

In the

ORIGINAL

Supreme Court of the United States

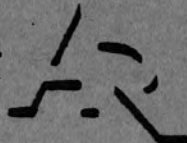
FEDERAL ENERGY REGULATORY COMMISSION, :
ET AL., :
Appellants, : No. 80-1749
v. :
MISSISSIPPI, ET AL. :

Washington, D. C.

Tuesday, January 19, 1982

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REPORTING

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Tuesday, January 19, 1982

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 11:05
o'clock a.m.

APPEARANCES:

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C O N T E N T S

ORAL ARGUMENT OF

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1 rates, and a second set of standards, five in number,
2 dealing with terms and conditions of electric service. The
3 rate standards, all of them, and some of the electric
4 service standards are directed toward two objectives.

5 The first is to cut down the amount of electric
6 energy, and therefore imported oil, that is consumed in this
7 country. And the second objective is to shift electric
8 demand away from peak periods, thereby diminishing the use
9 of less efficient generating facilities and scarce fuels;
10 notably, oil.

11 As to gas, Title III requires consideration of only
12 two of the terms service standards. Each of the standards,
13 both Title I and Title III, is to be considered in a hearing
14 after public notice, and a written statement of the reasons
15 for declining to implement or adopt -- in the event of a
16 declamation to implement or adopt -- any of the standards is
17 to be made available to the public.

18 In addition, Titles I and III require that within
19 one year after enactment of the statute and annually
20 thereafter for ten years, state regulatory authorities and
21 non-regulated utilities report the progress of their
22 consideration of these standards to the Secretary of Energy
23 who in turn is to submit a summary and analysis of the
24 reports to Congress.

25 The other part of the statute is Title II, probably

1 the most controversial. Specifically, Section 210, whose
2 objective is to encourage the development of cogeneration
3 and small power production facilities. Cogeneration is the
4 combined product of both electrical energy and useful
5 thermal energy such as heat or steam from a single process.
6 It has great potential as a source of energy conservation.
7 At one time it accounted for some 15% of this nation's
8 energy total, but with the advent of cheap fossile fuel
9 power, that has diminished to 4%.

10 A small power production facility is a facility
11 having a capacity of no more than 80 megawatts and using
12 something other fossile fuels, defined by the statute as
13 biomass, waste, geothermal or renewable resources such as
14 wind, water, solar energy, for the purpose of producing
15 electric power.

16 Congress identified two impediments to the
17 potential of cogeneration and small power production
18 facilities as additional sources of domestic power with
19 consequent lessening of dependence on foreign oil. The
20 first was its conclusion that subjecting cogeneration and
21 small power production facilities to the usual state and
22 federal regulatory burdens was unnecessary and would unduly
23 discourage their development.

24 The more controversial aspect of the congressional
25 determination was the second. These two types of facilities

1 must rely on traditional electric utilities, both as a
2 source of backup power, and also as a market for their
3 surplus power. They do not sell generally to the public.
4 They use them only for their own purposes.

5 Evidence before Congress showed that since these
6 facilities are potential competitors of public utilities,
7 utilities were often less than cooperative in supplying
8 either backup power or markets.

9 PURPA deals with each of these impediments. Its
10 response to the problem of surplus and backup power is the
11 most hotly-contested of the Act's provisions. What Congress
12 eventually adopted in this respect represents a compromise.
13 The administration's proposal, which passed the House and
14 was sent to the Senate, would have established a regulatory
15 program virtually identical to that upheld by this Court in
16 the Virginia Surface Mining Act case last term, under which
17 the regulatory burden would have been assumed by federal
18 authorities in the event that state authorities chose not to
19 participate.

20 At the other end of the spectrum, the Senate bill
21 would have required the Secretary to follow basically the
22 Title I/Title III approach, which is simply to recommend
23 guidelines to state public service commissions that they
24 could adopt or not.

25 Opponents of the administration House bill, by the

1 time it got to the Senate, presented to Congress substantial
2 testimony and arguments to the effect that it was state
3 rather than federal officials who possess the necessary
4 expertise to implement reforms. The legislation dealing
5 with these issues should be responsive to local needs and
6 local differences, and that what might be appropriate for
7 Florida might not necessarily be appropriate for Oregon.
8 And that the states should be allowed to continue to
9 experiment in the national interest with different
10 regulatory approaches.

11 The compromise that became law was responsive to
12 these arguments, which were grounded in the preservation of
13 state interests. The Act, in fact, gives the authority to
14 make general rules to the Federal Energy Regulatory
15 Commission in order to achieve the general objectives of the
16 Act, but with the more specific authority to implement the
17 statute being left to the states.

18 The Commission has, in fact, adopted regulations
19 which afford the states great latitude in determining how
20 the congressional objectives are to be achieved. Under
21 these regulations, state implementation may be accomplished
22 by any one of three ways. First of all, by the issuance of
23 regulations. Second, and probably most important for
24 purposes of this lawsuit, by the resolution of disputes
25 between utilities and qualifying facilities on a

1 case-by-case basis. And the third is a general catch-all;
2 by any other action reasonably designed to give effect to
3 the Commission's rules.

4 This suit was brought by the state of Mississippi
5 and its public service commission with Mississippi Power and
6 Light being permitted to intervene, against the Secretary of
7 Energy who has general responsibility for Titles I and III,
8 and the Federal Energy Regulatory Commission which has
9 general responsibility for Title II, Section 210, seeking a
10 declaratory judgment that the entire Act is beyond the scope
11 of Congress' Commerce Clause power and an unconstitutional
12 invasion of state sovereignty as declared by this Court in
13 National League of Cities and Towns v. U.S. Gypsum.

14 Judge Cox's decision holding the statute
15 unconstitutional on both grounds preceded this Court's
16 decision in Hodel v. Indiana and Virginia Surface Mining,
17 and this appeal followed.

18 There are two independent reasons in the
19 government's view why the decision of the lower court must
20 be reversed. First, --

21 QUESTION: May I ask, Mr. Lee, you did say that
22 whatever federal regulations are needed have now been
23 promulgated?

24 MR. LEE: That is correct. That is correct.

25 And they are extremely deferential to the states.

1 They leave to the states as much discretion as the
2 proponents of that approach before Congress said they should
3 --

4 QUESTION: How long have they been effective?

5 MR. LEE: They were adopted -- I'll find that out.

6 The two reasons why this decision must be reversed,
7 in our view, are, first, applying the standards announced by
8 this Court in Hodel and earlier in Usery, there is no
9 constitutional violation, looking at it as an exercise of
10 Congress' Commerce Clause power. And second, the Act is
11 also a legitimate exercise of Congress' power to provide for
12 our national defense.

13 I will look at the Commerce Clause issues first.
14 Last term in the Virginia Surface Mining case, this Court
15 identified three hurdles plus a balancing test that a
16 challenge to a congressional exercise of the Commerce power
17 on Tenth Amendment grounds must surmount. Before turning to
18 a specific discussion of those three issues, however, I
19 would like first to point out the aspect of this case that
20 distinguishes it from National League of Cities and Towns v.
21 Usery, and simply makes the rationale of that case
22 inapplicable to this case.

23 The evil against which this Court's holding in
24 National League of Cities and Towns protects is intrusion by
25 one sovereign in a federal system into the prerogatives of

1 another. And that problem simply does not exist where, as
2 here, the only reason that the states are exercising
3 authority in the field at all is that Congress chooses to
4 permit them to do so. This difference between the Act in
5 both of the predecessors to this case and this case is
6 illustrated both by the history and also by the content of
7 this legislation.

8 The appellees concede, as they must, that the state
9 functions of whose federal invasion they complain could have
10 been totally preempted by Congress. The reason that
11 Congress did not do so is that it was persuaded by the
12 advocates of Federalism that the wiser policy and the more
13 effective policy was to preserve a larger role for the
14 states.

15 QUESTION: Mr. Lee, do you think Congress could
16 direct, for instance, a state legislature to consider
17 certain statutes? Mandate that under the Tenth Amendment?

18 MR. LEE: I believe, Justice O'Connor, that if it
19 was in an area, that if it was in an area, that clearly
20 could be preempted by Congress, in which Congress itself
21 could have acted, and then Congress --

22 QUESTION: So in the Commerce area you would argue
23 that Congress could go so far as to even mandate state
24 legislatures to consider certain laws.

25 MR. LEE: Of course, the word "mandate" triggers

1 sensitive nerves in the Tenth Amendment area. But mandate a
2 consideration, particularly in a circumstance such as you
3 have in Titles I and III where the only obligation is simply
4 to consider but not to adopt one way or the other --

5 QUESTION: But these public utility commissions of
6 states are an administrative arm of the Legislative Branch
7 of the government, and they are being told that they must
8 consider certain action. They are not being told they have
9 to implement it, but they must consider it, isn't that so?

10 MR. LEE: That is absolutely correct, and for
11 reasons that I attempt to discuss, we believe that that is
12 constitutional.

13 The principal reason is, aside from the three
14 hurdles, when you consider the balance of relevant
15 interests, state and federal, particularly as applied to
16 this kind of case, it is not that much of an intrusion,
17 certainly not an unconstitutional intrusion, when you're
18 dealing in areas like the Commerce Clause -- and I reiterate
19 that there is no dispute in this case that the turf on which
20 we are operating is federal turf -- it is congressional
21 turf, the kind of regulatory area in which Congress could
22 legislate if it chose to do so.

23 Instead, what Congress concluded was that its
24 federal purposes would be better served if it permitted the
25 states to consider certain basic objectives, not to adopt

1 them but simply to consider them.

2 QUESTION: General Lee, what is the mechanism by
3 which the FERC is entitled to enforce this duty to consider?

4 MR. LEE: The duty to consider the Title I and III
5 standards is vested in the Secretary. And the mechanism is
6 as follows.

7 There is the authority in the Secretary as to both
8 Title I and Title III to intervene before the state
9 regulatory proceedings. In the event that the matter then
10 proceeds to court, as to Title I the Secretary has the
11 authority to participate as a party as an intervenor. As to
12 Title III, with respect to gas, he has the authority to
13 participate only as an amicus.

14 QUESTION: What court does it proceed to?

15 MR. LEE: The state courts. And whatever courts
16 properly review the proceedings -- whatever courts the
17 states have designated as those that are proper to --

18 QUESTION: Well, the law says that the body must
19 consider it. How does it -- if the agency just -- nothing
20 ever comes before the agency, they don't put it on the
21 docket, no one -- does somebody suggest to them that they
22 are under a legal obligation?

23 MR. LEE: I suppose the Secretary could appear and
24 suggest they are under a legal obligation.

25 QUESTION: Could appear before them and say I move

1 you or perhaps you should -- and then they reject him and
2 then --

3 MR. LEE: And then they reject him.

4 QUESTION: And then he can take them to state court
5 to review an administrative agency --

6 MR. LEE: As I read the statute, what it is talking
7 about is that in the event that it is taken to state court,
8 he does have the right to take --

9 QUESTION: Oh, if it is taken to state court.
10 Well, how does it ever get there? The agency says we don't
11 want to go to court.

12 MR. LEE: Right. The way the Act handles that,
13 Justice White, is that in the event that the regulatory
14 agency does not consider it, then in the next rate
15 proceeding, which is basically an adjudicatory proceeding to
16 -- well, whether adjudicatory or legislative -- in the next
17 rate proceeding, it must consider it at that time.

18 Now, there is, of course, --

19 QUESTION: What if it decides it isn't going to do
20 it?

21 MR. LEE: There is always that possibility that it
22 can simply decide not to. We assume, in light of the fact
23 that states recognize the rule of law and that this is an
24 area of federal authority, that they will conform in one way
25 or another.

1 QUESTION: Is there some authority or even if there
2 isn't, could the Secretary bring a suit and get an
3 injunction ordering them to consider it, or not?

4 MR. LEE: Apparently not. There is a --

5 QUESTION: There is no provision for it, anyway, in
6 the Act.

7 MR. LEE: No. Apparently, the only authority that
8 the Secretary has to enforce through federal court is his
9 right to intervene in state court.

10 QUESTION: Mr. Solicitor, is there anymore
11 effectiveness to this than there is to the Constitution's
12 provision that the state officers must take an oath and
13 support the Constitution of the United States? Is it
14 anymore effective than that?

15 MR. LEE: My opponent, I am sure, would say that it
16 does impose more extensive obligations than that. The
17 obligations that are imposed on the state that are to be
18 balanced against the very substantial interest that the
19 federal government has in regulating its energy program with
20 concomitant consequences not only on energy savings
21 themselves but on no such lesser interests as inflation,
22 interstate commerce and national security are as follows.

23 On the one hand, the state must consider it; it
24 must hold hearings, must give public notice. Second, it
25 must give written determination or written statements

1 concerning its reasons. In the event that it decides not to
2 adopt one of the Title I or Title III standards, then it
3 must give written statement of the reasons to do so. And
4 finally, the fourth is that it has to report on an annual
5 basis for ten years. And that's it under Title I and Title
6 III.

7 Now, with regard to Section 210 -- this, as I say,
8 is where we go beyond considering and actually having to do
9 something -- it would be anomalous in the extreme, I submit,
10 to hold the Surface Mining Act, held constitutional last
11 term, constitutional, and at the same time hold an act
12 unconstitutional which was enacted as a compromise in direct
13 response, in direct reaction, to Federalism interests asking
14 for lesser intrusion in the state prerogatives and hold it
15 unconstitutional in the name of the Tenth Amendment, which
16 of course preserves state prerogatives. Because, --

17 QUESTION: Mr. Lee, in the Surface Mining case,
18 couldn't the states continue regulating in that field as
19 long as they didn't conflict with federal law? I mean,
20 there is a section preserving state law and procedure if it
21 doesn't conflict. And in this case, the state can't choose
22 not to participate unless it just wants to get out public
23 utility regulation totally.

24 So the choice for the states is much harder here,
25 is it not, than it was in the Surface Mining case?

1 MR. LEE: Two answers to that, Justice O'Connor.
2 The first is I don't think it was harder because while both
3 of them are complex pieces of legislation, the basic
4 approach as to the Surface Mining Act was that state plans
5 were submitted to the Secretary, and if they were
6 acceptable, then the states could regulate. Otherwise, the
7 state took over and regulated directly.

8 QUESTION: You mean the federal government.

9 MR. LEE: Excuse me, the federal government took
10 over and regulated directly.

11 But the more persuasive distinction is that
12 whatever the distinction, whatever the comparative intrusion
13 on state interests, I think the best judge of that has to be
14 the states themselves. And it was organizations such as the
15 National Association of Regulatory Utility Commissioners and
16 others that presented extensive testimony before the Senate
17 saying do not adopt the Virginia Surface Mining model
18 because if you do, three things will happen.

19 One is it will be a greater than necessary
20 intrusion in the state prerogatives; number two, we need the
21 flexibility in this area of electric generation regulation
22 to make adaptation for the differences that exist from one
23 locality to the other; and the final one is we need the
24 opportunity to continue to experiment.

25 It was in -- I think there is no doubt that if the

1 House bill had passed it would be constitutional. My
2 opponents concede that it was a Virginia Surface Mining type
3 statute. The reason that the House bill did not pass was
4 because the advocates of Federalism came in and said, this
5 is too much of an intrusion under our prerogatives.

6 The other matter that needs to be mentioned in this
7 respect --

8 QUESTION: I'm just curious, Mr. Solicitor, do we
9 know what the recorded vote of the Mississippi senators and
10 the House delegation were on this compromise?

11 MR. LEE: That's one thing I haven't checked into,
12 Justice Brennan.

13 (Laughter.)

14 But it is significant in that respect that the
15 group that is perhaps the most intensely affected, the
16 regulatory commissioners themselves, were at the forefront
17 of this plea, don't adopt the Virginia Surface Mining model,
18 and they were also the ones who praised before the Federal
19 Energy Regulatory Commission the approach that was followed.

20 QUESTION: Well, maybe they just talked Congress
21 into passing a law that gave them an unconstitutional order.

22 MR. LEE: Oh, so that they could win in this
23 lawsuit.

24 (Laughter.)

25 At least if they did, they did a very sophisticated

1 job of it in presenting their evidence before the Congress.

2 I'd like to deal now with the compliance by the
3 states with the Section 210 requirements for the sale of
4 surplus power and the purchase of backup power.

5 There are three opportunities; there are three ways
6 that the states are given to comply, and the third one, of
7 course, is the very broad one, "any other means" by which
8 the policies of the federal regulation may be obtained.

9 But one of those options is simply to entertain
10 disputes between regulated utilities on the one hand and
11 qualifying facilities, cogeneration or small power
12 production facilities, on the other on a case-by-case
13 basis. Thus viewed, all that Section 210, as certainly as
14 implemented by the FERC regulations, does is simply to
15 provide a federal rule of decision that is applicable in
16 those cases where the state entertains lawsuits for other
17 type of adjudicatory proceedings.

18 Thus viewed, regardless of what the constitutional
19 rule might be in the event that regulations had been
20 required, -- in further answer to Justice O'Connor's
21 question -- or that legislation had been required, that
22 obligation can be performed, can be satisfied, simply by
23 entertaining disputes. And that brings the case squarely
24 within this Court's holding in *Testa v. Katt*, that it is not
25 unconstitutional for the federal government, for Congress,

1 to supply the rule of decision applicable in state
2 adjudicatory proceedings so long as that same kind of rule,
3 if enacted as a source of state law, would be constitutional.

4 I'd like to say just a word about the comparative
5 weight of the federal and the state interests in this case.
6 This case demonstrates better than either of predecessor the
7 wisdom of what this Court implied in National League of
8 Cities and Towns, and expressly stated in the Virginia
9 Surface Mining case, that the federal interest -- that
10 regardless of the three tests, that the federal interest
11 nevertheless may be such that it justifies state submission.

12 On the federal side of the balance scale, it would
13 be impossible to overstate the magnitude of this nation's
14 energy problem. It's important not only in its own right,
15 but also because of its effect on inflation, the
16 environment, interstate trade and national security.

17 Our opponents have said that it's in the future,
18 and that it's not something that Congress has to deal with
19 yet. I submit that Congress is to be praised, rather than
20 its statute to be held unconstitutional simply because it
21 anticipated and dealt with the problem before we have, once
22 again, such severe problems as we have had in the past.

23 The other side of the balance scale is the adverse
24 effect on state interests. I submit that for reasons
25 discussed, these are minimal as to Titles I and III; they

1 require only consideration. And as to Section 210, since
2 they can be satisfied by a means that has already been
3 validated by this Court in Testa v. Katt, the comparative
4 balance between state and federal interests clearly favors
5 the constitutionality.

6 And finally, this statute is a proper exercise of
7 Congress' national security powers. The linkage between
8 national security on the one hand, and on the other, the
9 dependence on foreign oil in this case and controlling the
10 price of timber sales involved in Case v. Bowles greatly
11 favors the balance in this particular case. The courts of
12 appeals that have dealt with this issue have uniformly
13 upheld congressional statutes enacted in the interest of
14 national security when attacked on Tenth Amendment grounds.

15 I would like to reserve the rest of my time.

16 CHIEF JUSTICE BURGER: Very well. Mr. Alston?

17 ORAL ARGUMENT OF ALEX A. ALSTON, JR., ESQ.

18 ON BEHALF OF THE APPELLEES

19 MR. ALSTON: Mr. Chief Justice, and may it please
20 the Court:

21 I think probably the best place to start with the
22 question of constitutionality of PURPA would be look at the
23 Act itself. The Solicitor General went through the Act with
24 some detail, and the mechanics of the Act that he did
25 discuss I do not disagree with.

1 However, this is certainly more than just simply a
2 suggestion to the state of Mississippi on how to regulate
3 their public service commission. It's certainly more than
4 just a study telling the public service commission what to
5 do.

6 QUESTION: Do you agree that the federal authority
7 could have done all the things that they hoped the states
8 would do?

9 MR. ALSTON: Mr. Chief Justice, if, as a matter of
10 fact, in the findings they found that this did have a
11 substantial effect on interstate commerce, and if indeed
12 they found that the Act itself was reasonable to affect the
13 utilities themselves, then perhaps they could do that. It
14 may be absolutely so. I don't know the answer to that
15 question. They may could have preempted the area.

16 But in the field of Federalism, if we talk about
17 Federalism, that does not destroy the principles of
18 Federalism. I disagree with the Solicitor General. If the
19 federal government takes over an area, if they have a
20 constitutional right to take over that area in the
21 Constitution, if it's permissible under the Commerce Clause,
22 the federal government at that point carries the burden;
23 they are the responsible party to exercise that law.

24 One of the great principles of Federalism, as a
25 citizen of the state of Mississippi, I can look to my public

1 officials. We elect our public service commissioners. I
2 can look to them to implement, to promulgate state law. I
3 do not want for them to implement federal law. I have no
4 control over that.

5 It's deceptively simple to say, when they are
6 looking at a statute like this, to say well, this is good.
7 A transient majority of Congress may say look, this is very
8 good for the state of Mississippi, and what we'll do is
9 we're going to tell the state of Mississippi what they are
10 going to do. That makes it easy. But it completely
11 destroys the concept of Federalism.

12 I'm not looking now to my public service
13 commissioners to implement state law. The public service
14 commission is the one that gets called when the rates go
15 up. The burdens should not be placed on them unless they
16 have consented to, by the electorate in the state of
17 Mississippi.

18 QUESTION: What specifically do you object to? The
19 fact that -- the Act saying that they must consider certain
20 things, put certain things on their agenda?

21 MR. ALSTON: Mr. Justice White, they completely set
22 up an agenda for the state of Mississippi, and I was just
23 going to go over that before the question was asked by Mr.
24 Chief Justice.

25 It starts out in Section 111, "The state of

1 Mississippi is ordered..." You are hereby required --
2 Section 111 says -- to consider very, very complicated
3 rate-making standards. Okay. Section 113 says "You
4 must..." you are absolutely required, public service
5 commission, to consider all of these other standards, six or
6 eight standards.

7 Turning now to 302, 303 in the gas section, it says
8 "You must..." consider all of these standards. Not only
9 that, if the Court please, it tells you the procedure. It
10 sets the agenda for my public service commission, tells of
11 the procedures that I have to follow.

12 Also, if these procedures disagree with what the
13 procedures of the Act are, they override state law. It's
14 interesting, too, the Act says, that the purposes of this
15 Act supplement state law. Difficult to me to see how the
16 federal government can supplement the state law to give our
17 public service commissioners additional discretion.

18 But the Act goes further. They mandate, they order
19 that we do this, they tell the procedures that we're going
20 to have to follow. In addition to that, if you turn to
21 Section 115, if the Court please, it says, here's the
22 evidence you've got to look at when you consider these
23 standards.

24 You go to 210 -- 210 is not just a minor section of
25 the Act. It says the state tax commission shall give notice

1 and hearing and implement the rules as promulgated by the
2 federal government, in connection with 210.

3 As far as any enforcement of the Act is concerned,
4 I submit that the Solicitor General was just wrong in his
5 answer to the Court, because as a matter of fact, under
6 Section 123 it says any person can enforce upon the state
7 tax commission what the Act is about.

8 You turn to the Conference Report, and I just
9 happened to open to it when the Solicitor General was
10 speaking -- the Conference Report says specifically, this
11 enforcement provision of obligation of state regulatory
12 authorities and non-regulated utilities to hold hearings, to
13 make -- comply -- requirements A and B.

14 They are reviewable under the orders of this Court,
15 and they may be forced -- the enforcement provision
16 contemplates enforcement by writs of mandamus. Furthermore,
17 under --

18 QUESTION: Does the Act mention that in a --

19 MR. ALSTON: Yes. The Act, in 123, if the Court
20 please, says they can enforce these provisions; any person
21 can enforce these provisions.

22 QUESTION: What does that mean, can enforce the
23 provisions?

24 MR. ALSTON: I don't know, except what the
25 Conference Report says, Your Honor. Mr. Justice White, the

1 Conference Report says they can enforce it by writs of
2 mandamus or other proceedings.

3 QUESTION: Well, any person couldn't do that
4 without a case or a controversy. I mean, just some wiseacre
5 off the street couldn't go in and enforce it. So who --

6 MR. ALSTON: Yes. The statute says any person,
7 including the Secretary, speaking of the Secretary of Energy
8 may bring an action to enforce the requirements of this
9 title in the appropriate state court.

10 QUESTION: In the appropriate state court.

11 MR. ALSTON: Yes.

12 QUESTION: So he could bring an action in his own
13 name against the regulatory commission seeking an order or
14 an injunction or a writ of mandamus to make them carry out
15 their obligations under the Act. That's the way you read
16 the Act.

17 MR. ALSTON: That's exactly the way I read it, if
18 the Court pleases.

19 QUESTION: Has any such action ever been brought,
20 do you know?

21 MR. ALSTON: Not that I know of.

22 Furthermore, under Section 210 -- that's under
23 Titles I and III. Furthermore, under Section 210 they are
24 subject to civil and criminal penalties, they are subject to
25 any penalty under the Federal Power Act. In turning to the

1 Federal Power Act, refusal to comply with the provisions
2 would subject you to the penalties under that.

3 QUESTION: If the Act had said we request, rather
4 than order, and some state utility commission had complied
5 with the request but rejected all -- and went through the
6 motions but then -- would you object to the Secretary having
7 the right to appeal and challenge the agency decision?

8 MR. ALSTON: I believe I would, Your Honor.

9 QUESTION: Under the Tenth Amendment? I know you
10 object to it, but would --

11 (Laughter.)

12 MR. ALSTON: Yes, I believe, because -- Mr. Justice
13 White, are you talking about the intervention in the court
14 proceedings and appeal from that?

15 QUESTION: I meant he can appear before the agency,
16 I gather.

17 MR. ALSTON: Yes, sir.

18 QUESTION: And suppose the agency has voluntarily
19 gone through these motions. They have been requested to but
20 not ordered to, and they go through the motions. They
21 consider all these things. They reject them all. And the
22 Secretary says, well, you certainly made a mistake; I'm
23 going to go to court, I'm going to take you up. And they
24 say go ahead.

25 Would you say that's unconstitutional?

1 MR. ALSTON: I think it would. The fact that he
2 can intervene in my state proceedings, and the fact that
3 this is not consistent with the law of the state -- you have
4 to have a hearing, a determination, whether someone can
5 intervene in any state proceedings, if the Court please.
6 That flies in the face of the principles and the procedures
7 of our courts.

8 And then if he could appeal any of these decisions,
9 -- as a matter of fact, this appeal causes me some concern,
10 Mr. Justice White, because if, really and truly, the federal
11 government didn't care whether these were implemented or
12 not, if they did care, why did they give them a right to
13 appeal?

14 QUESTION: Well, what do you conceive the issue to
15 be on appeal, say, before one of your state courts? Or do
16 you ordinarily hear an appeal from the utility commission?

17 MR. ALSTON: I guess the issue on appeal would be
18 whether or not the decision of the public service commission
19 was arbitrary or capricious and not based on the proper
20 standard, if the Court please, not based on substantial
21 evidence.

22 QUESTION: So you think it would just be the
23 ordinary state standard, and would vary from state to state,
24 I suppose?

25 MR. ALSTON: It would vary from state to state

1 except that the procedure itself would be highly changed in
2 connection with the state in the proceeding before the
3 public service commission. Because the rules of evidence
4 and every other part of it would go into the question of
5 whether or not the action was reasonable or based on
6 substantial evidence.

7 QUESTION: I gather from that, the ultimate
8 decision of your highest state court would not be reviewable
9 here?

10 MR. ALSTON: I think it would be reviewable under
11 the Act all the way up to the United States Supreme Court,
12 as by writs of certiorari and otherwise. Review of the
13 action in the Supreme Court in accordance with Sections 1257
14 and 1258 --

15 QUESTION: Well, what federal question would there
16 be?

17 QUESTION: That's what I -- For 1257 there would
18 have to be a final decision on the federal question,
19 wouldn't there?

20 MR. ALSTON: A federal question would be perhaps,
21 if we said we would not let the Secretary of Energy
22 intervene, perhaps. That --

23 QUESTION: Maybe, but he intervenes. He intervenes
24 and the court affirms the rejection of all the federal
25 standards. Federal question?

1 MR. ALSTON: Secondly, if the Court please, we fail
2 to follow the standards as set out in 115. We were mandated
3 under this procedure to follow the federal guidelines, as
4 they told us. We failed to do that. It may be a federal
5 question involved --

6 QUESTION: Whether or not you did violate something
7 by what you did might be a federal question.

8 MR. ALSTON: Yes, sir.

9 QUESTION: I didn't understand you were required to
10 follow them. Just consider them. Take, for example, the --

11 QUESTION: But you have a routine of how you
12 consider them. Is that it?

13 MR. ALSTON: Yes.

14 QUESTION: Is that what you're talking about about
15 the guidelines?

16 MR. ALSTON: Yes, you do have a routine. If you
17 take, for example, the master metering standard, you would
18 have to consider the master metering standard, and you're
19 required to do it. You have to then --

20 QUESTION: Say you considered it and you said we
21 don't like it, it doesn't work well in Mississippi.
22 Wouldn't that discharge your federal obligation? Under
23 Title I, that is.

24 MR. ALSTON: That's true.

25 QUESTION: Let me ask. Could a consumer in

1 Mississippi raise the same question in some of your agency
2 procedures? Could a consumer come in and file a petition
3 and say I'd like to ask the commission to adopt a rule
4 against declining block rates, or whatever they are,
5 time-a-day rates -- .

6 MR. ALSTON: I think the rule is 25 consumers under
7 certain procedures, under the procedures set up by the
8 court, could come in and ask for changes in the rules and
9 rate-making --

10 QUESTION: Would it have been constitutional for
11 Congress to pass a statute saying that the Secretary of
12 Energy can direct 25 federal employees within the city of
13 Jackson to file such a petition? Who are all consumers.

14 MR. ALSTON: I don't know that I know the answer to
15 that question.

16 QUESTION: Under the procedures, you'd be required
17 to consider the standard.

18 MR. ALSTON: Yes. If 25 consumers came before
19 them, they would have to make the decision of whether or not
20 they wanted to proceed further with whatever was before
21 them, the agency, at that time.

22 If it please the Court, we contend that this -- the
23 manner in which this Act was written is most unique. They
24 did not follow, the federal government did not follow, the
25 provisions as they followed, or the scheme that they

1 followed in all of the other regulatory provisions. They
2 gave the state the option of whether or not -- as they did
3 in the Surface Mining case, if the Court please -- the
4 option of whether or not they would desire to follow the
5 procedures or not, and gave them the right to get out. They
6 didn't want to.

7 Under those circumstances, the federal government,
8 at that point, would take over the whole administration of
9 that area. This is entirely different from what we are
10 talking about today. As a matter of fact, I have been
11 trying to find some statute or some authority -- and
12 certainly the Solicitor General hasn't given me any
13 authority -- that would be constitutional where a statute is
14 mandated on a state regulatory commission and they are
15 required to follow the mandates of that statute. And as a
16 matter of fact, they commandeer the public service
17 commission's machinery into going about this Act.

18 The only cases that I think I saw that are closest
19 to it were the EPA cases that came up to this Court in EPA
20 v. Brown.

21 QUESTION: I'm not sure you really mean your
22 statement. There are a lot of federal laws that forbid a
23 state agency from doing certain things.

24 MR. ALSTON: Yes, sir. They may be state laws that
25 forbid, but I don't --

1 QUESTION: Federal laws that forbid state agencies
2 from doing certain things.

3 MR. ALSTON: There may be, if the Court please,
4 statutes that forbid state agencies from doing certain
5 things where there is a conflict. But I know of no case.

6 QUESTION: Well, all right. That makes a
7 conflict. If the prohibition is constitutional, that is a
8 conflict -- if the state agency purports to do something
9 that it's forbidden to do.

10 MR. ALSTON: Yes, sir. The point that I --

11 QUESTION: I know that this is different.

12 MR. ALSTON: Yes, sir. The point that I'm trying
13 to make, I know of no statute and I have seen no case where
14 affirmative burdens are placed on an administrative agency
15 of a state.

16 QUESTION: Have you been able to find any other
17 statute like this? Has there ever been one, do you know?

18 MR. ALSTON: I don't know of any statute like
19 this. The closest I can recall are the EPA v. Brown that
20 came before this Court. As you recall, in that case, the --

21 QUESTION: I know, but the state still had an
22 option.

23 MR. ALSTON: The issue was, in that case, whether
24 or not the administrator of the EPA could require the state
25 to implement certain rules and regulations.

1 QUESTION: That's right.

2 MR. ALSTON: The Solicitor General admitted that it
3 could not do that, and therefore, this Court held, I
4 believe, in 1977 that the issue was moot.

5 The only other time that I can recall anything that
6 has been considered, if the Court please, is when Congress
7 was attempting to pass no-fault insurance. And I remember
8 that the then-Attorney General Edward Levy was asked what
9 his opinion on the constitutionality of requiring certain
10 affirmative obligation on the state, and he was quick to
11 tell Congress in those hearings that indeed, they could not.

12 QUESTION: Mr. Alston, would you agree that at
13 least some portion of Section 210 simply preempt, as a
14 matter of federal law, some applicable rules and don't pose
15 a Tenth Amendment problem? Would you agree with that? That
16 certainly some sections of Section 210 don't have that kind
17 of a --

18 MR. ALSTON: Your Honor, I do agree with that. I
19 think Section (e) could have been passed separately, and I
20 think that would be severable, so that the small power
21 plants and the cogeneration could be exempted from the
22 Federal Power Act.

23 I would think that primarily 210 was executed so
24 that the federal government would implement these rules and
25 the states were forced to comply with these rules to see

1 that the utilities followed the federal mandate.

2 QUESTION: Do you think that Section 210 would
3 significantly hinder states in their ability to perform
4 other functions?

5 MR. ALSTON: I think that they would significantly
6 impair the state of Mississippi and the public service
7 commission in their choices. Section 210, they have not
8 chosen to go into the area that's mentioned in Section 210.
9 As a matter of fact, they don't even have authority to go
10 into -- in some of the areas that are mentioned in 210, they
11 have no jurisdiction whatsoever over interstate rates.

12 For example, in purchasing power from a small power
13 plant, that would be an interstate transaction, as I
14 understand the law on it. The only authority the
15 Mississippi Public Service Commission has would be to -- for
16 the regulation of interstate rates.

17 QUESTION: Do you think that Congress could say not
18 only consider these, but what if Congress just said we find
19 that it is essential to regulation of commerce that in
20 ratemaking, state public utilities commissions shall follow
21 the following standard. And it just says what the standard
22 is. They don't say consider it, they prescribe it.

23 MR. ALSTON: Do I consider that to be
24 constitutional under the Tenth Amendment? No, sir, I would
25 not. If they say you will follow, Mississippi Public

1 Service Commission, you will follow these standards, I would
2 consider that to be an impermissible intrusion on the
3 sovereignty of the state.

4 QUESTION: Well, would you say that a -- there are
5 a lot of federal laws that affect the rates that a public
6 utility commission can allow.

7 MR. ALSTON: I'm not familiar of any such law. The
8 interstate rates that are promulgated by the Mississippi
9 Public Service Commission are promulgated under the
10 authority of the Mississippi Public Service Commission, and I
11 don't know of any federal law that would change --

12 QUESTION: Do you think the federal law could limit
13 the ratemaking activities of the -- say in the railroad
14 business?

15 MR. ALSTON: I would think if there were a finding
16 of Congress that, of course, that intrastate railroads have
17 a significant effect on interstate commerce. And --

18 QUESTION: I'm just saying now there is such a
19 finding.

20 MR. ALSTON: Yes, sir, and they preempted that area
21 of regulation.

22 QUESTION: They didn't preempt it; they just said,
23 here is the standard you will use.

24 MR. ALSTON: Under those circumstances, I believe
25 that it would be unconstitutional just because -- and I

1 disagree with the Solicitor General on this point -- just
2 because the federal government could preempt an area that is
3 in its constitutional power to do --

4 QUESTION: Well, it does, in a sense, preempt. It
5 says, here is the standard you will use.

6 MR. ALSTON: If Congress wanted to preempt the
7 area, and take over all of the regulation of all of the
8 utilities in the state of Mississippi, under those
9 circumstances of course they could.

10 But it's a different thing I think, Your Honor. I
11 think it touches on sovereignty, the very sovereignty of the
12 state of Mississippi. The action is directly against the
13 state as a state, it touches I think on attributes of
14 sovereignty.

15 QUESTION: Let me put this slightly different
16 question on what Justice White asked. Supposing Congress
17 passed a law saying that declining block rates shall be
18 prohibited throughout the United States because we make
19 findings that they use up too much energy? Could they do
20 that?

21 MR. ALSTON: It's a possibility. That's not
22 putting an affirmative burden.

23 QUESTION: Well, it's an affirmative prohibition.
24 Could they say, then, we will require time-of-day rates in
25 all parts of the country because they are in the interest of

1 conservation? Every state must have time-of-day rates. And
2 then if you say yes, to that, could they then say they must
3 put them in effect unless they first consider them and
4 decide not to put them in effect? Would that be
5 constitutional?

6 MR. ALSTON: I don't believe so, Mr. Justice --

7 QUESTION: Then that crosses the line?

8 MR. ALSTON: Yes, sir, I think that would cross the
9 line and be unconstitutional.

10 QUESTION: Well, what was your answer to Mr.
11 Justice Stevens on there will be time-of-day rates
12 everywhere?

13 MR. ALSTON: Well, I would not --

14 QUESTION: And all the findings that you could
15 possibly think of are made in this statute.

16 MR. ALSTON: That there will be time-of-day rates
17 across the United States of America.

18 QUESTION: That's it. And the necessity for it is
19 spelled out in the findings.

20 MR. ALSTON: That perhaps would be constitutional
21 if that was -- if they didn't tell the state tax commission
22 how they had to implement the rules or how they had to go
23 about the rules and it was certainly just the statement that
24 everybody had to --

25 QUESTION: Well, suppose that the -- let's say that

1 that kind of a requirement would be constitutional. And
2 suppose a utility commission refused to put in time-of-day
3 rates. You apparently, if you say that rule was
4 constitutional there must be some enforcement mechanism.

5 MR. ALSTON: I don't know of any enforcement.

6 QUESTION: How about the Solicitor General's Testa
7 v. Katt reliance? There, certainly, the federal government
8 prescribed a rule of decision and said a state court had to
9 follow it.

10 QUESTION: Mr. Justice Rehnquist, I don't think
11 Testa v. Katt applies at all in this case. As I read the
12 case, I see it is that a state court simply cannot
13 discriminate in a federal cause of action if they hear state
14 causes of action under the same cause.

15 Of course, the statute that we're talking about
16 goes much further. The statute that is before the Court
17 today, it first is an administrative agency, it is not a
18 court, to start off with. This is a legislative functioning,
19 it's ratemaking, it's legislative in Mississippi, and these
20 are affirmative burdens placed on the Mississippi Public
21 Service Commission.

22 That's a far cry from what Testa v. Katt is being
23 cited for. Secondly, it would seem to me that certainly,
24 the public service commission wouldn't even have
25 jurisdiction over the question of wholesale rates in that

1 connection, and certainly Testa v. Katt would never say that
2 you can force jurisdiction on a court such as this.

3 There's no doubt that a statute such as we are
4 talking about is attractive to Congress. I can see where
5 they can say that they do not want to take care of the
6 burden of enforcing it, and put it on the states to
7 enforce. This is where we say that you run into the
8 questions of Federalism, and this is where we say that we
9 run into trouble.

10 QUESTION: Mr. Alston, the statute may also be more
11 attractive to many states than the alternative of total
12 federal regulation, wouldn't you say?

13 MR. ALSTON: I don't know whether it would be more
14 attractive or not. I don't know how to answer that
15 question. I know it's not more attractive to the state of
16 Mississippi. I know it's not more attractive to the state
17 of Louisiana, that also has filed an amicus brief in this
18 case.

19 QUESTION: Federal preemption would be preferable,
20 then.

21 MR. ALSTON: No, I'm certainly not saying federal
22 preemption would be preferable. But I'm making the
23 distinction in opposition to what the Solicitor General. He
24 said if you could preempt, of course, you have authority to
25 do all of these things against state agencies. I say that

1 just does not follow.

2 Certainly, if you preempt that puts the burden on
3 the national government. Under our system of Federalism I
4 know who to look to for my rate structure.

5 QUESTION: I suggest to you that there is that
6 middle ground of preemption, and instead of taking over the
7 whole regulatory job you just mandate a series of standards
8 that must be followed. There shall be time-of-day rates
9 everywhere, or, they go right through the list. They say
10 this is what the rule of the game is. That doesn't -- and
11 if that's constitutional, that doesn't mean the federal
12 government is taking over the regulation.

13 MR. ALSTON: But what it does, Your Honor, I think
14 it runs completely afoul to the three tests of Hodel.
15 first, they are telling the state as a state what to do.
16 Certainly, --

17 QUESTION: They tell them the rules of the game,
18 that's right.

19 MR. ALSTON: And they're telling them how to follow
20 it, the rules they've got to play, what they've got to
21 consider. They've got to let anybody intervene under the
22 rules. As a matter of fact, the purposes supplement state
23 law, the procedures would override state law. In addition
24 to that, it involves attributes of state sovereignty.
25 That's the paradigm of state sovereignty, the ability to

1 pass laws and to pass regulations.

2 Thirdly, we contend that it significantly impairs
3 the ability of the state --

4 QUESTION: Is a highway patrolman in Mississippi
5 bound to enforce the 55 mile speed limit, or do you know?

6 MR. ALSTON: Yes, sir, he is. Of course, that's
7 under a spending clause, under clauses where if we take
8 money from federal funds, we --

9 QUESTION: You mean, except for that, he isn't. Is
10 that it? Except for the fact that they are in part
11 supported by the federal government? What about -- is a
12 state officer required to enforce --

13 MR. ALSTON: Yes, sir, would be to enforce the 55
14 mile an hour speed limit.

15 QUESTION: Even if it isn't tied with a grant for
16 federal highways?

17 MR. ALSTON: If it was not tied to the grant to
18 federal highways, I don't know that he would be.

19 QUESTION: Well, if the 55 mile an hour speed limit
20 is one promulgated by Mississippi because it feels that
21 otherwise it would lose its federal highway entitlement --

22 MR. ALSTON: That's true.

23 QUESTION: Let's assume -- I took Justice White's
24 question to be -- that if there were no grants involved and
25 this wasn't a quid pro quo, a condition of the grant, if

1 there is a federal statute for 55 mile speed limit for the
2 purpose of conserving gasoline and energy in the national
3 interest, in your view, must Mississippi enforce that or
4 does it have a choice?

5 MR. ALSTON: I don't know if it would be necessary
6 that it enforce that obligation. I am not sure that you can
7 force a state officer to enforce a federal regulation of
8 that nature.

9 QUESTION: Even if they're related to commerce and
10 the national security? Even if they have made that claim?

11 MR. ALSTON: And the 55 mile speed limit is
12 applicable to all of them? I would think then under those
13 circumstances that he would, if the Court please.

14 QUESTION: Would be enforced?

15 MR. ALSTON: Yes, sir.

16 QUESTION: Mr. Alston, let's back up a minute.
17 Doesn't your public service commission feel itself bound by
18 the Due Process Clause of the Constitution?

19 MR. ALSTON: I think we all are bound by the Due
20 Process Clause.

21 QUESTION: So that's -- so it's not absolutely free.

22 MR. ALSTON: That is absolutely so. We are bound
23 by the Due Process Clause of the Constitution. And the
24 public service commission --

25 QUESTION: I hear you talking about mandamus. Do

1 you have mandamus in your state laws?

2 MR. ALSTON: Yes, sir.

3 QUESTION: Right now.

4 MR. ALSTON: Yes, sir.

5 QUESTION: So that's not anything new, either, is
6 it?

7 MR. ALSTON: Mandamus is an old remedy, if the
8 Court please, that we have followed for a long time.

9 QUESTION: I thought so. And it would apply
10 against the public service commission under the right state
11 of facts.

12 MR. ALSTON: And under the right state of facts,
13 they could.

14 QUESTION: And without this provision you read from
15 the report.

16 MR. ALSTON: Mandamus would apply if the public
17 service commission did not comply with administerial duties
18 in doing certain things; the writ of mandamus may just apply.

19 In conclusion, I just wanted to state that
20 certainly, it's no question the government recognizes that
21 these mandates are forced on state's estates. Certainly,
22 the right to make the laws of the state of Mississippi,
23 certainly the right to promulgate the regulations of the
24 state of Mississippi, is an attribute of sovereignty. That
25 is the attribute of sovereignty.

1 We further contend that certainly, this impairs,
2 the Act impairs the ability of the state of Mississippi to
3 structure its integral operations in area of traditional
4 functions, and this is indeed a traditional function.

5 CHIEF JUSTICE BURGER: We will resume there at 1:00
6 o'clock.

7 (Whereupon, at 12:00 o'clock p.m. the oral argument
8 in the above-entitled matter recessed for lunch, to
9 reconvene at 1:00 p.m. the same day.)

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1 states a larger role in that particular governmental
2 function.

3 With regard to Section 210, Mr. Alston
4 distinguished Testa v. Katt on the ground that no state
5 functions were displaced. Really, they haven't been here,
6 either. The states are given several options as to what
7 they can do, but they are not required to bring into
8 existence any new entity of government. They are not
9 required to have any of their existing public service
10 commissions perform any functions that they are not now
11 performing.

12 The obligation imposed by Section 210 and the
13 implementing regulations can be performed by simply
14 entertaining disputes before appropriate adjudicatory
15 entities. And that does not mean that any new entity must
16 be brought into existence. That point is made, for example,
17 with respect to Nebraska, which has no public utility
18 commission with authority to set rates. In Nebraska,
19 presumably, that responsibility can be performed simply by
20 entertaining that kind of suit before the courts.

21 And that, at a very minimum, is what Testa v. Katt
22 says. And in that respect, Testa v. Katt is
23 indistinguishable, that states are simply required to
24 observe a federal rule of decision that is prescribed by the
25 federal government but to be observed in state proceedings.

1 QUESTION: In that respect, you analogize it, I
2 suppose, to the 55 mile an hour hypothetical that we
3 proposed.

4 MR. LEE: Yes. And clearly, Mr. Chief Justice, if
5 the federal government has the authority under the Spending
6 Clause to impose that kind of an obligation on the states,
7 then clearly, under its --

8 QUESTION: Would that be purely under the Spending
9 Clause, or under the Commerce Clause?

10 MR. LEE: Well, the Spending Clause or the Commerce
11 Clause. Then clearly, if you take into account the kind of
12 balancing and recognition of the comparative weights of
13 federal and state interests, particularly where in many
14 instances, in the view of many states in this case, they are
15 identical, then Congress certainly, in light of that
16 balancing approach, should have that kind of flexibility.

17 And if it has that kind of power under the Taxing
18 and Spending and the Commerce Clauses over a 55 mile an hour
19 speed limit, then clearly, under its powers over national
20 security it should have the flexibility to deal in as
21 cooperative Federalism approach as it has in 1978.

22 QUESTION: Mr. Solicitor General, are you disturbed
23 at all by the breadth of the Standing Clauses in this
24 statute? Clauses that provide standing for, in one section,
25 any consumer of electricity, which means every citizen,

1 really; and in another section, standing for any person
2 providing attorney's fees and other reasonable expenses? A
3 field day for lawyers, at least.

4 Are there other federal statutes that have gone
5 that far in changing the state rules of standing before
6 regulatory commissions, or courts?

7 MR. LEE: Well, of course, those are problems that
8 will have to be worked out on a case-by-case basis as those
9 matters come before the state. Since most of the
10 proceedings are going to be in state court, it is not the
11 Article III case or controversy requirement that will apply,
12 but rather, state rules. And in my view, they're governed
13 by state law.

14 Thank you.

15 CHIEF JUSTICE BURGER: Thank you, gentlemen, the
16 case is submitted.

17 (Whereupon, at 1:05 p.m., the oral argument in the
18 above-entitled matter was submitted.)

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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:

Federal Energy Regulatory Commission, Et Al., Appellants, V. Mississippi, Et Al. - No. 80-1749

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

BY Suzanne Young

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