

In the

# Supreme Court of the United States

ARKANSAS LOUISIANA GAS COMPANY, )

PETITIONER, )

V. )

FRANK J. HALL ET AL. )

No. 78-1789

Washington, D.C.  
April 20, 1981

Pages 1 thru 44

ORIGINAL



202/544-1144

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :  
3 ARKANSAS LOUISIANA GAS COMPANY, :

4 Petitioner, :

: No. 78-1789

5 v. :

6 FRANK J. HALL ET AL. :  
7 - - - - - :

8 Washington, D. C.

9 Monday, April 20, 1981

10 The above-entitled matter came on for oral ar-  
11 gument before the Supreme Court of the United States  
12 at 11:09 o'clock a.m.

13 APPEARANCES:

14 REUBEN GOLDBERG, ESQ., Goldberg, Fieldman & Letham,  
15 1700 Pennsylvania Avenue, NW, Washington, D.C. 20006;  
16 on behalf of the Petitioner.

17 JAMES FLEET HOWELL, ESQ., Wiener, Weiss, Madison &  
18 Howell, 411 Commercial National Bank Bldg.,  
19 Shreveport, Louisiana 71161; on behalf of the  
20 Respondents.

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1                                   P R O C E E D I N G S

2                   MR. CHIEF JUSTICE BURGER: We'll hear arguments next  
3 in Arkansas Louisiana Gas Company v. Hall. Mr. Goldberg, you  
4 may proceed when you are ready.

5                   ORAL ARGUMENT OF REUBEN GOLDBERG, ESQ.,

6                   ON BEHALF OF THE PETITIONER

7                   MR. GOLDBERG: Mr. Chief Justice and may it please the  
8 Court:

9                   This case involves a suit filed by the respondents in  
10 the State Court of Louisiana with respect to a contract that  
11 is on file with the Federal Energy Regulatory Commission as the  
12 respondent's Rate Schedule No. 4. In that suit they sought dam-  
13 ages which were in fact a claim for a retroactive rate increase  
14 under the Natural Gas Act. The respondents were successful in  
15 that suit and it is petitioner's position that the decision of  
16 the court below violated the Filed Rate Doctrine, violated the  
17 primary jurisdiction of the Commission and its exclusive rate  
18 jurisdiction and Commission regulations. And I should say to  
19 the Court that these positions were steadfastly maintained  
20 through each of the courts through the State of Louisiana, the  
21 trial court as well as the courts of appeal.

22                   The contract between petitioner and respondents pro-  
23 vides for the sale by respondents to petitioner at the wellhead  
24 of the entire stream of wet gas from respondents' wells located  
25 in the Sligo field in North Louisiana. I should say at this



1 point that gas is known as wet gas when the gas stream contains  
2 liquefiable hydrocarbons. These liquefiable hydrocarbons exist  
3 in the gas stream in a gaseous state and they are extractable  
4 through a simple process at a processing plant at the surface.  
5 When these liquefiable hydrocarbons have been extracted, the  
6 gas stream is known as dry gas or residue gas, and the terms  
7 are used interchangeably.

8 Now, to return to the contract which is at the seat  
9 of this case, the negotiations leading to its execution were  
10 quite lengthy. The respondents wanted a provision included in  
11 the contract which is known in the industry as a favored nation  
12 provision. They wanted one that would escalate fixed prices  
13 that had been agreed to in the contract if any buyer of gas in  
14 the Sligo field paid any seller a price higher than the fixed  
15 prices in the contract. They also wanted the favored nation  
16 provision to apply to liquefiable hydrocarbons and to conden-  
17 sate, which is a form of crude oil that at the surface without  
18 any processing drops out; it becomes a liquid and drops out  
19 in the separator.

20 The favored nation provision that finally emerged when  
21 the petitioner rejected these proposals of respondent is the  
22 one that appears in the contract. It's in the Joint Appendix  
23 at page 99. It does not apply to hydrocarbons and condensate  
24 and is triggered only by the purchase of gas by petitioner in  
25 the Sligo field from -- and I quote these words, because they

1 are important -- "another party seller" at a price higher than  
2 the fixed prices established in the contract for the wet gas.

3 The favored nation provision provides that in deter-  
4 mining whether a given price is in fact a higher price, the  
5 provisions of the contracts being compared bearing on that de-  
6 termination such as point of delivery, delivery pressure, are  
7 to be compared and adjustments made for the differences between  
8 them. Only when the differences are found and adjustments are  
9 made for them can it be known whether in fact the favored nation  
10 was triggered.

11 Petitioner also agreed to a proposal that had been  
12 made by respondents for the elimination from the contract of  
13 payments for extracted liquids in return for an increase in the  
14 price for the gas of 1/4 of a cent.

15 The favored nation provision during the negotiations  
16 received so much attention and was so carefully dealt with by  
17 the petitioner that it actually became thereafter the model for  
18 petitioner's favored nation provisions in contracts. In 1954,  
19 after this Court in the Phillips Petroleum case had declared  
20 that producers of natural gas selling gas in interstate commerce  
21 were subject to the Natural Gas Act, the respondents filed a  
22 contract and secured from the Commission certificates of public  
23 convenience and necessity to make the sales as required by the  
24 Act. And as I have said before, at the outset, it's the respon-  
25 dents' Rate Schedule No. 4 on file with the Commission.

1           Some years later, in 1961, the petitioner acquired an  
2 interest in a United States Government mineral lease of lands  
3 in the Sligo field, the very same field. Petitioner, having ac-  
4 quired that interest, thereby became obligated to make royalty  
5 payments to the United States for the value of the extracted  
6 liquid hydrocarbons and condensate and for the value of the resi-  
7 due or dry gas. The lands involved in the government lease had  
8 been withheld for a time by the Government from production and  
9 development but it developed that adjacent landowners were  
10 draining the minerals from underneath the Government lands and  
11 the Government opened them up to development and that produced  
12 the government lease.

13           And it is interesting that the Hall group -- I refer  
14 to the respondents sometimes as the Hall group -- had land adja-  
15 cent to the government lease.

16           Petitioner's acquisition of the interest in the govern-  
17 ment lease was not concealed from anyone. The petitioner had no  
18 reason to keep the matter hidden; it did not keep it hidden; and  
19 it could not have been kept hidden from knowledgeable, active  
20 oil and gas men such as existed in the Hall group.

21           Additionally, the papers assigning the interest to the  
22 petitioner and the approval of the assignment was a matter of  
23 public record. It was recorded in the Recorder's Office of  
24 Bossier Parish, and actually, in the 1962 report to its stock-  
25 holders, the petitioner discussed in that report its interest



1 in the lease and its activities thereunder. And I should say  
2 right here that despite the charges of fraudulent concealment by  
3 the respondents in the lower courts, the trial court made no  
4 findings on the point. The intermediate court of appeal,  
5 the Court of Appeal of Louisiana, found that there was no frau-  
6 dulent concealment and that finding was affirmed by the Supreme  
7 Court of the State of Louisiana, and the fact is there was no  
8 concealment of any kind of the facts with respect to the lease,  
9 fraudulent or otherwise.

10 QUESTION: Well, but the respondents' position as I  
11 understand it, Mr. Goldberg, is that Arkla had a duty under the  
12 contract to report that they were getting a higher price from  
13 the United States than they were getting from the respondents.  
14 That's their position, isn't it?

15 MR. GOLDBERG: I'm not sure that they expressly sta-  
16 ted that claim but our position is --

17 QUESTION: I don't find the complaint here -- I under-  
18 stood from the briefs that, in effect, what they're saying is,  
19 you breached the contract by not formally advising them you were  
20 getting a higher price from the United States than you were  
21 getting from them, and that this is a breach of contract.

22 MR. GOLDBERG: No, their claim of a breach of contract  
23 is that the royalty payments made under the government lease  
24 constituted a purchase from a party seller, the Government, of  
25 gas, and that therefore, since that's the language of the

1 favored nation provision, and they claim that it was a higher  
2 price than the fixed prices in the contract, and therefore,  
3 they said, the favored nation provision was triggered.

4 QUESTION: Well, as I recall it, you argue in the  
5 briefs that purchase, you didn't realize that the contract pro-  
6 vision came within purchase until that was decided in '78,  
7 wasn't it, or something like that?

8 MR. GOLDBERG: No, it's our position that settled  
9 Louisiana law as well as federal law says that a royalty payment  
10 is not a purchase of gas. The reason is that a --

11 QUESTION: But in 1978 did not the Louisiana courts  
12 construe the word "purchase" as including what happened here?

13 MR. GOLDBERG: Oh, yes, yes.

14 QUESTION: And you didn't know about it, you say,  
15 until 1978? But wouldn't that be a defense to a contract  
16 action?

17 MR. GOLDBERG: Our defense to the contract action --

18 QUESTION: Well, I know, you're arguing that primary  
19 jurisdiction, they have no jurisdiction to do this at all. But if  
20 it's a simple contract claim, breach of contract claim.

21 MR. GOLDBERG: Well, we also --

22 QUESTION: And you had that defense.

23 MR. GOLDBERG: We also say that under the terms of  
24 the contract, the favored nation provision was not triggered  
25 because the royalty payments did not constitute a purchase and

1 the decision of the court below was in error. In actual fact,  
2 Mr. Justice Brennan, the Court of Appeal agreed with the peti-  
3 tioner that under settled state and federal jurisprudence the  
4 royalty payments did not constitute a purchase, but it went on,  
5 nevertheless, to hold, that there was a triggering by reason of  
6 the royalty payments, we say, and that decision ignored the  
7 commonly understood and accepted usage of the phrase "pur-  
8 chase" --

9 QUESTION: Well, I know, but is that anything we can  
10 review?

11 MR. GOLDBERG: What we've asked you to do here --

12 QUESTION: What's the federal question involved in  
13 that?

14 MR. GOLDBERG: Whether the award of the court below vio-  
15 lated the Filed Rate Doctrine, violated the primary jurisdiction  
16 and exclusive rate jurisdiction of the Commission, and regula-  
17 tions of the Commission.

18 QUESTION: But if the respondents had known that the  
19 favored nation clause was triggered, if you had told them so,  
20 or at least had given them the information on which they could  
21 conclude that, I take it between '62 and '72 they might have  
22 gone to the federal commission and got approval of the rates.

23 MR. GOLDBERG: I don't know what they would have  
24 done but that's what they should have done. That's what they  
25 should have done.



1 QUESTION: Well, maybe they -- well, they didn't know,  
2 they didn't know; you didn't tell them.

3 MR. GOLDBERG: And even if they didn't know it and  
4 found out for the first time in '74 -- let's assume that for the  
5 sake of argument -- their proper course of action was to go to  
6 the Commission. The fact of the matter is, they finally did go  
7 to the Commission recently asking for a waiver of the filing  
8 requirements, recognizing that they were in jeopardy without  
9 that waiver. So that if they had asked for the waiver at that  
10 time, at any time earlier than 1974, they would have been con-  
11 fronted by the same proposition, that the Commission has denied  
12 on the merits that request for a waiver in a very well reasoned  
13 order which is an appendix to our reply brief.

14 But I think we started out on the proposition as to  
15 whether they had made some other claim, and I don't recall that  
16 they made any other claim other than the royalty payments con-  
17 stituted the purchase.

18 QUESTION: Do you contend, Mr. Goldberg, that the  
19 reasoning of this recent order would have applied if they had  
20 asked, or if they'd filed back in 1962 or '63?

21 MR. GOLDBERG: In 1962 they were asking for an increase  
22 back to 1961 --

23 QUESTION: But you think the reasoning of this order  
24 would have applied?

25 MR. GOLDBERG: Yes, I --

1 QUESTION: I thought it was based on the fact that  
2 they were so late.

3 MR. GOLDBERG: We would have had the same considera-  
4 tions that the Commission refers to.

5 QUESTION: If they came in '62 and said, we want to  
6 get the higher rate for the period '62 to '72, the next ten  
7 years.

8 MR. GOLDBERG: I don't think they could come in and --

9 QUESTION: We don't know whether the Commission would  
10 have let them do it or not.

11 MR. GOLDBERG: We do not. We do not.

12 QUESTION: You don't deny that it was at least possi-  
13 ble the Commission would have let them do that?

14 MR. GOLDBERG: Well, the present Federal Energy  
15 Regulatory Commission as presently constituted has said in their  
16 order that they hesitate to speculate on what the Commission  
17 would have done. I do, too.

18 QUESTION: Well, doesn't that mean that it was at  
19 least a possibility that it would have been done had they been  
20 able to act promptly?

21 MR. GOLDBERG: I suppose that possibility could  
22 exist. The possibility could exist also that they might not  
23 have been able to demonstrate either that there was triggering  
24 or that it was in fact a higher price.

25 QUESTION: But who's responsible for the fact that

1 they were unable to go in in '62?

2 MR. GOLDBERG: Not the petitioner. The petitioner,  
3 we submit, did everything that was required of it, and there  
4 is no provision in the contract, nothing --

5 QUESTION: But if you read the contract the other  
6 way. Now, that depends on how one reads the contract. But if  
7 we assume that the Louisiana court correctly reads the contract  
8 and that you did have a duty to notify them, then are you not  
9 responsible for the delay?

10 MR. GOLDBERG: If you assume that we had a duty, then  
11 I suppose it would be we would be responsible for the delay  
12 if that is the federal jurisprudence, because this contract  
13 is not controlled by state jurisdiction, state jurisprudence.  
14 It is a contract on file as a rate schedule. As a rate schedule  
15 under the Natural Gas Act it is the federal jurisprudence that  
16 determines how that contract is to be handled and interpreted,  
17 particularly in the light of the public interest requirements  
18 of the Natural Gas Act. This is one of the difficulties with  
19 the state court's decision. The state court referred to  
20 Article 2040 of the Louisiana Civil Code and determined that  
21 under that civil code provision there was a duty upon -- that  
22 being, not a duty, but that the petitioner had prevented the  
23 respondents from complying with the rate change filing require-  
24 ments of the Act, and that therefore they should be deemed as  
25 having fulfilled those requirements. And I point out in that



1 connection that the court also recognized when it said that,  
2 that it was dealing with the Natural Gas Act and that it had to  
3 meet the next requirement, would the Commission have allowed  
4 it? And it concluded, yes, the Commission would have allowed  
5 it, and the Commission has told you in -- told the Court --

6 QUESTION: The state court said, on the preponderance  
7 of the evidence we think it's more likely they would than they  
8 would have not. And as I understand, the Commission said, well,  
9 we don't know what we would have done.

10 MR. GOLDBERG: I think that we could have demonstrated  
11 to the Commission --

12 QUESTION: But you didn't.

13 MR. GOLDBERG: We didn't because they made no filing,  
14 but if you're asking me to speculate --

15 QUESTION: No, all I asked you was whether or not  
16 it were possible as a matter of law that they could have ruled  
17 in favor of allowing the higher rate, back if they'd made a  
18 timely filing?

19 MR. GOLDBERG: If they also met the qualifications  
20 of the favored -- the Commission would have had to find  
21 that the favored nation was triggered because the royalty pay-  
22 ments constituted a purchase from any party seller. I have  
23 difficulty seeing how the Commission could have decided that.  
24 The jurisprudence was against that decision and a royalty  
25 interest has no gas to sell.

1 QUESTION: I thought the way the case comes to us we  
2 assume for purposes of whether the Filed Rate Doctrine applies  
3 or not that there was a violation of the favored nations agree-  
4 ment, the duty and all the rest. And you argue, well, never-  
5 theless, the Filed Rate Doctrine precludes the higher rate.

6 MR. GOLDBERG: That's right, because the allowance  
7 by the court below violates the determinations under the Filed  
8 Rate Doctrine. It violates the Commission's ceiling prices.

9 I would point out also that the Commission in that  
10 order of November 5, 1980, which is part of, attached to our  
11 reply brief as an appendix, that the Commission points out that  
12 its review of the record reveals to it, and it concludes, that  
13 Arkla could reasonably have assumed that the royalty payments  
14 did not trigger the favored nation provision. And I submit that,  
15 under those circumstances, if we could have reasonably assumed  
16 that, I think the more reasonable inference is that we could  
17 have demonstrated to the Commission, if back in 1962, perhaps,  
18 and the Commission would not in 1962 have found that the favored  
19 nation provisions had been triggered.

20 The file doctrine says, the Filed Rate Doctrine says  
21 that no one can claim a rate as a legal right that is other than  
22 the filed rate, and that not even a court can authorize commerce  
23 in the commodity on other terms. Now, the courts below sought  
24 to avoid the Filed Rate Doctrine by labeling respondents' claim  
25 as a claim for damages.

1 QUESTION: I suppose, Mr. Goldberg, your position  
2 would be that it applied even, even had Arkla here deliberately  
3 and intentionally not informed the respondents that they were  
4 getting a higher rate in a situation where they should have  
5 given it? I guess you'd still say that under the filed rate  
6 doctrine, nevertheless, they can't prevail.

7 MR. GOLDBERG: Yes, but I'd like to say first, we  
8 don't have to go that far, back to the states.

9 QUESTION: I know. But answer my question. Am I right?

10 MR. GOLDBERG: Yes.

11 QUESTION: That's how far you would go?

12 MR. GOLDBERG: Yes.

13 QUESTION: All right.

14 MR. GOLDBERG: And we say, also, that if you read  
15 Montana-Dakota, in that situation, where the Filed Rate Doctrine  
16 was held to apply, the complainant in that case, the plaintiff  
17 in that case was under the thumb of a parent corporation, was  
18 clearly prevented from going before the Commission and protest-  
19 ing the rates involved. Nevertheless, it was held that the Filed  
20 Rate Doctrine precluded them from having a claim. And we say  
21 that that is no less the situation in this case.

22 QUESTION: Isn't it correct that that case really just  
23 held that that precluded them from having a claim under the  
24 federal statute. It didn't really decide whether there might be  
25 a state law claim of some kind?



MR. GOLDBERG: No, we think that if you read the case as a whole --

QUESTION: That case did arise in the federal judicial system and the first question is whether federal jurisdiction --

MR. GOLDBERG: They sought to draw a right to their cause of action from the terms of the Federal Power Act itself.

QUESTION: Correct.

MR. GOLDBERG: But a reading of that decision clearly demonstrates that even if they had gone to the state court they could not have maintained that action, and that they --

QUESTION: They could not have maintained an action for violation of the Federal Power Act in the state court but the court really didn't have any occasion to decide whether there was any breach of fiduciary relationship that might give rise to a common law claim.

MR. GOLDBERG: I think the --

QUESTION: Which wasn't before the court.

MR. GOLDBERG: I think the language of the court in that case clearly says that by reason of the fact that there is a Federal Power Act there is no recourse available to the state court either. If they had any recourse it would have been only to the Commission. If the respondents here had any recourse it was only to the Commission and they have gone to the Commission and the Commission has pretty well indicated in that order of November 5, 1980, that they are not entitled to the relief

1 that they claim. The decision of the court below undertakes to  
2 assert that the contract is to be interpreted on the basis of  
3 state law and that it derives its force and effect from state  
4 law. The fact of the matter is, it derives its force and ef-  
5 fect, particularly with respect to rate matters, from the  
6 Natural Gas Act, and it is federal jurisprudence that determines  
7 how that contract is to be interpreted. And under federal  
8 jurisdiction -- I refer particularly to the Mobile case --  
9 there is no purchase of gas associated with the payment of a  
10 royalty.

11 When the Supreme Court of Louisiana held that the  
12 Commission would undoubtedly have allowed the rate had they  
13 gone to the Commission at an earlier time, we think the court  
14 was induced to make that statement by a statement by the  
15 Commission in an earlier order it had issued in which it said  
16 that the rates did not exceed the ceiling prices. The Commis-  
17 sion has since that time advised that it was in error because  
18 it thought the sale was a sale at the plant and not a sale at  
19 the wellhead. As a sale at the wellhead it clearly exceeded  
20 the ceiling prices and the Commission says very clearly it was  
21 a violation of the Filed Rate Doctrine.

22 With respect to the matter of primary jurisdiction,  
23 the Commission's exclusive rate jurisdiction extends not only  
24 to the unit rates and charges and to all classifications, prac-  
25 tices and regulations affecting such rates and charges, but --

and I quote -- "to all contracts which in any manner affect or relate to such rates, charges, or to classification of the services."

I'd like to go on but I would love also to preserve some five minutes, and I notice my light is on. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Howell.

ORAL ARGUMENT OF JAMES FLEET HOWELL, ESO.,

ON BEHALF OF THE RESPONDENTS

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

Respondents respectfully submit that the core fundamental issue presented in this case involves the separate and independent obligation of the petitioner herein, Arkansas Louisiana Gas Company, to respond in compensatory damages out of its own assets and profits for the actual losses that it wrongfully caused the 15 individual respondents herein to sustain and incur from September, 1961, through December, 1975, by continuously breaching and violating their favored nations rights under the '52 contract and by uncooperatively and effectively withholding all of the true, relevant, and material facts concerning that breach of contract from respondents from 1961 through 1975. We respectfully submit that the statement of the situation concerning the payments that Arkla made to the United States Government by opposing counsel are not precisely consistent with the contracts between Arkla and the United States



1 Government. An examination of Section 2(n) of the 1961 protec-  
2 tive lease contract, Exhibit P-45, reflects that that contract  
3 anticipated the situation that actually existed between Arkla  
4 and the Government.

5 In other words, Arkla was in a dual capacity. It was  
6 not the typical lessee. It was a lessee that was also a pipe-  
7 line purchaser that owned and operated a pipeline system and a  
8 gas processing plant in the Sligo field, and under Section 2(n)  
9 of that Government lease contract Arkla was obligated contrac-  
10 tually to purchase the Government's gas at reasonable rates and  
11 reasonable prices. And the Government did require Arkla to pay  
12 the prices the Government felt was reasonable for the Govern-  
13 ment's royalty gas as delivered into Arkla's Sligo pipeline  
14 system. As evidenced by Exhibit P-82, Arkla and the Govern-  
15 ment negotiated as to the price that Arkla would have to pay to  
16 the Government for the Government's royalty gas and the explicit  
17 language of that letter contract, Exhibit P-82, sets forth so  
18 many cents per Mcf to be paid by Arkla for the Government's  
19 royalty gas.

20 Now, with respect to the problem that these respon-  
21 dents had in discovering and obtaining the true facts concern-  
22 ing Arkla's payments of higher prices to the United States  
23 Government for the Government's royalty gas produced in the  
24 Sligo field and delivered into Arkla's Sligo pipeline system  
25 and into Arkla's Sligo gas processsing plant, I think we must

1 begin with the fact that at the time it became necessary for  
2 Arkla to arrive at a price that it would pay the Government,  
3 one of their officials, Mr. J. C. Templeton, a vice president  
4 who was in charge of negotiating price on behalf of Arkla with  
5 the Government, wrote a memorandum on November 17, 1961, to  
6 Mr. B. E. Harrell, the senior vice president who actually nego-  
7 tiated our '52 contract on behalf of Arkla, and inquired of  
8 Mr. Harrell, what price should we pay the Government?

9 Mr. Harrell came back with a memorandum dated Novem-  
10 ber 20, 1961, which is in evidence as Exhibit P-58, wherein he  
11 said, "I have no particular opinion as to what price Arkla  
12 should pay the Government but I do wish to point out that we  
13 have a favored nations contract with Mr. W. E. Hall et al. and  
14 they are receiving approximately 8-1/2 cents at this time."

15 Here is the company official who was very familiar  
16 with the negotiations that led to the perfection of the '52  
17 contract and he said, I do not know whether payment of a higher  
18 price to the Government would breach, activate, or trigger this  
19 favored nations clause. But if it does, it could cost Arkla  
20 millions of dollars during the life of the '52 contract. So,  
21 in Arkla's -- in the mind of their chief vice president who  
22 negotiated the contract with respondents in '52, there was a  
23 serious question about whether the payment of a higher price to  
24 the Government would activate or trigger this favored nations  
25 clause.

1           One month later, on December 27, 1961, the corporate  
2 counsel, Mr. Robert Roberts, Jr., had received a copy of  
3 Mr. Harrell's warning memorandum, wrote the company, and said,  
4 in connection with the government lease contract -- and this  
5 memorandum is in evidence as Exhibit P-62, he said, it's a very  
6 difficult problem in connection with the government lease, and  
7 Arkla doesn't want to buy any gas or set a price. So, with  
8 that background, let's look at what happened from 1961 forward.

9           As testified to by Frank Hall, he and his now-deceased  
10 father, W. E. Hall, Sr., went to Arkla's office month after  
11 month, year after year, from '61 to '73, to seek to determine  
12 if Arkla was paying anybody else a higher price in the Sligo  
13 field, obviously to see if they had any rights under their  
14 favored nations clause. Each time Mr. Harrell and Mr. Miles,  
15 primarily on behalf of Arkla, told them that they were receiv-  
16 ing the highest prices that Arkla paid to anyone else in the  
17 Sligo field, that Mr. Hall was a royalty owner, he was an  
18 overriding royalty interest owner, and a working interest owner,  
19 and he didn't delineate, are you paying a higher price for  
20 royalty gas or are you paying a higher price for working inter-  
21 est gas, he just said, are you paying anyone else in the field  
22 a higher price?

23           On each occasion, they were told, you're getting the  
24 highest price that we're paying to anyone else in the field.  
25 Now, these people relied upon this, they believed it in good



1 faith, and they had no way to check. There was nothing of  
2 record as to what price Arkla was paying the Government. They  
3 didn't even know they were taking any of the Government's royal-  
4 ty gas into their pipeline system, or into their Sligo plant.

5 QUESTION: Well, the points you're making surely bear  
6 on the equities, perhaps, but is that controlling?

7 MR. HOWELL: Your Honor, I think -- yes, sir, I think,  
8 to the extent that we sued for breach of contract because they  
9 destroyed these people's contractual rights and their rights to  
10 enforce and implement their contractual rights consistent with  
11 all applicable laws, rules, and regulations. And --

12 QUESTION: Mr. Howell, what would be the -- if you're  
13 right and we were to affirm --

14 MR. HOWELL: Yes, sir.

15 QUESTION: What damages would you recover, say, for  
16 the period from '62 through '72?

17 MR. HOWELL: The damages should be measured by what  
18 the United States Government received, Your Honor.

19 QUESTION: In other words, the difference between  
20 what you're getting and what the United States got?

21 MR. HOWELL: Yes, sir.

22 QUESTION: Well, now, then that's really in effect the  
23 rate increase, isn't it, for that period?

24 MR. HOWELL: Your Honor, it's award of damages mea-  
25 sured by --

1 QUESTION: I know, that's the name of it.

2 MR. HOWELL: Yes, sir.

3 QUESTION: In effect it's the same thing as a rate increase.

4 MR. HOWELL: Well, I think it can be styled that way  
5 semantically but I would say from the legal proposition it would  
6 be the payment of damages by Arkla --

7 QUESTION: Well, in any event, it would an amount of money --

8 MR. HOWELL: Yes, sir.

9 QUESTION: Without prior Commission approval which  
10 would be exactly what you would have sought in the way of appro-  
11 val of a rate increase had you known about this deal with the  
12 Government, isn't it?

13 MR. HOWELL: Yes, sir, and in that regard --

14 QUESTION: Doesn't that have some significance on the  
15 real issue we've got to decide?

16 MR. HOWELL: Your Honor, I think, perhaps in this  
17 context, we filed a petition with the Federal Power  
18 Commission on June 30, 1976. We asked them to clarify  
19 what we could and would have received as contractually  
20 authorized if we had been able to file, if we'd  
21 have had the true facts to make a Section 4(d) notice filing.  
22 And they set forth rather explicitly and expressly that if we  
23 were contractually authorized to receive the same prices that  
24 the Government received from Arkla for its gas and for the  
25 liquids and the condensate, that, one, if it was a severable

1 price for the liquids and the condensate like the Government  
2 received, there would have been no Commission jurisdiction  
3 over the liquids and the condensate. It was simply a matter of  
4 contract law.

5 And they said, with respect to the dry residue gas,  
6 if we were contractually authorized and if we'd have filed for  
7 the same price that the Government received for the dry residue  
8 gas, these are the maximum area rate ceilings up to which we  
9 would have approved. And they said, not maybe, or possibly,  
10 they said, we would have approved your contractually authorized  
11 prices up to these area rate ceilings. And that was filed in  
12 evidence. That's Exhibit D-59, Your Honor. It's a November 8,  
13 1976, order issued by the Federal Power Commission.

14 QUESTION: Well, are you telling me then, actually,  
15 you in effect had Commission approval on the difference?

16 MR. HOWELL: The Commission deferred to the courts,  
17 Your Honor, the question as to whether or not we were contrac-  
18 tually authorized. In other words, we brought the suit in  
19 state court, and part of our proof was to prove --

20 QUESTION: Well, what I'm trying to get, Mr. Howell,  
21 did the Commission in effect tell you, if you can get approval  
22 of the -- if there was a violation of the contract here and you  
23 were entitled to it, consider that we've approved it?

24 MR. HOWELL: Your Honor, I interpret it that way and  
25 I think the Louisiana courts did too, because the order clearly



1 says, if you would have filed and if you were contractually  
2 authorized, these are the rates --

3 QUESTION: Is that order in our Appendix?

4 MR. HOWELL: Yes, sir. It's Exhibit D-59. It's in  
5 the Joint Appendix at page 183.

6 QUESTION: 180?

7 MR. HOWELL: Yes, sir, and it was cited by the Louis-  
8 iana court in its opinion in the appendix at the top of page  
9 62, in the Joint Appendix, the Louisiana Supreme Court specifi-  
10 cally relied upon the Federal Power Commission's November 8,  
11 1976, order.

12 QUESTION: Could I ask you if you had, say, in 1972 or  
13 '73, you had gone to the Commission and asked for a rate  
14 increase, saying that you were contractually permitted to in-  
15 crease the rates and please give us permission to charge a  
16 higher rate, and the Commission had said fine, that's fine, now,  
17 that certainly would have been permission for you prospec-  
18 tively to file, to charge higher rates?

19 MR. HOWELL: Yes, sir.

20 QUESTION: Is the Commission authorized to give retro-  
21 active effect to any rate increase?

22 MR. HOWELL: No, sir. In what you call a retroactive  
23 rate increase, Your Honor --

24 QUESTION: So, the question that my brother Brennan  
25 asked you, was, do you interpret the Commission's response to

1 what you did file as saying, we consent to your charging higher  
2 rates from 1961 up to -- I don't think they have the authority  
3 to make rate increases retroactive.

4 MR. HOWELL: Your Honor, they defer to the courts,  
5 recognizing that the courts had concurrent jurisdiction over  
6 breach of contract --

7 QUESTION: I understand that. I understand that.

8 MR. HOWELL: Yes, sir.

9 QUESTION: Even if it were conceded that the contract  
10 permitted you to -- if there was no question whatsoever about  
11 that, the Commission would -- the most the Commission could do  
12 is say, prospectively, you may charge higher rates?

13 MR. HOWELL: Well, at the time we found out about it,  
14 Your Honors, in 1974 --

15 QUESTION: Well, that's the problem.

16 MR. HOWELL: Yes, sir, that is the problem. That is  
17 the problem. And it's our position that Arkla's breach of the  
18 contract and withholding of the facts gave rise to a separate  
19 and independent cause of action under state law for recovery of  
20 damages to be paid by Arkla and the stockholders and not to be  
21 included in Arkla's rate base or passed on to consumers. And I  
22 believe this Court in 1961, as I read the Pan American Petroleum  
23 v. Superior Court of Delaware, recognized that the Natural Gas  
24 Act, which effectuated a stream of regulation based on private  
25 contracts, held that these common law contract rights were not

1 abrogated or destroyed by the Natural Gas Act and that we were  
2 still afforded rights to be treated as we should have been  
3 treated and that is, the fact should have been disclosed. These  
4 parties should have been given an opportunity to file their  
5 Section 4(d) notices and put their contractually authorized  
6 prices into effect.

7 Mr. Justice Stevens posed the question as to what  
8 would have happened in '61 if we would have known about this  
9 information. We would have filed a Section 4(d) notice with  
10 the Commission. If there was any dispute at that time about  
11 whether or not we were contractually authorized, the chances are,  
12 I submit, based on the Commission's long-time policy of defer-  
13 ring contractual questions to the courts, they would have  
14 deferred us to the courts at that time. We would have gone to  
15 court to determine if we were contractually authorized a higher  
16 price, the court would have decided it, and then prospectively  
17 we could have received whatever the court said we were contrac-  
18 tually authorized to, consistent with the Commission's area  
19 rate ceilings. But that whole process was prevented from  
20 occurring because they withheld the facts and failed to comply  
21 with their affirmative duty to disclose the true facts.

22 I think it's adequately been discussed in other --

23 QUESTION: As I understand the Commission, the Commis-  
24 sion opposes the result you want to reach here?

25 MR. HOWELL: Yes, sir, they --



1 QUESTION: And on the ground that this would undercut  
2 their authority despite the claim of -- your claim based on the  
3 equities, and despite your in effect claiming estoppel --

4 MR. HOWELL: Yes, sir.

5 QUESTION: Or misrepresentation or whatever -- ?

6 MR. HOWELL: Just a breach of an affirmative duty to  
7 disclose true and material facts relative to contractual rights.

8 QUESTION: And the Commission -- that's the Commis-  
9 sion's position, isn't it?

10 MR. HOWELL: Your Honor, after the Louisiana Supreme  
11 Court rendered its judgment on March 5, 1979, they issued an  
12 order on April 25, 1979, and they said that we're not interested  
13 in the damages awarded for the liquids and the condensate,  
14 based on what the Government received. We are interested in  
15 the damages awarded on the dry residue gas by the Louisiana  
16 courts. And they ordered us to file copies of our complaints,  
17 our amended complaint, and all copies of all the damages evi-  
18 dence, and summaries of how the courts awarded damages for the  
19 dry residue gas, the difference between what we received and  
20 what the Government received during this period '61 to '72.  
21 And we filed that and they issued an order on May 18, 1979,  
22 saying that our damages were measured by what the Government  
23 received and what the Government received was fair and square  
24 with the Natural Gas Act, below the area rate ceilings, and no  
25 jurisdiction over the condensate and the liquids.

1           The Commission has taken the position that after 1972  
2 when the Small Producer Act came into effect and these people  
3 were given small producer status, that is simply a breach of  
4 contract matter in which you recover those damages.

5           QUESTION: From '72 on?

6           MR. HOWELL: Yes, sir.

7           QUESTION: At least, any producer who was a small  
8 producer entitled to be exempt from filing?

9           MR. HOWELL: Yes, sir. Did not have to make a filing.

10          QUESTION: There is some argument about whether all  
11 of them are or not?

12          MR. HOWELL: But the Commission has held that we were,  
13 Arkla has treated us as such, and I really think that's --

14          QUESTION: So, from '72 on, it didn't make any differ-  
15 ence whether --

16          MR. HOWELL: That's correct. And it's our position  
17 from '61 to '72 it made no difference with respect to the con-  
18 densate and the liquids, that we should have been paid the same  
19 as the Government got because because the Commission has said,  
20 if there's a severable price paid to the Government, which there  
21 was, we should have the same --

22          QUESTION: Well, the Commission position is, though,  
23 from '61 to '72, as to the dry gas residue, you're not entitled  
24 to any --

25          MR. HOWELL: We've been caught in a Catch-22,

1 Your Honor, that Arkla, by withholding the facts. And in the  
2 order, they refer to the Note, No. 5, 1980 order, the Commission  
3 said, we refuse to go back 20 years to see what would have been  
4 approved. Well, in their November 8, 1976, order, they said,  
5 if you were contractually authorized, we would have approved up  
6 to these maximum area rate ceilings. We defer to the courts to  
7 find out if you were contractually authorized. So after the  
8 Louisiana Supreme Court had rendered its judgment, staff counsel  
9 issued a brief saying, in order for us to get the damages for  
10 the dry residue gas from '61 to '72, we should seek a waiver  
11 of the Section 4(d) notice filing based upon Arkla's withholding  
12 of the facts in the prevention of performance in estoppel.

13 So, we filed for the waiver alleging that our prices  
14 were below area rate ceilings, that we were prevented from  
15 filing, there was no humanly possible way that we could make  
16 the filing. And the Commission ruled that in essence we're  
17 denying the waiver because it goes back 20 years. And that  
18 goes into the Catch-22 -- it goes back 20 years because they  
19 effectively withheld the fact the court needs.

20 QUESTION: Well, was the position, Mr. Howell, that  
21 there was no jurisdiction to grant a waiver?

22 MR. HOWELL: No, sir, they have the authority to  
23 grant a waiver and they granted it in 20-some-odd cases that we  
24 cited to the Commission -- Plaquemines, Piqua, and other deci-  
25 sions -- they've granted waivers; yes, sir.



1 QUESTION: Well, is that judgment that --

2 MR. HOWELL: No, sir, we've taken an appeal from their  
3 denial of the waiver to the 5th Circuit Court of Appeals.

4 QUESTION: Is it pending there?

5 MR. HOWELL: It's pending there. The FERC in -- the  
6 petitioner herein has asked that court to hold that proceed-  
7 ing in abeyance until this Court rules. Now, where we are  
8 procedurally, if you think it's necessary for us to get a  
9 waiver --

10 QUESTION: I was going to say, if you lose here, is  
11 the issue of a waiver still open in the 5th Circuit or isn't it?

12 MR. HOWELL: Your Honor, I think that the waiver  
13 issue is essential to us getting damages for the dry residue  
14 gas from '61 to '72 and this Court doesn't feel that it can  
15 address the waiver head-on in this breach of contract case,  
16 then I think certainly we're entitled to go through the process  
17 to --

18 QUESTION: Well, you're already there, I gather, and --

19 MR. HOWELL: Yes, sir, and entitled to finish it.

20 QUESTION: What does the Commission have to say about  
21 the waiver?

22 MR. HOWELL: Your Honor, the Commission said that it  
23 just goes back too far, it -- they say the equities are on our  
24 side in the original order that they issued. They supported our  
25 rates and said they were below area rates. They took that out,

1 that footnote out in the errata notice, but simply, they say,  
2 it just goes back too far and we don't want to get into a posi-  
3 tion of speculating what someone else might have interpreted  
4 the contract back in 1961.

5 QUESTION: Well, it's kind of like the doctrine of  
6 laches, isn't it?

7 MR. HOWELL: Sir?

8 QUESTION: It's kind of like a doctrine of laches,  
9 isn't it, that you can't go back forever?

10 MR. HOWELL: Yes, sir, but it's being applied to us  
11 when we were prevented from taking the action necessary to im-  
12 plement our rights at that time. We're saying Arkla is estopped  
13 to rely on its own breach of contract and its own withholding  
14 of the facts which prevented us from implementing our contrac-  
15 tual rights consistent with the Section 4(d) notice filings from  
16 '61 to '72 with respect to the dry residue gas. And that that's  
17 really why we've been damaged.

18 QUESTION: When was the waiver appeal taken?

19 MR. HOWELL: Your Honor, it was taken --

20 QUESTION: When was it filed in the Court of Appeals?

21 MR. HOWELL: The rehearing was denied, I believe,  
22 January 2 -- the waiver was denied on November 5, 1980. We  
23 filed application --

24 QUESTION: That was after -- that was after we granted  
25 certiorari?

1 MR. HOWELL: No, sir, I believe you granted certio-  
2 rari January 19 of this year, if I'm not mistaken.

3 QUESTION: This year, did we?

4 MR. HOWELL: Yes, sir. We filed May 25, 1979.

5 QUESTION: So we knew that the waiver had been denied?

6 MR. HOWELL: Yes, sir.

7 QUESTION: And we also knew that you were appealing  
8 to the 5th Circuit?

9 MR. HOWELL: Yes, sir. Yes, sir.

10 QUESTION: When did you file your notice of appeal  
11 in the 5th Circuit?

12 MR. HOWELL: I believe it was January 7 or 8 of this  
13 year.

14 QUESTION: So, within five or ten days of the time we  
15 granted certiorari?

16 MR. HOWELL: Yes, sir.

17 QUESTION: How do we know that, Mr. Howell? Frankly,  
18 I ask because I don't remember it.

19 MR. HOWELL: Your Honor, the other side, the peti-  
20 tioner herein, made a filing showing that our application for  
21 rehearing with the FERC had been denied. We made a filing to  
22 inform the Court that it had been denied, of course, but that  
23 we had taken the appeal to the 5th Circuit. I think it was  
24 done by me, so the letter would be, a copy of the petition for  
25 appeal attached. I believe that was the method by which it was



1 attached. Your Honor, I think examination of what happened in  
2 the case of Western Natural v. Cities Service Gas Co., a case  
3 arising through the Oklahoma state courts, this Court having  
4 denied cert. and dismissed the appeal, and then the adjunct  
5 case going before the FPC and before the D. C. Circuit Court of  
6 Appeals where Cities Service Gas Company breached and violated  
7 a 1949 private gas sales contract -- ours was a 1952 contract.  
8 They withheld their cooperation, that is Cities Service Gas  
9 Co. withheld its cooperation, prevented Western Natural from  
10 getting an abandonment under Section 7(b) of the Natural Gas  
11 Act. They prevented Western Natural from filing a new contract  
12 with the Commission as a new rate schedule under Section 4 of  
13 the Act, and they prevented Western Natural from getting higher  
14 prices for its gas sold in interstate commerce. Western Natural  
15 went to court, that proved that Cities Service had withheld  
16 its cooperation, preventing them from getting Commission  
17 approval to abandon and to file a new contract with the Commis-  
18 sion. They recovered compensatory damages for the breach of  
19 contract and for failure to cooperate of over \$5 million. The  
20 Oklahoma Court of Appeal affirmed that judgment, this Court  
21 denied the Cities Service's appeal, and dismissed its petition for  
22 certiorari. Then it went before the FPC and the FPC recognized and  
23 delineated between the obligation of a pipeline company to pay  
24 just and reasonable area rates for natural gas sold in inter-  
25 state commerce, and the obligation of a pipeline company to

1 respond with compensatory damages out of its own pocket for  
2 losses caused by the breach of violation of its private contrac-  
3 tual agreements. And I think the decision of the District of  
4 Columbia Court of Appeals clearly recognizes that there must be  
5 some measure of protection for people who sign these contracts  
6 because this Court has held time and time again that the Natural  
7 Gas Act did not destroy the integrity of private supply con-  
8 tracts. But if this Court holds that we're caught in a  
9 Catch-22 with a breach of the contract, withhold the facts,  
10 prevent us from making a notice filing, and then we can't re-  
11 cover damages, then in truth and in fact the integrity of this  
12 contract is completely destroyed, 15 citizens who contracted in  
13 good faith with Arkla have been wrongfully injured and damaged. And I  
14 just think the result is so inequitable, especially in light  
15 of the fundamental principle that this Court has passed down  
16 case after case, starting with United States v. Peck in 1880,  
17 that a party to a contract that prevents the performance of  
18 that contract may not rely upon its own breach of contract,  
19 its own inequities, its own fault, to escape its own liability  
20 for the losses caused by that breach of contract. And I respect-  
21 fully submit, under the rationale of this Court's decision in  
22 NAACP v. FPC, decided by this Court in 1976, that a pipeline  
23 company, whether it breaches civil rights, employment rights,  
24 rights under contracts, or commits torts, the damages that it  
25 must pay because of these types of conduct and these types of

1 injuries must be absorbed by the company out of its own private  
2 corporate assets and profits and not included in its rate base  
3 or passed on to the consumer. Because breaching contracts or  
4 injuring someone through the violation of their civil rights  
5 or their employment opportunities is not a legitimate function  
6 of a pipeline company. A pipeline company is supposed to honor  
7 contracts. It's supposed to fulfill contracts. It's supposed  
8 to honor people's civil rights as well as their private rights.  
9 And if the Court is worried about the consumers having to pay  
10 any of these damages by Arkla passing it through, Arkla has to  
11 pursue that through a separate proceeding before the Commission  
12 and receive Commission approval. If the Commission is concerned  
13 about Arkla trying to pass any of this corporate damage obliga-  
14 tion on to the public, the Commission can simply deny the  
15 attempt to pass through and make Arkla, the wrongdoer that  
16 caused these losses and damages, simply stand behind its obliga-  
17 tion to make these people whole.

18 QUESTION: Would you think that if this were a com-  
19 pletely private contract, no filed rates, just a contract be-  
20 tween two private parties, that the doctrine of laches might  
21 move in and cut you off at some point in that period or not?

22 MR. HOWELL: Your Honor, not as long as they were  
23 withholding the facts, and I was getting to that a while ago.  
24 Mr. Frank Hall, one of the respondents, was having lunch at the  
25 Freeport Petroleum Club in January, 1974, when he inadvertently



1 overheard a conversation between two gentlemen assumed to be  
2 employees of Arkla talking about the prices that Arkla was  
3 paying the Government. That's the first time any of these  
4 respondents had any idea that Arkla was paying a higher price  
5 to the Government or paying any price to the Government at all,  
6 and so, if laches would occur, it would seem like January of  
7 '74 would be the earliest time that they could have taken any  
8 action, and what they did after that was, they wrote letters to  
9 Arkla and called Arkla and asked them to give them the facts.  
10 And Arkla continued to withhold the facts. Will Hall, Jr.,  
11 wrote letters to the Department of the Interior and asked them  
12 to tell him what prices Arkla was paying the Government. The  
13 Department of Interior took the position that that was privileged  
14 proprietary information, what the Department of Interior was  
15 receiving for we, the people's royalty gas, and refused to  
16 give them the information.

17 So they had to hire me in May of 1974 to simply obtain  
18 the facts. They didn't have the facts when they retained me  
19 in 1974, and pursuant to the Freedom of Information Act I fi-  
20 nally received the information.

21 MR. CHIEF JUSTICE BURGER: We will resume there at  
22 1 o'clock, counsel.

23 (Recess)

24 MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

25 MR. HOWELL: Mr. Chief Justice, and may it please

1 the Court:

2 Immediately before the noon recess I was addressing  
3 some questions about laches, and would like to follow that  
4 through, Your Honors.

5 As I was saying, that I had not been able on behalf  
6 of my clients to obtain the true facts until I received a letter  
7 from the United States Department of Interior dated June 24,  
8 1974. That's in evidence as Exhibit P-142, where the Department  
9 of Interior advised me on behalf of these respondents as to the  
10 actual prices that the Government had been receiving from Arkla  
11 for its royalty gas in Sligo field. At that time I made a  
12 written demand upon Arkla for a full disclosure of all of the  
13 true facts, specifically, copies of their contracts with the  
14 Government and specifically all of the information concerning  
15 the prices that Arkla had been, was then paying to the United  
16 States Government, copies of checks, and other sales reports  
17 and production reports. And that amicable plan was rejected.  
18 In essence they forced us to file a lawsuit to judicially dis-  
19 cover all of the truth, relevant material, and necessary facts  
20 from Arkla's own files and records.

21 And as the record in this case will reflect, we went  
22 through about two years of litigation which were devoted solely  
23 to discovery. We had to file motion after motion and obtain  
24 order after order in order to obtain all of the true facts  
25 necessary to prove the breach of contract and to prove the

1 losses and damages. And the issue concerning obtaining a  
2 waiver of the notice filing requirement only came up, as I said,  
3 in 1979, when the FERC staff counsel suggested that in order to  
4 obtain the damages for the dry residue gas from '61 to '72, that  
5 we should think of obtaining a waiver of the notice filing  
6 requirement, which we very promptly filed for in May of 1979.  
7 And the waiver application was based on two contentions, one  
8 in light of the Western Natural v. Cities Service litigation  
9 that a waiver should not be necessary when it's a breach of  
10 contract that prevented you from making the filing in the first  
11 instance. But that if it was, we were entitled to it, because  
12 Arkla, by breaching the contract and withholding the facts from  
13 respondents for 14 years and then requiring respondents to go  
14 through six years of litigation to discover and prove the true  
15 facts, certainly the 20-year period that had elapsed was the  
16 fault of Arkla and not the fault of these respondents.

17 And, of course, after the waiver was denied on  
18 November 5, 1980, we immediately filed a petition for rehearing  
19 with the Commission which was denied on January 2.

20 QUESTION: Are there many precedents, Mr. Howell,  
21 waivers by the Commission?

22 MR. HOWELL: Yes, sir. The two leading appellate  
23 decisions from the D. C. Circuit Court of Appeals are the Pla-  
24 quemines case, decided in 1971. The Commission had declined  
25 to grant a waiver of a Section 4(d) notice filing for a five-year



1 period prior to '71, and the Court of Appeals, the D. C. Circuit  
2 Court of Appeals ordered the Commission to grant a waiver if it  
3 found that the prices provided for under the contract were below  
4 area rate ceilings. And so it reversed and remanded to the  
5 Commission to grant the waiver.

6 In the Piqua case, decided by the Commission in 1978,  
7 the Commission granted a waiver saying that the Commission had  
8 a long history of granting waivers where through some inequity  
9 there was the noncompliance with the procedural notice filing  
10 requirement. And they said, in order to protect the integri-  
11 ty of the contract and the true intentions of the parties, they  
12 should grant a waiver to clear up the absence of the prospective  
13 notice filing requirement. So that --

14 QUESTION: So you were surprised when you got the  
15 denial?

16 MR. HOWELL: I've never been more shocked in my life,  
17 Your Honor, to be quite frank. We felt that -- and even the  
18 Commission recognized that the Louisiana courts had held, the  
19 courts to whom the Commission had deferred, had held that Arkla  
20 in breach of its contractual obligations failed to disclose the  
21 facts. Thank you.

22 MR. CHIEF JUSTICE BURGER: Thank you. Do you have  
23 anything further, Mr. Goldberg?

24 ORAL ARGUMENT OF REUBEN GOLDBERG, ESQ.,  
25 ON BEHALF OF THE PETITIONER -- REBUTTAL

1 MR. GOLDBERG: Just a few things here.

2 Counsel referred to Section 2(n) of the Government  
3 lease as having some bearing on this case. It has absolutely  
4 no bearing whatsoever on the case. The Government had no gas  
5 to sell, and it never tendered any gas to Arkla which Arkla  
6 would have had to purchase. Arkla produced its own gas and it  
7 made royalty payments. The Government under the lease had the  
8 option to take gas in kind instead of accepting royalty payments.  
9 If it had exercised that option, it would have had gas to sell,  
10 gas it would have sold. And in order to have, to assure itself  
11 of a purchaser, Section (n) was in the provisions, but if it  
12 did not exercise that option Section (n) was entirely irrelevant.

13 Counsel keeps saying that they purchased residue gas  
14 and the Commission was misled at one time too, and it has cor-  
15 rected itself. It was basing its opinion that there was no  
16 breach in the ceiling prices, based upon the fact that it  
17 thought residue gas had been purchased. And if the Court will  
18 refer to our reply brief at pages 11 and 12 you will find the  
19 Commission's statement retracting their earlier statement and  
20 explaining why they had been misled.

21 Now, counsel also referred to a legal opinion which  
22 he said demonstrated a reference to the difficulty of the prob-  
23 lem. That legal opinion had nothing to do with triggering. It  
24 was related, triggering of the favored nation clause. It was  
25 related to balancing takes from other producers, from a number

1 of producers, how you balance takes.

2 There was a legal opinion dealing with triggering.  
3 When the Government demanded rents or royalty payments in ex-  
4 cess of the fixed prices in the contract, Arkla was concerned  
5 about agreeing to that without first knowing whether it would  
6 trigger favored nation provisions and it submitted the question  
7 to its counsel and its counsel said, favored nations will not  
8 be triggered by the royal payment. A royalty payment is not a  
9 purchase of gas under well-settled federal and state jurisdic-  
10 tion. Now --

11 QUESTION: But counsel, a moment ago you referred to  
12 the fact that the Commission was misled and cited us to a foot-  
13 note ten in your brief on page 11, I believe. And as I read  
14 that footnote --

15 MR. GOLDBERG: Page 11 of the reply brief.

16 QUESTION: Oh, of your reply brief? And is that an  
17 FERC proceeding?

18 MR. GOLDBERG: Yes; yes. That's at the bottom of  
19 page 11 and the top of page 12; there's a two-paragraph quota-  
20 tion.

21 QUESTION: Is there any argument in this case about  
22 -- or I'll put it the other way -- must we decide whether these  
23 companies are small companies that are freed from the filing  
24 requirements as of '72? Is there an issue about that?

25 MR. GOLDBERG: Yes. There is a small producer issue



1 in the case. We discussed it in our brief, but I just simply  
2 haven't had the time to get to it.

3 QUESTION: But you mean, if someone is a small pro-  
4 ducer, then from '72 on there is no dispute?

5 MR. GOLDBERG: Not unless they can demonstrate --  
6 there still is the question, even if you're a small producer.  
7 The small producer exemption says, you don't have to make a  
8 filing to get the rate increase but you still have to demon-  
9 strate, you still have to show that the increase is contrac-  
10 tually authorized and that it is reasonable. So that --

11 QUESTION: Well, then, it'd all go back to the state  
12 court?

13 MR. GOLDBERG: Well, that's a question for the  
14 Commission.

15 QUESTION: Why is that?

16 MR. GOLDBERG: Because it's within the Commission's  
17 primary jurisdiction and in its exclusive --

18 QUESTION: I thought the Commission in this very case  
19 said that to the extent these companies are small producers,  
20 then it's up to the state court after '72?

21 MR. GOLDBERG: No, I don't think the Commission said  
22 that. The Commission did say, in some order, that there were  
23 five of the respondents that had small producer certificates  
24 but that the benefit of the small producer exemption was  
25 available to all of the respondents. It did say that.

1 And that's -- that's on appeal --

2 QUESTION: But -- the Commission washed its hands of  
3 the whole matter then, with respect to post-'72 rate increase?

4 MR. GOLDBERG: No, I don't think that you could say  
5 that, because -- may I just --

6 QUESTION: Well, you were about to say that that's on  
7 appeal anyway, weren't you?

8 MR. GOLDBERG: It's on appeal in the United States  
9 district court.

10 QUESTION: All right. Well, that's where it presently  
11 sits?

12 MR. GOLDBERG: It's held in abeyance pending the out-  
13 come of this case.

14 What I did want to indicate, that the perception of  
15 the case and the development of its attitude towards its primary  
16 jurisdiction and exclusive rate jurisdiction is very inter-  
17 esting. When we first --

18 QUESTION: I don't want to extend your time,  
19 Mr. Goldberg.

20 MR. GOLDBERG: Thank you.

21 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
22 case is submitted.

23 (Whereupon, at 1:10 o'clock p.m., the case in the  
24 above-entitled matter was submitted.)  
25

CERTIFICATE

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No. 78-1789

ARKANSAS LOUISIANA GAS COMPANY

V.

FRANK J. HALL ET AL.

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