

In the

ORIGINAL

# Supreme Court of the United States

NEW ENGLAND POWER COMPANY,

Appellant,

v.

NEW HAMSHIRE, ET AL.;

MASSACHUSETTS, ET AL.,

Appellants,

v.

NEW HAMPSHIRE, ET AL.: and

DENNIS J. ROBERTS, II, ATTORNEY  
GENERAL OF THE STATE OF RHODE  
ISLAND, ET AL.,

Appellants,

v.

NEW HAMPSHIRE, ET AL.

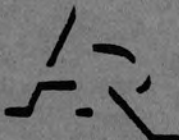
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Washington, D. C.

December 7, 1981

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REPORTING

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 NEW ENGLAND POWER COMPANY,                   :

4                               Appellant,                   :

5                   v.                               :     No. 80-1208

6 NEW HAMPSHIRE, ET AL.;                       :

7 MASSACHUSETTS, ET AL.,                       :

8                               Appellants,                   :

9                   v.                               :     No. 80-1471

10 NEW HAMPSHIRE, ET AL.; and                   :

11 DENNIS J. ROBERTS, II, ATTORNEY           :

12     GENERAL OF THE STATE OF RHODE           :

13     ISLAND, ET AL.,                           :

14                               Appellants,                   :

15                   v.                               :     No. 80-1610

16 NEW HAMPSHIRE, ET AL.                       :

17 - - - - - :

18                                               Washington, D. C.

19                                               Monday, December 7, 1981

20                   The above-entitled matter came on for oral

21 argument before the Supreme Court of the United States at

22 10:56 o'clock a.m.

23

24

25

1 APPEARANCES:

2 SAMUEL HUNTINGTON, ESQ., Westborough,  
3 Massachusetts; on behalf of the Appellant  
4 in No. 80-1208.

5 DONALD K. STERN, ESQ., Assistant Attorney  
6 General of Massachusetts, Boston,  
7 Massachusetts; on behalf of the Appellants  
8 in No. 80-1471 and No. 80-1610.

9 GREGORY H. SMITH, ESQ., Attorney General of  
10 New Hampshire, Concord, New Hampshire; on  
11 behalf of the Appellees.

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1	<u>C O N T E N T S</u>	
2	<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
3	SAMUEL HUNTINGTON, ESQ.,	
4	on behalf of the Appellant in No. 80-1208	4
5	DONALD K. STERN, ESQ.,	
6	on behalf of the Appellants in No. 80-1471	
7	and No. 80-1610	15
8	GREGORY H. SMITH, ESQ.,	
9	on behalf of the Appellees	22
10	SAMUEL HUNTINGTON, ESQ.,	
11	on behalf of the Appellant in No. 80-1208	
12	- rebuttal	41
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



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P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: We will hear arguments next  
3 in the New England Power Company against New Hampshire.

4

It appears that the Attorney General has been able  
5 to get out of the snows and arrive, and we will put him on  
6 in due course. He must be anxious to get back to those  
7 snows some time today.

8

Mr. Huntington, I think you may proceed whenever  
9 you are ready.

10

ORAL ARGUMENT OF SAMUEL HUNTINGTON, ESQ.,

11

ON BEHALF OF THE APPELLANT IN NO. 80-1208

12

MR. HUNTINGTON: Mr. Chief Justice, and may it  
13 please the Court, these consolidated cases are here on  
14 appeals from the Supreme Court of New Hampshire. The key  
15 issues are whether New Hampshire's restriction on  
16 hydroelectric exports places an undue burden on interstate  
17 commerce in violation of the commerce clause, and whether  
18 the restriction is pre-empted by the Federal Power Act.

19

The facts are straightforward. New England Power  
20 Company is part of a holding company system that serves  
21 customers in Rhode Island, Massachusetts, and New  
22 Hampshire. It owns several hydroelectric units along the  
23 Connecticut River located in New Hampshire. Energy from  
24 these units is delivered to an integrated regional  
25 transmission grid and flows freely in interstate commerce.

1           In 1980, the New Hampshire Public Utilities  
2 Commission invoked a 1913 state statute and ordered New  
3 England Power Company to sell within New Hampshire the  
4 output from the units. The Commission did not order NEP to  
5 interrupt physically the way the power is being generated or  
6 transmitted. Rather, it sought to capture exclusively for  
7 the benefit of New Hampshire citizens the economic benefits  
8 of these units.

9           New Hampshire's attempt to retain the economic  
10 benefits of an important natural resource exclusively for  
11 its own citizens violates the commerce clause. There are  
12 two mainstream cases by this Court which are directly on  
13 point. West versus Kansas Natural Gas Company involved a  
14 state prohibition against the export of natural gas. And in  
15 a case even more on point, in Pennsylvania against West  
16 Virginia, this Court struck down a statute that required  
17 natural gas companies to serve local needs first, before  
18 exporting any natural gas.

19           QUESTION: So you say that the Federal Power Act  
20 of '35 doesn't either hinder or help you, or at any rate you  
21 don't need it?

22           MR. HUNTINGTON: Well, our commerce clause  
23 argument is based on the commerce clause itself. In  
24 addition to that we have a pre-emption argument that the New  
25 Hampshire restriction is pre-empted by the Federal Power Act.

1           Now, New Hampshire seeks to rebut our commerce  
2 clause argument by relying on Section 201(b) of the Federal  
3 Power Act, so the Federal Power Act is involved in our  
4 commerce clause argument to that extent. And I would like  
5 to turn now to that clause.

6           New Hampshire's argument is that that is an  
7 affirmative grant of authority, and therefore Congress  
8 affirmatively authorized them to burden interstate commerce.

9           QUESTION: What is, Mr. Huntington?

10          MR. HUNTINGTON: Section 201(b) of the Federal  
11 Power Act. Let me turn immediately to the language of that  
12 section, which I think itself is dispositive. 201(b)  
13 provides, "The provisions of Part 2 of the" --

14          QUESTION: Where have you cited that?

15          MR. HUNTINGTON: This is at Page 19 of our brief.

16          QUESTION: Thank you.

17          MR. HUNTINGTON: "The provisions of Part 2 shall  
18 not deprive a state or a state commission of its lawful  
19 authority now exercised over the exportation of  
20 hydroelectric energy which is transmitted across a state  
21 line." The question is, is this a grant, and we submit that  
22 the words "shall not deprive" are flatly inconsistent with a  
23 grant. These are not words of grant. "Lawful authority now  
24 exercised" is certainly not a reference to new authority  
25 heretofore barred by the commerce clause.

1           QUESTION: What do you make of Congressman  
2 Rodgers' comment?

3           MR. HUNTINGTON: Congressman Rodgers may have  
4 thought that the state had lawful authority to restrict  
5 hydroelectric exports. What Congressman Rodgers said is,  
6 allow us to continue to exercise these rights which we  
7 have. Congress's reaction to that was to enact 201(b),  
8 which is a savings clause. Congress said, all right,  
9 whatever lawful authority you now have you can continue to  
10 exercise, no more, no less.

11           The context of Section 201(b) is also flatly  
12 inconsistent with reading that --

13           QUESTION: Counsel, what do you think that clause  
14 saved for New Hampshire?

15           MR. HUNTINGTON: It saved whatever authority New  
16 Hampshire had. Now, we don't think the Court needs --

17           QUESTION: What authority did it have? As a  
18 practical matter, what did that clause save, in your view,  
19 for New Hampshire?

20           MR. HUNTINGTON: Well, in fact, it may have saved  
21 nothing. We don't think the Court needs to reach that  
22 issue, because I think there may be a category of cases  
23 where the Court could restrict hydroelectric exports in  
24 order to meet a local emergency or need, and we do address  
25 that in our brief.



1 QUESTION: Do you think that it may also have  
2 saved the power of New Hampshire to regulate retail  
3 interstate sales?

4 MR. HUNTINGTON: No, there is another provision --

5 QUESTION: As opposed to wholesale?

6 MR. HUNTINGTON: There is another provision in  
7 Section 201(b) that says that the authority of the Federal  
8 Energy Regulatory Commission extends to wholesale sales, but  
9 to no other sales, and that would take care of the retail  
10 sales.

11 I think the context of Section 201(b) is important  
12 here. Part 2 of the Federal Power Act was passed following  
13 the Attleboro decision, which held squarely that interstate  
14 flows of electricity are subject to the protection of the  
15 commerce clause, and that regulating wholesale sales in  
16 interstate commerce is beyond the power of the states. Now,  
17 Congress's reaction to that decision was not to create new  
18 authority, not to delegate to the authority affirmative --  
19 to the states affirmative power to regulate wholesale  
20 sales. Congress's power was -- Congress's reaction was to  
21 observe federal-state constitutional lines to give the  
22 Federal Power Commission, as it was then called, authority  
23 over wholesale rates and to preserve to the states whatever  
24 authority they had, and we submit that Section 201(b) is  
25 completely consistent with

1 this division. Ther is another section --

2 QUESTION: Are there two federal Acts you are  
3 talking about? Because certainly there is a considerable  
4 lapse of time between the Attleboro and the '35 Act.

5 MR. HUNTINGTON: Attleboro was in 1927, so it was  
6 seven or eight years. But the legislative history of the  
7 Part 2 makes clear that they were reacting to the Attleboro  
8 decision and that Part 2 was enacted specifically to fill  
9 the so-called Attleboro gap.

10 There is another section --

11 QUESTION: Well, Mr. Huntington, are you -- you  
12 are arguing first pre-emption, I take it.

13 MR. HUNTINGTON: No, we are arguing first that it  
14 is an undue burden on interstate commerce.

15 QUESTION: Why are you taking that approach?

16 MR. HUNTINGTON: Because we think the restriction  
17 falls squarely within this Court's commerce clause decisions  
18 and must fall. We think that is the easiest ground to rest  
19 the decision.

20 QUESTION: On pre-emption would the case be clear  
21 for you if 201 wasn't in the statute?

22 MR. HUNTINGTON: Well, 201(b) is relevant --

23 QUESTION: Would it or not? Would it or not?

24 MR. HUNTINGTON: I beg your pardon?

25 QUESTION: Would you think that without 201(b)

1 your pre-emption --

2 MR. HUNTINGTON: Without 201(b) we wouldn't be in  
3 Court. It would be clear that there was no -- that we had a  
4 solid case. I don't think New Hampshire would have a case.

5 QUESTION: Well, suppose we agreed with your  
6 colleague on the other side that 201(b) did save state power?

7 MR. HUNTINGTON: If you construe 201(b) as an  
8 affirmative grant, which we think would be --

9 QUESTION: Well, you would never get to the  
10 commerce clause argument then.

11 MR. HUNTINGTON: That is right. You could then --

12 QUESTION: Well, don't you think we must face the  
13 pre-emption argument first?

14 MR. HUNTINGTON: The case presents squarely a  
15 commerce clause issue and two pre-emption --

16 QUESTION: Not if 201(b) saves state power.

17 MR. HUNTINGTON: If 201(b) -- 201(b) has to be  
18 looked at in two senses. First, does it save from  
19 pre-emption the New Hampshire restriction?

20 QUESTION: If it does, it doesn't violate the  
21 commerce clause, the New Hampshire law doesn't violate the  
22 commerce clause, either.

23 MR. HUNTINGTON: No. No, no. 201(b), if it is a  
24 traditional savings clause, as we assert it is, then it  
25 could save the New Hampshire restriction from pre-emption

1 under Part 2. However, the statute could still be invalid  
2 under the commerce clause unless 201(b) is an affirmative  
3 grant. Now, this is the approach the Court used last term  
4 in the BT Investment Managers case.

5 QUESTION: We at least have to construe the  
6 statute in order to determine which of those it is.

7 MR. HUNTINGTON: No question, the Court must  
8 construe Section 201(b), and our contention is that the  
9 first question the Court must address is, is it an  
10 affirmative grant or is it a savings clause. If it is a  
11 savings clause, then it is not a defense to our commerce  
12 clause challenge. It is only a defense to our pre-emption  
13 argument, and that is the approach that the Court used in  
14 the BT Investment Managers case last year, which involved a  
15 savings clause practically identical to the 201(b) savings  
16 clause here.

17 The Court there held that the saving -- that it  
18 was a savings clause, and it protected the Florida statute  
19 there in question from pre-emption, but it was not an  
20 affirmative grant, and the Florida statute was struck down  
21 on commerce clause grounds.

22 Let me refer the Court to Section 202(f) of the  
23 Federal Power Act, which was not mentioned in our briefs,  
24 but I think it is relevant here, and I brought it to Mr.  
25 Smith's attention.



1           202(f), Part 2, was enacted in 1953 to make clear  
2 that the Federal Power Commission's jurisdiction did not  
3 extend to international sales, wholesale sales between a  
4 single state and a foreign country. Congress in enacting  
5 202(f) was concerned that these sales might then be beyond  
6 either federal or state authority under the Attleboro  
7 decision. So in 202(f) Congress added a provision that  
8 said, and I quote, "The states may regulate any such  
9 transaction."

10           And the legislative history of 202(f), which is  
11 House Report Number 978, 83rd Congress, First Session, makes  
12 clear that Congress added that because they were concerned  
13 that the states might not have that authority under the  
14 Attleboro gap -- under the Attleboro decision. So 202(f) is  
15 an example of a clear delegation to the states of authority  
16 to regulate wholesale sales. The states may regulate any  
17 such transaction. That stands in total contrast to 201(b),  
18 which says that nothing shall deprive a state of any lawful  
19 authority now exercised.

20           I would like to turn now to New Hampshire's second  
21 argument to avoid the commerce clause contention we make.  
22 And that is that the state has a proprietary interest in the  
23 river itself, and that justifies this restriction on  
24 interstate commerce. Even if the state has a proprietary  
25 interest, and we submit it does not, that interest does not

1 justify restricting commerce in a product which is privately  
2 manufactured using the river's power.

3           Electricity is a product generated by New England  
4 Power Company using the river's power. By way of analogy,  
5 flour is a product that can be milled using the river's  
6 power. Clearly, New Hampshire does not have the authority  
7 under the commerce clause to restrict commerce in flour. We  
8 submit it does not have any authority to restrict commerce  
9 in a privately produced product such as electricity.

10           This is the clear teaching of Foster Packing, a  
11 1928 decision that says a state may not prevent privately  
12 owned articles of trade from being sold in interstate  
13 commerce.

14           QUESTION: Do you think cases like that and  
15 Attleboro would come out the same way today?

16           MR. HUNTINGTON: We rely on Attleboro for the  
17 proposition that electricity in interstate commerce is  
18 subject to the protection of the commerce clause. Attleboro  
19 stands for the proposition that wholesale sales in  
20 interstate commerce are beyond the authority of the states  
21 to regulate.

22           I think there may be some question as to whether  
23 all wholesale sales in interstate commerce are beyond the  
24 constitutional authority. However, the restriction we have  
25 here is very akin to the Pennsylvania against West Virginia

1 decision, and that case has been reaffirmed time and time  
2 again, as recently as last year in the BT Investment case,  
3 in the Philadelphia against New Jersey landfill case, and  
4 stands for the very solid proposition that a state cannot  
5 erect a barrier to the interstate commerce of a product  
6 generated from a natural resource.

7           We submit in any event that New Hampshire does not  
8 have a proprietary interest in the river in the same way  
9 that it owns, say, state forest lands or the state capitol  
10 building. The interest New Hampshire does have is a  
11 regulatory interest. It has an interest in seeing that the  
12 resource is not wasted, it is conserved, and so on. But  
13 this Court's decision in Hughes against Oklahoma, striking  
14 down a state barrier on the export of minnows, stands firmly  
15 for the proposition that this ownership interest in natural  
16 resources, wildlife, and so on, does not protect the state  
17 regulation from commerce clause scrutiny. The ownership  
18 interest is simply the equivalent of saying, yes, the state  
19 may regulate for valid conservation or waste purposes, but  
20 those regulations must still pass muster under the commerce  
21 clause.

22           We submit that under the core commerce clause  
23 decisions of this Court, the New Hampshire restriction  
24 cannot survive the commerce clause attack.

25           With the Court's permission, I would like to save

1 the balance of my time for rebuttal.

2 CHIEF JUSTICE BURGER: Mr. Stern.

3 ORAL ARGUMENT OF DONALD K. STERN, ESQ.,

4 ON BEHALF OF THE APPELLANTS IN NO. 80-1471

5 AND NO. 80-1610

6 MR. STERN: Mr. Chief Justice, and may it please  
7 the Court, Massachusetts and Rhode Island also contend that  
8 the order of the New Hampshire Public Utilities Commission  
9 violates the commerce clause and is pre-empted by federal  
10 statute. We agree that Section 201(b) does not act as a  
11 grant of Congressional authority, but instead should be  
12 construed by this Court as a saving clause.

13 For purposes of my argument, however, I will  
14 assume a contrary interpretation of Section 201(b), and will  
15 assume that Congress did in fact give to New Hampshire the  
16 authority to limit or ban the exportation of hydroelectric  
17 power and that the PUC's order fell within the grant of that  
18 authority.

19 Such an interpretation would, in our view, present  
20 serious Constitutional questions centering on the limits of  
21 Congressional authority.

22 QUESTION: What do you do with Prudential against  
23 Benjamin and cases like that?

24 MR. STERN: Well, Your Honor, we don't dispute  
25 that Congress can -- has broad discretion and authority with



1 respect to the commerce clause, nor do we dispute that  
2 Congress's authority under the commerce clause exceeds that  
3 which a state might otherwise have. In other words, this  
4 case is not a case where we argue that Congress was  
5 incapable of giving to the states authority which it  
6 wouldn't have had in absence of Congressional authority.

7           What we do suggest is that that power which  
8 Congress has and which the states willingly gave up to  
9 Congress when it entered into the Constitution must be  
10 exercised in a way so that the exercise of Congressional  
11 power is exercised in some rational manner consistent with  
12 the legitimate ends that Congress sought to achieve.

13           Now, before I pursue that question, Your Honor, I  
14 want to briefly describe what we consider Massachusetts and  
15 Rhode Island's interest in this litigation. On one level,  
16 of course, our interest is as narrow as is New Hampshire's.  
17 Any reduced savings to New Hampshire inevitably means that  
18 we pay more.

19           QUESTION: Well, and partly, too, your citizens,  
20 according to New Hampshire, are migrating to New Hampshire.

21           MR. STERN: Well, that is true, Your Honor. They  
22 are then becoming New Hampshire residents and New Hampshire  
23 citizens. But what is clear is that the fiscal impact of  
24 the PUC's order by its very terms is to shift the economic  
25 burden of some \$25 million. Our estimates exceed that

1 amount, but we are willing to accept that at a minimum \$25  
2 million is being shifted from the shoulders of New Hampshire  
3 residents, rather, from Massachusetts to New Hampshire, but  
4 the real impact, I suggest, Your Honor, and this is, I  
5 think, perhaps the primary reason we are here, exceeds and  
6 transcends the dollars and cents.

7       The decision of the PUC threatens the  
8 long-standing cooperative efforts of the New England states  
9 with respect to energy matters. The New England Power Pool  
10 represents perhaps this nation's most sophisticated and  
11 highly integrated energy power pool arrangement. This  
12 arrangement, however, is a finely tuned arrangement, and one  
13 which, as the Commissioner of the Rhode Island PUC testified  
14 at the New Hampshire hearing suggested, could unravel fairly  
15 easily.

16       Moreover, the PUC's order invites the very sort of  
17 economic retaliation and isolation which these same three  
18 states were subject to when they were governed by the  
19 Articles of Confederation, which leads me to the commerce  
20 clause, or back to the commerce clause, and to the authority  
21 which the states willingly gave up to Congress.

22       While we concede that this authority is expansive,  
23 there are certain internal and external constraints, we  
24 suggest, on Congress's power to legislate in the area. I  
25 intend to focus my argument on the internal constraints

1 implicated by the commerce clause, and suggest that if the  
2 Court adopts New Hampshire's interpretation of Section  
3 201(b), that this case then presents one of those rare  
4 occasions for holding that Congress has exceeded its power  
5 under the commerce clause.

6           In prior instances where the Court has been faced  
7 with this argument, it has followed essentially a two-step  
8 analysis. First, whether the subject matter which Congress  
9 acts falls within the broad reach of the commerce clause,  
10 and here there is no dispute. We concede that Congress had  
11 the authority to regulate in the energy area generally, and  
12 with respect to hydroelectric power specifically. In fact,  
13 it forms the premise of our own commerce clause claim and  
14 our prep-emption claim.

15           But the second step and the second question is  
16 contested here, and that is whether Congress's action is  
17 reasonably related to the goal of regulating interstate  
18 commerce. This question, which is essentially a limited  
19 means and ends analysis, requires that there must be some  
20 showing, however minimal, that Congress has acted in a  
21 rational manner, and here, it is our position that whether  
22 one looks for an articulated purpose on the part of Congress  
23 or indeed for any plausible reason for Congress's action,  
24 none emerge to support a grant of authority to New Hampshire  
25 which effectively keeps the benefits, the economic benefits

1 of hydroelectric power within her borders at the expense of  
2 her sister states.

3           The fact that similar authority was not provided  
4 to the vast majority of other states underscores the  
5 irrationality of Congress's action.

6           QUESTION: Well, it was a grandfathering thing,  
7 according to the Congressman from New Hampshire, wasn't it?

8           MR. STERN: Well, we suggest, Your Honor, that  
9 labeling it as a grandfather clause in this case doesn't  
10 assist New Hampshire, for several reasons. The first is, it  
11 was a curious kind of grandfather clause, because New  
12 Hampshire argues that it didn't simply lock in lawful  
13 authority. Part of its argument is that it gave to a few  
14 states authority which it didn't have before under the  
15 commerce clause.

16           But secondly, we suggest that calling it a  
17 grandfather clause may describe what Congressman Rodgers had  
18 in mind, but in other instances where the Court has upheld  
19 the rationality of grandfather clauses it has looked to see  
20 whether the locking in of the inequity, if we can call it  
21 that, furthers some other rational, some other legitimate  
22 purpose which the legislature or the city council in the  
23 case of New Orleans versus Duke had in mind.

24           Here, of course, it is not a temporary solution.  
25 It is a -- to a national problem. What it does is to give



1 to New Hampshire forever power, important power, within its  
2 borders, this economic benefit, yet at the time same deny to  
3 the rest of the union, and here specifically Massachusetts  
4 and Rhode Island, this very same power. This is not an  
5 instance where Congress simply follows the problem, as it  
6 did in the decision which the Court upheld last year, the  
7 statute which the Court upheld last year in Hodell, where  
8 Congress dealt with a problem, and after extensive hearings  
9 found that although the statute, the Strip Mining Act fell  
10 peculiarly upon Virginia, what Congress was doing was simply  
11 following the problem wherever it found it.

12           Nor is it an instance, we suggest, as in the  
13 voting rights case, the Katzenbach case, where Congress  
14 selectively carves out its remedial powers in response to a  
15 national problem. Here, Massachusetts and Rhode Island find  
16 themselves on the receiving end of action which we assume  
17 for argument purposes but for Congressional action would  
18 violate the commerce clause, yet at the same time our action  
19 is judged, of course, by the higher standard of the commerce  
20 clause, since we lack that Congressional grant.

21           We suggest that such an unprecedented result is  
22 contrary to the very purpose of the commerce clause.

23           This Court has in the past found great meaning in  
24 the silences, in the great silences of the commerce clause.  
25 The Court has interpreted that provision in the name of

1 national unity and free commerce as inhibiting the states.  
2 We suggest that there is another great silence in the  
3 commerce clause which places certain limits on Congress,  
4 admittedly very narrow ones. Those limits at a minimum  
5 preclude Congress from selectively choking off interstate  
6 commerce in a manner that bears no rational relationship to  
7 the purpose of the commerce clause.

8           QUESTION: In effect, Mr. Stern, you are  
9 suggesting that this statute might just as well have read,  
10 State of New Hampshire.

11           MR. STERN: Yes, it could have, Your Honor. We  
12 think that Congress can --

13           QUESTION: That that is the only one of the 50  
14 states to which it could apply?

15           MR. STERN: Oh, no, no, Your Honor. By mentioning  
16 New Hampshire, I am focusing on the fact that it is New  
17 Hampshire and her neighboring states that are before the  
18 Court. At the time the statute was passed, there were in  
19 fact other states which arguably fell within 201(b).

20           QUESTION: How many?

21           MR. STERN: I think there were four, Your Honor,  
22 and there now remain, I think, only New Hampshire and  
23 Wisconsin which at all suggest that they have any  
24 authority. Wisconsin is not before the Court, so we don't  
25 know what authority it suggests.

1           In conclusion, I want to again make clear that we  
2 do not believe that Congress by virtue of Section 201(b)  
3 intended such a grant of authority to New Hampshire. We do  
4 suggest that if the Court disagrees with this interpretation  
5 of 201(b), that this interpretation provides a separate  
6 basis upon which to reverse the decision of the New  
7 Hampshire Supreme Court.

8           CHIEF JUSTICE BURGER: Mr. Attorney General.

9           ORAL ARGUMENT OF GREGORY H. SMITH, ESQ.,

10           ON BEHALF OF THE APPELLEES

11           MR. SMITH: Thank you, Mr. Chief Justice, and may  
12 it please the Court, without meaning any disrespect for my  
13 opposing counsel, or for the counsel in my office who  
14 drafted the brief in this case, which I approved, I would  
15 like to begin by saying to the Court that in preparing for  
16 this argument, I reread all the briefs in this case, and I  
17 think that there is one issue in this case, and only one  
18 issue in this case, and that is whether Section 201(b) of  
19 the 1935 Federal Power Act upon which New Hampshire relies  
20 in this case is unconstitutional.

21           The appellants, to prevail in this case, must  
22 carry their burden of demonstrating that that Act was an  
23 unconstitutional Act by Congress. If they do, I lose this  
24 case. If they do not, I do not believe there is any way  
25 that they can prevail.

1 I ask your indulgence to treat briefly some  
2 further facts which have already been referred to in the  
3 earlier argument.

4 Section 201(b), as I think you know, provided in  
5 fairly explicit terms that a state would not be deprived of  
6 its lawful authority now exercised over the exportation of  
7 hydroelectric energy which is transmitted across a state  
8 line. That Act of Congress adopted the practice then in  
9 existence in four states in the union and wrote it right  
10 into the law. The hydroelectric power plants in New  
11 Hampshire on the Connecticut River, which is in fact wholly  
12 within New Hampshire, generate electricity without any  
13 interstate character in the generation of the electricity  
14 itself.

15 If there is any doubt about what that section of  
16 201(b) means, the appellants have called upon the right  
17 state to give the answer. That section, which was an  
18 amendment to the Federal Power Act when it proceeded through  
19 Congress, was introduced, was sponsored, and shepherded  
20 through Congress by representatives of the state of New  
21 Hampshire. In doing so, the Congressman from the state of  
22 New Hampshire addressed his colleagues by saying, "The  
23 Senate bill as originally drawn would deprive certain  
24 states, I think five in all, of certain rights which they  
25 have over the exportation of hydroelectric energy which is



1 transmitted across the state line. This situation has been  
2 taken care of by the House Committee, and I hope you will,  
3 when you come to it, Section 201 of Part 2 of the 1935 Power  
4 Act, that you will grant us the privilege to continue as we  
5 have been for 22 years, to exercise our state right over the  
6 exportation of hydroelectric energy transmitted across state  
7 lines, but produced up there in the granite hills of old New  
8 Hampshire."

9           QUESTION: Mr. Smith, it is true that at that  
10 time, the state had never in effect exercised its power, is  
11 it not, by any action of the Public Utilities Commission?  
12 It simply had a statute on the books which would have  
13 permitted the Public Utilities Commission to have acted? Is  
14 that right?

15           MR. SMITH: I do believe that is correct, Your  
16 Honor. In fact, that statute, which was enacted in 1913,  
17 applied to the Connecticut River hydro plants after 1926,  
18 and I believe the record shows that all of the hydroelectric  
19 plants subject to this appeal were built or taken over by  
20 the New England Power Company after 1926.

21           I think the record also shows that in 1934, the  
22 Public Utilities Commission was asked by the New England  
23 Power Company or its predecessor with respect to these dams  
24 for permission to export hydroelectric energy out of New  
25 Hampshire, and that permission was granted. It has been

1 exercised from the beginning, and the owners of the current  
2 dams have taken their interest in these dams, apparently  
3 realizing that expressly, and I believe there is reference  
4 to that in the record.

5           It is our position, in fact, contrary to our  
6 opponents', that that authority was exercised, and that the  
7 other states, West Virginia, Maine, and Wisconsin, had also  
8 statutes on the books at that time, and it was authority  
9 which had been used. It was lawful authority, and we  
10 believe the reference to lawful authority in the statute can  
11 have only one intelligible meaning. It meant enacted into  
12 law. They were writing at the time in an obvious context.  
13 This particular statute was brought to the attention of  
14 Congress, and it was with this particular statute in mind  
15 that that amendment was offered and incorporated into the  
16 1935 Power Act.

17           It is placed in the section in which the other  
18 authority of states regulating hydroelectric energy export  
19 is also dealt with. That is, the authority to control  
20 interstate shipments for ultimate consumption and the  
21 authority to regulate wholly intrastate authority, and as  
22 further support for our view of the clear intention of  
23 Congress as expressed in this Act, in the 1978 amendments,  
24 the Public Utilities Regulatory Policy Act, a further  
25 amendment to 201(b) allowed the Federal Energy Regulatory

1 Commission to require pooling, to mandate interconnection of  
2 hydroelectric plants, and there is an exception created in  
3 that amendment to this provision upon which we rely today,  
4 indicating that Congress had some idea that without that  
5 exception the 201(b) as we construe it, and as we think it  
6 clearly takes effect in this case, would have prevented  
7 mandated pooling ordered by the federal authorities.

8           QUESTION: Would you also say that in the absence  
9 of the statute, that New Hampshire's actions were lawful  
10 under the commerce clause? In other words, was it in fact a  
11 lawful exercise of authority by New Hampshire at the time  
12 Congress acted?

13           MR. SMITH: We think that it very well may have  
14 been, and we think that reviewing the authorities from this  
15 Court, the control that a state may have over the natural  
16 resources within its boundaries which it owns is a question  
17 that has been somewhat left open in the decisions of this  
18 Court, and --

19           QUESTION: Well, at least it is arguable, is it  
20 not, that at the time Congress acted the first time with  
21 201(b), that the action, whatever it was, that was being  
22 taken by New Hampshire was not lawful under the commerce  
23 clause?

24           MR. SMITH: Certainly it has been argued before  
25 this Court today. In our view, the states do have such

1 authority to control their natural resources, and we cite in  
2 our brief such recent authority as the Rees versus State  
3 case, the cement plant, indicating that a state, when it  
4 owns the thing of commercial value, may have far more  
5 authority to control the delivery of that into the stream of  
6 commerce than it would have with respect to other matters.

7           It is our position here today before you, however,  
8 that that is not the question before the Court, that 201(b)  
9 clearly provides that New Hampshire may exercise its  
10 authority under the statute, and the Court need go no  
11 further to decide this case --

12           QUESTION: Well, all right, but help me over that  
13 interpretation, if you will. Assume for a moment that it  
14 was unlawful for New Hampshire to be regulating that at the  
15 time that 201(b) was passed, and 201(b) was a grant of power  
16 for a lawful exercise by New Hampshire. Then how do you  
17 interpret the statute, 201(b), to help you?

18           MR. SMITH: I would interpret it the way I have  
19 now. That is, that if I assume, as you have asked me to,  
20 that this section was required as a grant of authority by  
21 Congress in order to avoid what would otherwise have  
22 affected the commerce clause, then relying upon an  
23 interpretation of lawful authority that referred directly to  
24 the Constitution would not make any sense. It is our view  
25 that the use of the word "lawful" referred to the New



1 Hampshire statute which had been called to the attention of  
2 Congress, and to construe it as a direct reference to the  
3 Constitution when Congress didn't say constitutional or cite  
4 some provision of the Constitution, renders the entire  
5 exercise meaningless. It becomes circular.

6           QUESTION: Wouldn't it be an equally plausible  
7 interpretation to say that it is a savings clause in effect,  
8 that Congress does not wish to pre-empt those states which  
9 are exercising lawful authority by virtue of the enactment  
10 of this particular Act of Congress?

11           MR. SMITH: I don't think so, Your Honor. I take  
12 the position it does not. In this particular case, it is  
13 perfectly clear what the reference was Congress had in mind  
14 when it enacted this particular provision. It does not  
15 matter whether it is viewed as a grant or a savings clause.  
16 It is plain from the reading of the statute that what  
17 Congress did was adopt the practice of New Hampshire and  
18 other states and permit us to go on doing it. It seems to  
19 me that analyzing it rigidly by other cases which refer to  
20 grants or savings of one authority or another is somewhat  
21 beside the point.

22           This particular statute is very specific, and in  
23 fact was enacted in order to authorize exactly what we were  
24 doing in 1935 and what we are doing today.

25           QUESTION: Let me put a hypothetical to you, Mr.

1 Attorney General. Suppose New Hampshire had a statute that  
2 authorized the state to divert or retain within the state  
3 any waters including navigable waters for the purposes of  
4 hydroelectric power for the state or irrigation or  
5 transportation, and then you had Section 201(b) making a  
6 judgment that that was presumably a valid right. What would  
7 you say about that?

8 MR. SMITH: Well, it seems to me that the  
9 authority for New Hampshire to control the water itself at  
10 the time that Section 201(b) was enacted was clearer than  
11 the authority with respect to hydroelectric energy, and that  
12 is largely because Congress had acted to regulate  
13 hydroelectric energy in Part 1 of the Federal Power Act of  
14 1920 and then again at the time that this was enacted.

15 QUESTION: Well, specifically, do you think New  
16 Hampshire could keep all the navigable waters that come into  
17 the state within the state and not let them flow on through?

18 MR. SMITH: I am sorry, Your Honor. I  
19 misunderstood. There is authority from this Court which  
20 prevents diverting the natural flow of a river out of the  
21 state, and --

22 QUESTION: My hypothetical was that New Hampshire  
23 asserted in a statute that it had authority to do that,  
24 contrary to other views. Would Section 201(b) give it any  
25 more than it had before? Would it give New Hampshire any

1 more rights with respect to those navigable waters than it  
2 had before the passage of the statute?

3 MR. SMITH: It seems to me that if the question is  
4 whether New Hampshire might interfere with the flow of the  
5 river in Massachusetts, as in this particular river or this  
6 case, this river runs into other states in which other  
7 states may have some interest in the flow, certainly the  
8 same interest New Hampshire has in the flow of the river,  
9 and the ownership of the bed under it that we make in our  
10 briefs in this case.

11 I don't think in this case there is any question  
12 of New Hampshire interfering with the flow of the river  
13 itself downstream to such an extent that states downstream  
14 from New Hampshire are in any worse position than they were  
15 before, and in fact in this particular case the order which  
16 is before the Court is one which does not even block the  
17 exportation of hydroelectric energy or the pooling of that  
18 energy in the New England power pool. Instead, it simply  
19 requires that there be an accounting or bookkeeping which  
20 treats it as though the fact that it had been sold within  
21 the state of New Hampshire. It does not undo the New  
22 England-wide --

23 QUESTION: Mr. Attorney General, what about Mr.  
24 Huntington's point about milled flour?

25 MR. SMITH: I think it is clearly beyond the scope

1 of what is at issue in this case. New Hampshire doesn't  
2 assert any control by this statute, and has not asserted in  
3 this case any control over those derivative products which  
4 may be benefitted from the flow of this river.

5           QUESTION: If it is not any control, why are we  
6 here?

7           MR. SMITH: New Hampshire asserts control only  
8 over -- only over the flow --

9           QUESTION: That is the answer I want about flour.

10          MR. SMITH: Mr. Huntington's argument goes too  
11 far. Mr. Huntington asserts that New Hampshire is trying to  
12 control any benefits at all from that hydroelectric energy  
13 wherever it may be -- wherever the power generated by that  
14 river may in fact aid in some incremental way in improving  
15 the economic value of some other part of commerce. New  
16 Hampshire hasn't done anything of the sort. New Hampshire  
17 is only asserting its control under the statute over the  
18 generation of the power itself. We go no further than that  
19 in terms of what happens to products.

20          QUESTION: Could it exercise that over the  
21 production of flour?

22          MR. SMITH: There is nothing in our statute which  
23 would permit us to exercise it over anything more.

24          QUESTION: Well, could they pass such a statute?

25          MR. SMITH: That certainly isn't what is at issue



1 here. All we have is a statute which regulates the power  
2 itself, and more importantly, a statute which --

3 QUESTION: Could they pass such a statute, and  
4 would it be constitutional?

5 MR. SMITH: It seems to me that the question would  
6 have to be whether Congress could pass a statute permitting  
7 the state of New Hampshire --

8 QUESTION: Well, could Congress pass such a  
9 statute?

10 MR. SMITH: I think it could. We do not take the  
11 position --

12 QUESTION: You might just as well get to it. I am  
13 going to keep asking until you get to it.

14 (General laughter.)

15 MR. SMITH: I think Congress could, and I think  
16 that the important point which is raised by the argument to  
17 which you refer is that there is no question in this case as  
18 to the selectivity of this particular -- the application of  
19 201(b). I think that the language in 201(b) which refers to  
20 authority now exercised is descriptive and not limiting.

21 In other words, although it is not before the  
22 Court today, it seems to me it may be left to another day  
23 whether if another state enacts a statute like this it may  
24 argue that the reference in 201(b) was to authority like New  
25 Hampshire's.

1 QUESTION: Well, then you say they couldn't pass a  
2 statute concerning flour, because that is not in effect  
3 today. Is that what you are saying?

4 MR. SMITH: No, Your Honor, I am saying that they  
5 could pass such a statute, and Congress could adopt such a  
6 statute, and I think that it would -- and I assume that it  
7 would apply to all states equally, in order to permit the  
8 regulation, for example, of flour by the states under the  
9 commerce clause.

10 QUESTION: Mr. Attorney General, can I ask you a  
11 question about the lawful authority language in 201(b)? You  
12 don't contend that that language would have authorized New  
13 Hampshire to regulate the rates on interstate sales of  
14 electricity, do you?

15 MR. SMITH: We have not contended that, Your  
16 Honor. I think that issue may have been raised in the court  
17 below. All that is done by the order in this case is a  
18 regulation of the volume of hydroelectric energy, and we  
19 refer, I think, in our brief to a footnote in authority of  
20 this Court that evidently that particular section was one  
21 which was not concerned with ratemaking, but rather was  
22 concerned with regulation or prohibition of the volume of  
23 hydroelectric energy which could be exported across state  
24 lines.

25 QUESTION: In constitutional terms, what is the

1 difference between a state regulation of rates and a state  
2 regulation of volume?

3 MR. SMITH: In constitutional terms, I am not sure  
4 that there is any difference.

5 QUESTION: Well, if there is no difference,  
6 doesn't Attleboro establish they could not regulate rates  
7 and ergo they could not regulate volume either?

8 MR. SMITH: The reason, Your Honor, that Attleboro  
9 is not dispositive is that Congress in fact has exercised  
10 its authority under the commerce clause and has adopted the  
11 New Hampshire statute, and has permitted New Hampshire to  
12 regulate.

13 QUESTION: Well, but if that is true, has it not  
14 also revitalized what Attleboro put an end to? I mean, I  
15 don't understand why lawful -- do you get the thrust of my  
16 concern?

17 MR. SMITH: Yes. I think that Attleboro was  
18 decided when Congress had not acted. And Attleboro decided  
19 that the states were without authority to regulate wholesale  
20 interstate shipments of hydroelectric energy as they were  
21 with respect to gas.

22 QUESTION: My question, in effect, is, did  
23 Attleboro remain good law after the enactment of 201(b)?

24 MR. SMITH: That's right. That's right, because  
25 Congress decided, having been called upon by the

1 Attleboro decision to enter the field, to allocate the  
2 regulatory authority between the Federal Power Commission or  
3 the Federal Energy Regulatory Commission and the states, and  
4 the section of the statute upon which we rely is found in  
5 that section where Congress was allocating the authority to  
6 regulate.

7           QUESTION: To whom did it allocate that authority?

8           MR. SMITH: It allocated it very nearly like the  
9 Attleboro decision, permitting states to regulate interstate  
10 shipments which were for retail or ultimate consumption, and  
11 states to regulate wholly intrastate sales. The clause in  
12 201(b) upon which we rely is in nearly the same section, and  
13 in that section Congress has permitted New Hampshire to  
14 regulate the energy generated at its hydroelectric plants,  
15 and so it is part of the process of Congress in deciding  
16 whether a federal agency or a state agency would be better  
17 suited to regulating that particular part of commerce.

18           QUESTION: Mr. Attorney General, suppose I were to  
19 read Section 201(b) to mean that the clause shall not  
20 deprive a state or state commission of whatever lawful  
21 authority it now exercises, and so on, would you say that  
22 would be an improper construction of the statute?

23           MR. SMITH: Well, I think that to the extent  
24 whatever suggests that Congress wasn't guided by the  
25



1 particular statutes which we can look to as the authority,  
2 that is, that lawful authority meant something less than  
3 what you have suggested to me, Your Honor. It meant that  
4 authority or that kind of authority which is being exercised  
5 now by four states under their state law, and I think that  
6 it is clear that Congress was referring exactly to these  
7 statutes. Authority which is broader than that I don't  
8 think fairly falls under that statute.

9           QUESTION: I suppose you would agree, or would  
10 you, that if your reading of that statute takes care of the  
11 pre-emption aspect, it doesn't automatically follow that it  
12 controls the commerce clause aspect of the case.

13           MR. SMITH: I think it does both, Your Honor. I  
14 think that it clearly takes care of the pre-emption question  
15 by its very terms, and I think that it is clear when we look  
16 to the statute and the way in which it was placed in the Act  
17 that it also was enacted by Congress presumed to be aware of  
18 its authority under the commerce clause to adopt the New  
19 Hampshire practice and permit it.

20           QUESTION: Well, are you saying that the Congress  
21 of the United States can interpret the commerce clause in a  
22 way that is binding on everyone else?

23           MR. SMITH: No, I am saying that Congress may act  
24 when it chooses to under the commerce clause to permit the  
25 states to regulate where they may not have been able to

1 regulate without an authorizing Act of Congress.

2           QUESTION: Certainly Article 1 would give you that  
3 impression, wouldn't it, when it delegates to Congress the  
4 right to regulate commerce among the several states?

5           MR. SMITH: And I think that that power that  
6 Congress has has always been referred to as plenary  
7 authority to enter the field, and it is clear that Congress  
8 may go further in permitting states to regulate than states  
9 could have regulated if Congress had not acted.

10          QUESTION: Well, do you mean by that that if  
11 Congress passed a statute that vested in the Robert Fulton  
12 Steamship Company the right to regulate traffic on the  
13 Hudson River in New York, that that would be binding on the  
14 courts?

15          MR. SMITH: No, I think that Congress may permit  
16 the states to regulate.

17          QUESTION: Well, in Gibbons against Ogden, the  
18 state had delegated that authority to Mr. Fulton and his  
19 colleagues, hadn't they?

20          MR. SMITH: Well, I think that Congress in that  
21 case, Congress had not addressed the matter at all, as I  
22 recall it. And it was clear that the silence of the  
23 commerce clause was sufficient to render unconstitutional  
24 the action of the state in having provided the preference to  
25 the private entrepreneur.

1           The question here, however, is different. The  
2 question here is one in which Congress, not unlike other  
3 situations, has acted, has acted with this particular  
4 authority specifically in mind, and has permitted states to  
5 exercise this type of authority in regulating private  
6 enterprise.

7           QUESTION: Mr. Smith, how would this preference be  
8 effected? And it doesn't contemplate, does it, any new  
9 transmission lines or anything, or does it?

10          MR. SMITH: I am sorry, Your Honor.

11          QUESTION: Are the New Hampshire customers who are  
12 going to be preferred going to be serviced out of the  
13 interstate grid or not?

14          MR. SMITH: Yes, they are. In fact --

15          QUESTION: Well, who established the grid?

16          MR. SMITH: The grid was established voluntarily  
17 by the private power companies, and now --

18          QUESTION: And approved by the FEC?

19          MR. SMITH: Yes, that's correct.

20          QUESTION: Would you say that it would be contrary  
21 to the statute if the FEC said, well, maybe you can preserve  
22 your own power for your own New Hampshire customers, but if  
23 you are going to do that, build your own transmission lines,  
24 and don't depend on the grid?

25          MR. SMITH: I think that with --

1 QUESTION: New Hampshire wants to effect this  
2 preference through the grid system, doesn't it?

3 MR. SMITH: That's correct, and the 1978  
4 amendments provide that for the first time the federal  
5 authority may require interconnection and wheeling of  
6 authority across utilities to others. Before that, it was  
7 voluntary, and it seems to me that the clear effect of that  
8 is that if the federal energy regulatory commission wants to  
9 exercise the authority it now has, there is a specific  
10 provision exempting that kind of authority, that is,  
11 mandatory pooling, from the effect of 201(b), but that  
12 wasn't so until 1978. Congress specifically exempted this  
13 kind of federal authority from the effect of the authority  
14 given the states under 201(b).

15 QUESTION: Well, you say it would not be  
16 inconsistent with the federal domain for New Hampshire to  
17 demand that its customers be preferred out of the power in  
18 the grid.

19 MR. SMITH: That is essentially -- That is  
20 essentially correct, Your Honor. In other words, we have  
21 not withdrawn --

22 QUESTION: I take it the FEC, FER doesn't agree  
23 with you on that.

24 MR. SMITH: They have filed a brief, and they do  
25 oppose it, in fact, Your Honor.



1           I would simply like to conclude, in sum, by saying  
2 that if 201(b) or the clause upon which we rely has any  
3 possible meaning, it must authorize what New Hampshire was  
4 doing in 1935 and what we are continuing to do today, and  
5 appellants --

6           QUESTION: Would you agree that the FERC could  
7 step in at this stage and say that the New Hampshire Supreme  
8 Court decision and PUC decision were superseded by a new  
9 order of the FERC?

10          MR. SMITH: I don't think in this particular case  
11 there would be any occasion to do that, but I think with the  
12 1978 amendments, that were New Hampshire to have exercised  
13 its authority more broadly, and to have required that the  
14 wires be snipped, as it said in the briefs, that with the  
15 1978 amendments, for the first time the Federal Energy  
16 Regulatory Commission could mandate interconnection and  
17 wheeling, and that seems to me to be clear, but New  
18 Hampshire has not exercised authority that broad in this  
19 particular case.

20          It seems to me that the appellants can prevail in  
21 only one of two ways. They must either have met their  
22 burden of proof that the Act of Congress which remained  
23 unchallenged for 45 years is unconstitutional, which they  
24 have not done, or they can go across the street to Congress  
25 and ask Congress to amend the statute.

1 Thank you, Your Honor.

2 CHIEF JUSTICE BURGER: Very well.

3 Mr. Huntington.

4 ORAL ARGUMENT OF SAMUEL HUNTINGTON, ESQ.,

5 ON BEHALF OF THE APPELLANT IN NO. 80-1208

6 MR. HUNTINGTON: The Attorney General stated that  
7 it is not significant whether the Section 201(b) savings  
8 clause is a grant or a savings clause. We differ there. We  
9 say that is very significant, and that is the square holding  
10 of BT Investment Managers just last term. When presented  
11 with a clause such as this, the Court must ask two  
12 questions. First, does the clause interdict pre-emption?  
13 We say clearly it does to some extent, and we have discussed  
14 in our brief exactly to what extent it does interdict Part 2  
15 pre-emption.

16 The second question is, does the clause go beyond  
17 interdicting pre-emption and affirmatively give to the  
18 states an authority to regulate commerce that the states did  
19 not previously have. In BT Investment Managers, the Court  
20 found that savings clause did not do that. We submit that  
21 this savings clause, which reads virtually identically to  
22 the Bank Holding Company Act savings clause in BT Investment  
23 Managers, also does not give the state authority.

24 In fact, New Hampshire concedes in their brief at  
25 Page 15 that the language of 201(b) is not that usually used

1 by a legislature when authorizing an act. That, we submit,  
2 is an understatement.

3           QUESTION: When was the Bank Holding Company Act  
4 enacted?

5           MR. HUNTINGTON: I am afraid I don't know.

6           Basically what happened here is, Congress finessed  
7 the issue as to whether the New Hampshire authority referred  
8 to by Congressman Rodgers was or was not -- Congress  
9 finessed it by saying, whatever authority you have is saved  
10 from Part 2 pre-emption, but left to the courts to determine  
11 what is saved, and that is precisely what this case presents  
12 for the first time. This is the first time New Hampshire  
13 has imposed a restriction. In fact, the first time any  
14 state has imposed a restriction --

15           QUESTION: Well, then, you concede that Congress  
16 did not intend to pre-empt New Hampshire's authority by  
17 the --

18           MR. HUNTINGTON: I think that comes to the  
19 question in volume versus rate regulation which Mr. Justice  
20 Stevens raised. I was interested to hear Mr. Smith contend  
21 now that all New Hampshire did here was to regulate volume  
22 and not rates. New Hampshire did not in any way attempt to  
23 restrict physically the amount of energy flowing out of  
24 state from these units. What did New Hampshire do? They  
25 attempted to require New England Power Company to sell this

1 power within New Hampshire, an economic shift through  
2 adjustments in wholesale contracts and tariffs. That is  
3 wholesale ratemaking, and that is exclusively within the  
4 jurisdiction of FERC.

5           There is one further case which we discuss in our  
6 brief which I think is pertinent here, and that is the  
7 California case.

8           QUESTION: You essentially then agree with the  
9 position of the United States, or the FERC, with respect to  
10 pre-emption?

11           MR. HUNTINGTON: Yes, we do. And we argue  
12 pre-emption on both Part 1 and Part 2 in our brief, and rely  
13 on our discussion there.

14           QUESTION: Yes.

15           MR. HUNTINGTON: The California case involved  
16 Section 20 of Part 1. Section 20 of Part 1 recognized or at  
17 least referred to state authority over wholesale sales from  
18 hydroelectric plants that are licensed. The Court had  
19 before it, does the state have any lawful authority after  
20 Attleboro over sales from hydroelectric licensed units, and  
21 the court held, no, it didn't. Congress was simply wrong  
22 when they assumed in enacting Section 20 that the states had  
23 some authority. We think we have a parallel situation  
24 here. Whatever Congressman Rodgers may have assumed, in  
25 fact, New Hampshire does not have any type of



1 authority under the commerce clause. That is what lawful  
2 authority is, and that --

3 QUESTION: But doesn't that bear on pre-emption,  
4 even if Congress is wrong as to its perception of the  
5 constitutional law, if it enacts a statute under that  
6 misapprehension? The misapprehension may be a valid tool  
7 for construing the statute?

8 MR. HUNTINGTON: It is certainly a valid tool as  
9 far as pre-emption is concerned, but Congress did not pass  
10 judgment on the lawfulness of the New Hampshire authority,  
11 and that is why they said lawful authority now exercised,  
12 leaving it for further determination what that lawful  
13 authority is.

14 QUESTION: Well, I take it the position of the  
15 United States or the FERC and you on pre-emption is that  
16 however you construe 201(b), that New Hampshire has gone way  
17 beyond whatever Congress may have approved in that. It  
18 never approved this approach to keeping the power within New  
19 Hampshire.

20 MR. HUNTINGTON: Precisely. Thank you.

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

23 (Whereupon, at 11:52 o'clock a.m., the case in the  
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

NEW ENGLAND POWER CO. v. NEW HAMSHIRE, ET AL #80-1208

MASSACHUSETTS, ET AL., v. NEW HAMSHIRE, ET AL #80-1471

DENNIS J. ROBERTS, II vs. NEW HAMPSHIRE, ET AL. #80-1610

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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