESTION: That's the important part of your argument. You have to begin with that hypothesis.

MR. CARTER: Indeed. You are entirely correct. If you say the city is the sovereign then you don't ever get any further than that under the very rules that I have been talking about.

QUESTION: In other words, Mr. Carter, if the defendant in this case had been the State of Louisiana which was in the electric power business, you would concede that they would not be within the coverage -- that if the state would not be within the coverage at all of the antitrust laws.

MR. CARTER: If it was in that business as a result of exercise of its sovereign power, I would --

QUESTION: It is a sovereign state --

MR. CARTER: Right.

QUESTION: -- to the extent states are sovereign.

And if it was in the electric business, then you would concede that you could not make it a defendant in your antitrust lawsuit?

MR. CARTER: I would as an antitrust matter, yes. I would say they would get grabbed under U.S. v. California under the Commerce Clause.

QUESTION: Well, Mr. Carter, do I get your submission is that,unless the particular municipal activity has been, what,compelled by state legislation, Parker-Brown does not apply to that activity when run by municipality?

MR. CARTER: Mr. Justice Brennan, I wouldn't restrict it to just legislative mandate. I think --

QUESTION: But doesn't there have to be some state mandate. You used the word "mandate."

MR. CARTER: Correct.

QUESTION: A particular activity has to be mandated -- carried on by the municipality -- has to be mandated by the state.

Tell me about this. My home state is a home rule state. It has the broadest kind of governmental powers. It carries on a great many -- I mentioned one earlier, the parking lot activity. That's not mandated by the state legislation, except that it has home rule powers that gives it the broadest possible governmental powers. Now what about that?

MR. CARTER: Your Honor, I think that --

QUESTION: Suppose, for example, that city entered into an agreement with the private parking lot owners to fix the price uniformly at both municipally operated and privately operated parking lots.

MR. CARTER: Your Honor, as I read Parker, Goldfarb, Cantor and Bates the answer is that if that parking lot were not the result of some mandate of the sovereign, some --

QUESTION: It is no more than what I tell you. It is a home rule city and has the broadest possible home rule powers.

MR. CARTER: Then, Your Honor, they would have to abide by the antitrust laws, in my opinion.

QUESTION: Mr. Carter, let me read you this sentence out of Parker v. Brown at page 347 of 317 U.S. It says: "If the proposed program is approved by the Commission, is consented to by 65% in number of producers in the zone owning 51% of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted."

Now, do you consider that to be a state mandated program, where it requires the consent of private individuals?

MR. CARTER: Yes, sir, because I think that the state directed him on that 65%, the legislative act. I think what you just read, that if it got to 65%, under the legislation he was directed not to act.

QUESTION: Well, so, in other words, authorizing legislation really can be mandatory in your view, so long as

the terms of the authorization are complied with.

MR. CARTER: I think authorizing legislation, Your Honor, could contain a mandate, but I think, on the other hand, you can have authorizing legislation that does not contain a mandate. I think that you have to look at what the legislative act did. I don't think in every instance -- For example in Louisiana, our legislative acts permit and authorize municipalities to engage in the electric business. They can run their own systems, either within the city limits or without. So they are authorized.

But the question here, and I think it will be the question on remand if this Court favors us, is going to be whether that operation of the electric business in the manner we have charged them with was a state compelled activity.

QUESTION: Then if the state statute said in any city in Louisiana where by referendum 60% of the voters of the city vote in favor of a municipal electric company the city shall establish one. That would meet your definition of mandated.

MR. CARTER: Yes, it would. Yes, it would. I think the legislature can act --

QUESTION: But you would demand that the legislature go further than that, wouldn't you? Under my brother Rehnquist's example, then that authorizes the city to -- when 65% of the electorate so votes to -- go into the electric power business.

You would require, as I understand your argument, that the state legislature also authorizes them to engage in conduct which, except for this authorization, would violate the antitrust laws.

MR. CARTER: Your Honor --

QUESTION: Wouldn't you?

They already are clearly authorized to be in the electric business, aren't they? By the state legislature.

MR. CARTER: Exactly.

QUESTION: So you would demand something more than that.

MR. CARTER: Oh, indeed, for them to violate the antitrust laws, I think --

QUESTION: Specific authorization to violate the antitrust laws, or to engage in conduct which otherwise would violate the antitrust laws.

MR. CARTER: Absolutely. I don't think they should just go around making tie-in arrangements.

QUESTION: But that's your test, isn't it?

MR. CARTER: My test if the Goldfarb test, Your Honor. I think you look at the activity and then you determine whether the state, as sovereign, compelled or directed that activity.

That's not my test. It is the Goldfarb test that I believe is sound as a dollar. It follows Parker. It accommodates

the Tenth Amendment argument that was made by Attorney General Warren, later Chief Justice. It does all that is necessary to have a fair and sound rule under which we can live with the antitrust statute.

QUESTION: Mr. Carter.

MR. CARTER: Yes, sir.

QUESTION: In Cantor the Public Utility Commission of Michigan was an agency of the state, was it not?

MR. CARTER: The Public Service Commission was an agent of the state, yes, sir.

QUESTION: It was argued in that case that, by virtue of that fact, there was state action. That argument was rejected by Detroit --

MR. CARTER: Detroit Edison argued that, Your Honor. And I think it was obvious from the decision of the court that the court considered that the mere filing of a rate calendar at that time was not state compelled action by the Public Service Commission.

QUESTION: The City, in this case, has authority to make rates and to enter contracts and generally operate a utility independently of the Public Service Commission of the state. Does it not?

MR. CARTER: Your Honor, if I caught your question correctly, you are asking about the City's authority?

QUESTION: I am asking about the City's authority to

operate an electric utility under the state law.

MR. CARTER: They can set their own rates. They are not regulated by the State Public Service Commission.

QUESTION: They are independent of the State Utility Commission.

MR. CARTER: That's right.

QUESTION: Does the City have authority to operate the utility that is substantially consistent with the authority conveyed to the Public Service Commission to supervise the operation of private utilities? I am trying to see whether there is an analogy between the power conferred on the Public Service Commission of the state and that conferred on the City.

MR. CARTER: Mr. Justice Powell, in Louisiana, the power of the Public Service Commission to regulate investor-owned utility companies and co-op's is what is known as plenary. Our power of our commission is plenary. So, without trying to be semantical, I'd say that the Cities would have certainly no more power than that and possibly less.

QUESTION: Except, of course, the City itself may own the utility.

MR. CARTER: Yes, that's right. That's right.

I see a time signal that causes me to desist from going further with the Bates case. I think the Court has already absorbed my point about these four cases. The Bates case just stands right on the same ground with the others.

The Court looked at the actor being the state bar and the activity restraining lawyer advertising, and the holding was found to be mandated by the sovereign, the Supreme Court of Arizona.

So I think that what you have here, and I want to state it in my own way, though it is really the Goldfarb --

QUESTION: Are you going to leave five minutes for your colleague?

MR. CARTER: Am I into his time?

MR. CHIEF JUSTICE BURGER: You are not quite into it yet, but you are getting close.

MR. CARTER: I think I can do something in about a minute here, Your Honor, that I would like to do very much.

Cities' counsel has pitched his whole case on policy. And I want to throw some policy considerations out to the Court. What does a consumer outside the City of Plaquemine do when he could get his electricity cheaper from LP&L or a co-op than he could from the City? But he is forced to take it from the City because that's the only way he can get water and gas. That doesn't seem to me a good policy.

QUESTION: Mr. Carter, does your counterclaim allege this practice? I didn't think --

MR. CARTER: Oh, yes.

QUESTION: It does?

MR. CARTER: Yes, sir. We allege a tie-in.

QUESTION: Of the water, electricity and the gas?

MR. CARTER: Yes, sir. The affidavit reflects --

QUESTION: It is not in the counterclaim itself?

MR. CARTER: Oh, yes. It is in the counterclaim. In the second amended counterclaim.

Now, for another policy question. What happens to the utility facilities that the power company has placed there to serve the customers and along comes the City?

Your Honors all know that facilities are what goes into the rate base and that's the proposition for setting rates and so, to make this brief, you know that the rate payers, our customers, end up picking up facilities in the rate base. I don't think that's a very good consideration.

I think that when you look at the policy considerations counsel has been talking about today he is giving a bunch of dire consequences that would derive from violations of the Antitrust Act, but he hasn't addressed a bit of what would be the dire consequences of abiding by it, like all the rest of us have to do.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Carter.

Mr. Crisp.

ORAL ARGUMENT OF WILLIAM T. CRISP, ESQ.,

AMICI CURIAE, FOR THE RESPONDENT

MR. CRISP: Mr. Chief Justice, and may it please the Court:

First, I want to thank you for indulging me this time as well as Mr. Carter. I know you don't look with favor on friends of yours coming up here and arguing before you. This will be my first time.

I want to respond, to begin with, to a question put by Mr. Justice Marshall. I alluded to Volume 1 of the First Federal Power Survey in my brief. The answer to your question about the number of different types of entities in the industry in 1962, according to that Volume 1 -- and I am referring to page 17 of it -- there were 480 investor-owned companies. There were 2,124 cities and PUD's. There were 969 cooperatives and 44 federal distributors of power.

Since that time there has been some diminution of the municipalities and some addition to the electric cooperatives.

QUESTION: In terms of volumes of the 485 -- about half the total or three-quarters or one quarter?

MR. CRISP: There are about 200 ICU's, Mr. Chief Justice Burger, who distribute about 98% of the power that is attributable to the investor-owned part of that segment.

I hope I am being responsive to your question.

Two events took place in 1890 without which we wouldn't be here in this case today. This Court, of course, is familiar with one of them which was the enactment of Sherman. The other is one that at that time foretold, perhaps, fortuitously, some of the facts that have emerged to give rise to this proceeding. For in that year, a line, an electric line, operating on alternating current was opened to carry 480 kilowatts of single-phase power at 4,000 volts and 125 cycles per second, fourteen miles from Willamette Falls, Oregon, to the City of Portland. And it was the first time that it was demonstrated that there would be economic feasibility for large unit, central station power in this nation.

It was over 50 years, however, before the rural segment of our society became accessible to that great technology. And that came about in the years immediately after World War II, as a result of the fact that the Congress in 1936 enacted the Rural Electrification Act. Its purpose was to make feasible electric power accessible to every rural American. And for all practical purposes, that objective has been accomplished.

I bring to you, in the name of those cooperatives, what I think is a unique situation, both legally and factually, that has a bearing on how this Court should rule in this case. In fact, I say to you, and perhaps this is too strong to start with, that unless you resolve the issue in our favor, there

will remain an untenable legal dichotomy, because of these particular facts and this particular law that I want to talk about.

Throughout this country, in most states, the municipalities have the power to expropriate going electric business properties, in most cases, of cooperatives and in some states of electric power companies.

In Louisiana, they may do it with respect to both the cooperatives and the power companies, and they have done so many times.

This, of course, affords a due process just compensation proceeding, whereby there is remuneration for the resulting damage.

On the other hand, not even in states where such powers may be statutorily exercised by either a municipality or a public utility district, may that power be exercised lawfully if to do so is to substantially impair the national objective of rural electrification? Because to do so would be to frustrate the Federal Supremacy Clause.

Now, what I am painting for you here is this dichotomy: If Louisiana Cities is permitted to prevail in this case, on the one hand, even in having the power to expropriate our properties, through due process and pursuant to the Fifth Amendment, they can't go so far as to destroy our properties if the result is to impair the remainder of what we

do.

Under their theory in this case, they may piece-meal and in certain instances blitzkrieg and widespread for sub-division purposes, come out and commit acts which we would be held not only civilly but criminally accountable for, piece-meal or widespread, and accomplish precisely the same results without being redressable under the Sherman Act.

Now, we say just this to you, in conclusion. That is dirty ball. That is unfair. And one tenet, I think, all of us will agree, is a fundamental tenet of construction is simply this: That you do not construe a statute if the result is to be probably unjust, absurd and unfair. And that's what we say to you will be the case if you rule as the Cities have asked you to here.

In parting, may I say whether we can agree that this is the statutory construction or not, if what the Cities are doing in their tie-in arrangements, which is a per se violation of Sherman and Clayton for us, if it is not, verily, men say, surely if it is not, it ought to be narrowly prohibiting.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:08 o'clock p.m., the case in the above-entitled matter was submitted.)