

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-731

TITLE ARKANSAS ELECTRIC COOPERATIVE CORPORATION, Appellant
v.

ARKANSAS PUBLIC SERVICE COMMISSION

PLACE Washington, D. C.

DATE January 17, 1983

PAGES 1 thru 31



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WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARKANSAS ELECTRIC COOPERATIVE :

4 CORPORATION, :

5 Appellant :

6 v. : No. 81-731

7 ARKANSAS PUBLIC SERVICE :

8 COMMISSION :

9 - - - - -x

10 Washington, D.C.

11 Monday, January 17, 1983

12 The above-entitled matter came on for oral argument
13 before the Supreme Court of the United States at 11:03
14 a.m.

15 APPEARANCES:

16 ROBERT D. CABE, ESQ., Little Rock, Arkansas; on
17 behalf of the Appellant.

18 JEFF BROADWATER, ESQ., Little Rock, Arkansas; on
19 behalf of the Appellee

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

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Arkansas Electric Cooperative Corporation
4 against Arkansas Public Service Commission. Mr. Cabe,
5 you may proceed whenever you're ready.

6 ORAL ARGUMENT OF ROBERT D. CABE, ESQ.

7 ON BEHALF OF THE APPELLANT

8 MR. CABE: Mr. Chief Justice, and may it
9 please the Court:

10 This case arises out of an attempt by the
11 Arkansas Public Service Commission to regulate the
12 wholesale sales of power and energy by Arkansas Electric
13 Cooperative Corporation to its member cooperatives.
14 This is an appeal from the decision of the Arkansas
15 Supreme Court, affirming the PSC's assertion of
16 jurisdiction over these wholesale rates.

17 The facts of the case, while undisputed, are
18 most important to a determination of the issues before
19 the Court. AECC is a generation and transmission
20 electric cooperative which makes no sales at retail to
21 ultimate consumers. It is engaged exclusively in sales
22 at wholesale. Most of these sales are to its 17 members
23 who are themselves local distribution cooperatives.

24 The remainder of AECC sales are to other
25 utilities which also generate, transmit and sell

1 electricity in interstate commerce.

2 AECC's member cooperatives sell the energy
3 they obtain to their customers, who are the ultimate
4 consumers of the power. The retail rates and operations
5 of the member cooperatives are fully regulated by the
6 PSC. AECC is concededly subject to PSC jurisdiction for
7 purposes other than regulation of wholesale rates.

8 AECC's rates, including the ones at issue
9 before the Court in this case, are established by AECC's
10 board of directors which includes two representatives of
11 each of the 17 local distribution cooperatives who are
12 the members.

13 Succinctly stated, AECC arranges for the power
14 and energy necessary to supply the needs of its member
15 cooperatives in the following manner. First, it owns
16 and operates generating plants. Second, it contracts
17 with three separate multi-state systems to buy energy
18 when its facilities are insufficient to provide the
19 needs or when it could even buy the power and energy
20 more economically than it can generate it. Third,
21 because AECC has very limited transmission facilities,
22 it arranges with these same three multi-state systems
23 for dispatch and transmission on the part of the grid
24 that is operated by each of these multi-state systems.

25 Pursuant to these arrangements, most of the

1 output of the AECC generating plants is delivered to the
2 grid. AECC's member cooperatives then obtain from the
3 grid the energy they need to serve their customers. In
4 fact, only about 10 percent of the energy which AECC
5 sells to its member cooperatives is ever involved with
6 transmission facilities actually owned by AECC. The
7 other 90 percent passes exclusively over the system or
8 grid of the multi-state utilities with which it does
9 business.

10 All of the systems which transmit energy for
11 and sell energy to and buy energy from AECC have
12 generating facilities both in Arkansas and in other
13 states, and all of these generating facilities are tied
14 into integrated systems among themselves.

15 When energy is delivered by the grid to a
16 local distribution cooperative, the amount of the energy
17 can, of course, be metered and precisely measured.
18 However, the generating source of that energy may have
19 been at any plant attached to that grid whether inside
20 or outside Arkansas, whether belonging to AECC or
21 belonging to the generating facility of one of the other
22 multi-state systems.

23 The PSC in this case does not appear to
24 seriously dispute the proposition that AECC sales are
25 sales at wholesale in interstate commerce. The

1 decisions in Attleboro and Colton make clear that the
2 state is prohibited by the Commerce Clause from
3 regulating sales at wholesale in interstate commerce.

4 QUESTION: Mr. Cabe, it's your position that
5 that prohibition arises from the Commerce Clause itself,
6 I take it, and not from any other federal legislation.

7 MR. CABE: That is correct, Your Honor.

8 QUESTION: So you're not arguing, then, that
9 the REA has preempted.

10 MR. CABE: Our position has always been in
11 this case, Justice O'Connor, primarily based on the
12 proposition that the Commerce Clause, standing alone,
13 prohibits state assertion of jurisdiction over the rates
14 in question.

15 QUESTION: You did write in the brief about
16 the REA.

17 MR. CABE: Yes, Your Honor.

18 QUESTION: Did you raise that argument before
19 the Supreme Court in Arkansas?

20 MR. CABE: Pardon me?

21 QUESTION: Did you raise that preemption
22 argument in Arkansas?

23 MR. CABE: Yes, that argument was raised in
24 the briefs filed with the PSC when the matter was
25 originally heard by the PSC at that stage of the

1 proceeding. It was raised briefly in the briefs at the
2 level of the Arkansas Supreme Court. When we submitted
3 our Jurisdictional Statement in this case, we relied
4 exclusively on the Commerce Clause argument.

5 However, before probable jurisdiction was
6 noted, the court invited the Solicitor General of the
7 United States to state the views of the United States,
8 and when the Solicitor General did so he employed a
9 preemption analysis in support of the argument. For
10 that reason, we included the preemption argument, but it
11 is our position that the Commerce Clause standing alone
12 by itself prohibits state exercise of jurisdiction in
13 this situation.

14 QUESTION: You don't disagree, I take it, with
15 the normal rule that an amicus curiae can't broaden the
16 issues in a case. That is, that the fact that the
17 Solicitor General as amicus curiae raises an issue
18 doesn't mean that it's necessarily -- he's entitled to
19 do so.

20 MR. CABE: Yes, Your Honor. And I think, of
21 course, the Court has within its discretion the
22 authority to consider the point. In our view, it is not
23 necessary for the Court to reach that point. The
24 Commerce Clause standing alone is sufficient to decide
25 the case.

1 QUESTION: Do you think the state court
2 rejected your REA submission?

3 MR. CABE: The state court specifically held
4 -- the state supreme court specifically held that the
5 PSC --

6 QUESTION: To reach its result it had to
7 reject your REA submission.

8 MR. CABE: I'm not sure the REA -- we would
9 call it a very strong REA submission, Justice White.
10 The supreme court specifically held in --

11 QUESTION: It needs to have been -- at least,
12 it needs to have been presented to the highest court of
13 the state before we have even jurisdiction to consider
14 the question.

15 MR. CABE: It was -- Excuse me -- It was
16 raised in the petition for rehearing. Mention was made
17 of the --

18 QUESTION: That isn't early enough. Was it
19 raised -- did you say it was raised in the initial
20 briefs or not?

21 MR. CABE: It was raised in the initial briefs
22 at the PSC level of the proceeding.

23 QUESTION: But how about the supreme court?

24 MR. CABE: No, Your Honor, I don't believe it
25 was.

1 QUESTION: I'm not sure we have jurisdiction
2 to reach the question.

3 MR. CABE: As I say, in our view it is not
4 necessary to reach the preemption issue. It is only
5 necessary to consider the Commerce Clause aspects of the
6 case.

7 QUESTION: You tried two or three times to say
8 what your idea was of what the supreme court said.
9 Would you tell me what you were going to say?

10 MR. CABE: I was going to say, Justice
11 Marshall, that the supreme court specifically said that
12 the PSC was neither prohibited by the Commerce Clause
13 nor preempted by any federal enactment from exercising
14 jurisdiction in this case.

15 The line of cases which culminated with
16 Attleboro concluded with respect to the natural gas and
17 electric utility industry that the Commerce Clause
18 prohibited state regulation of the parts of those
19 businesses that were national in character but allowed,
20 in the absence of conflicting congressional enactment,
21 state regulation of the parts of the business that were
22 essentially local.

23 This division between what was essentially
24 local and what was of paramount national importance was
25 thus applied in the Attleboro line of cases to arrive at

1 the rule that state regulation of wholesale sales in
2 interstate commerce was not permissible, but states
3 could regulate sales at retail by local distributing
4 companies to ultimate consumers of the energy.

5 QUESTION: Well, Attleboro wouldn't just
6 automatically apply to any wholesale sale; it would have
7 to be a wholesale sale in interstate commerce.

8 MR. CABE: Exactly, Your Honor, that's correct.

9 QUESTION: And if this generating facility
10 generated its own power and delivered it over its own
11 lines to local coops within the single state, I wouldn't
12 think -- you wouldn't be here arguing that.

13 MR. CABE: Absolutely not, Your Honor, and
14 that, in fact, of course, is the situation in Texas
15 where at least until recently, utilities there
16 generated, transmitted and delivered power strictly in
17 interstate commerce without interstate connection. But
18 that's not the case here.

19 QUESTION: What about the 10 percent that is
20 delivered directly to customers within the state from a
21 generating facility of the --

22 MR. CABE: It's not delivered directly from
23 the generating facility; it passes over transmission
24 lines that AECC owns.

25 QUESTION: I see. None of it --

1 MR. CABE: After it has gone onto the grid,
2 then it might come --

3 QUESTION: None of it is delivered directly.

4 MR. CABE: Not by direct connection, no. All
5 of those plants, all of those local distributing
6 cooperatives are tied to the grid, and that's where they
7 obtain virtually all of the energy that they sell to
8 their customers.

9 QUESTION: I see.

10 MR. CABE: Given the limited transmission
11 facilities that AEC owns -- that AECC owns, and the
12 desirability of buying energy and selling energy to the
13 other interstate companies, AECC could not accomplish
14 its purposes without these complex arrangements with the
15 multi-state systems and grids, which involve energy
16 generated outside the state of Arkansas as well as
17 energy generated inside the state of Arkansas.

18 The Attleboro line of cases established an
19 admittedly mechanical test for determining the
20 limitation of state power and the area which must be
21 regulated, if at all, only through exercise of federal
22 power. However, the court arrived at that test by
23 careful consideration of what was national importance as
24 opposed to what was essentially local and could be,
25 therefore, regulated by the states.

1 I don't feel that that test has been changed
2 or diminished in any way by later decisions of this
3 Court in any cases dealing with the gas or electric
4 utility industries.

5 QUESTION: Well, Mr. Cabe, didn't those cases
6 have, though, the fact that the Federal Power Act
7 adoption which did result in a preemption by Congress.
8 And what do you do with the Illinois Natural Gas Company
9 case which did recognize that there is a balancing line
10 of questions, as well as the so-called mechanical bright
11 line view, and in Illinois Gas declined to settle that
12 question. And isn't that the question we have here?

13 MR. CABE: In answer to your first question,
14 the Attleboro line of cases was decided before passage
15 of the Federal Power Act. Attleboro itself, which
16 culminated the line, was decided in 1927 and that act
17 was not passed until 1935.

18 QUESTION: Right.

19 MR. CABE: So it was decided without reference
20 to any federal enactment.

21 Secondly, in the Illinois Natural Gas case,
22 the court said that it was not necessary to reach that
23 issue about whether the balancing type approach was
24 appropriate in view of those other cases, although those
25 cases did not involve decisions dealing with either the

1 natural gas or electric utility cases.

2 In our view, the court did balance, back in
3 the Attleboro line, when it determined what was
4 essentially local and what was national in character.
5 It did take into consideration what was of such national
6 importance that the states could not reach it.

7 QUESTION: So I take it you say there's still
8 a gap, then. There's still an Attleboro gap because
9 these rates aren't regulated at the national level, are
10 they?

11 MR. CABE: Except to the extent that they are
12 regulated or controlled or supervised by REA, Your Honor.

13 QUESTION: Yes, but not by the federal --

14 MR. CABE: Not by the Federal Energy
15 Regulatory Commission. They are not regulated by that
16 agency.

17 QUESTION: So the Attleboro gap still exists.

18 MR. CABE: Perhaps as to the cooperatives,
19 yes, sir, it does still exist. If you ignore REA, then
20 the gap still exists.

21 While the test --

22 QUESTION: Although Congress attempted to fill
23 it, didn't it?

24 MR. CABE: In the Federal Power Act? Yes,
25 Congress did fill the gap certainly with respect to

1 investor-owned utilities, but the FPC at that time in
2 the Dairyland decision in 1967 concluded that Congress
3 did not intend to include cooperatives within the
4 definition of public utility under the Federal Power
5 Act. And that result was concurred in by the D.C.
6 Circuit in the Salt River Project case.

7 While the test has not been changed by any
8 later decision, the Attleboro line of cases test has not
9 been changed by any later decision, later decisions have
10 commented on the scope and breadth of the test. In
11 United States versus Public Utilities Commission of
12 California, this Court illustrated the clear and
13 decisive nature of the test when it noted that
14 Attleboro left no power in the states to regulate sales
15 for resale in interstate commerce.

16 QUESTION: And Congress thought Attleboro was
17 the law, I take it.

18 MR. CABE: Absolutely.

19 QUESTION: Whether it was right or wrong, they
20 seemed to adopt it.

21 MR. CABE: Yes, sir. Most clearly, the
22 comments in the congressional history seem to indicate
23 quite clearly that Congress assumed that Attleboro
24 prohibited all state regulation of sales at wholesale
25 and interstate commerce, and as indicated in the United

1 States versus Public Utilities Commission case and the
2 Colton case, this Court has affirmed that reading of the
3 Attleboro line of cases.

4 Also in the United States versus Public
5 Utilities Commission decision the court observed that
6 the Natural Gas Act and the Federal Power Act
7 established limitations on the Federal Power Commission
8 which "were designed to coordinate precisely with those
9 constitutionally imposed on the states."

10 Now, this brings us to the Colton case which
11 concerned FPC jurisdiction over sales by Southern
12 California Edison Company entirely to customers located
13 in central and southern California, although the sales
14 in issue apparently included some very small portion of
15 energy which was generated outside the state of Arkansas.

16 Two of the holdings of that case are important
17 in our view. First, in view of the Federal Power Act's
18 establishment of federal jurisdiction in precisely the
19 area which had been denied to the states, the holding
20 that Edison sales were sales at wholesale in interstate
21 commerce under FPC jurisdiction leads us to the
22 conclusion that AECC sales, also at wholesale in
23 interstate commerce, are beyond state power to regulate.

24 Second, we think it important that Colton
25 noted that the Attleboro line of cases and the test

1 established therein and adopted by Congress made
2 inappropriate a case-by-case analysis of the impact of
3 state regulation of sales at wholesale in interstate
4 commerce, but cut it cleanly and said that those sales
5 were entirely within federal power to regulate and
6 beyond state power to regulate.

7 QUESTION: Mr. Cabe, suppose that Attleboro
8 and Colton were not on the books, had never been
9 decided. Would you be here making the same argument?

10 MR. CABE: Yes, sir, I would.

11 QUESTION: And then resting, what, on Pike
12 against Bruce?

13 MR. CABE: If you want to apply the Pike
14 versus Bruce Church analysis, Your Honor, we believe
15 that state regulation of these sales is still
16 inappropriate. AECC as an electric cooperative is, by
17 statute and command of law, a non-profit organization.
18 Its revenues must equal its expenditures.

19 If the state of Arkansas, through regulating
20 the sales to the Arkansas local distribution
21 cooperatives, reduces the revenues which AECC obtains
22 from those sales, then AECC, to remain non-profit by
23 command of law, would then have to raise the prices
24 which it charges to these multi-state systems to and
25 with which it sells and exchanges energy.

1 So for that reason, it would be our conclusion
2 that even under a Pike versus Bruce Church analysis
3 there would be such an impact on interstate commerce, in
4 addition to all of the reasons stated in the Attleboro
5 line of cases that regulation of these sales should be
6 beyond state power, even if they have not already been
7 so held.

8 It is our position in this case that
9 Attleboro's recognition of the paramount national
10 importance of the regulation of sales of electricity at
11 wholesale in interstate commerce is even more
12 appropriate today than it was in 1927. This is because
13 of the recent development of these vast, multi-state,
14 interconnected grids and pools which are designed to
15 provide power more reliably and more economically.

16 By utilizing both the facilities of these
17 interstate systems or grids and by utilizing energy
18 generated in several states including Arkansas, AECC
19 makes the necessary power and energy available to its
20 member cooperatives.

21 Attleboro, in our opinion, is still good
22 constitutional law, and regulation of these sales by the
23 state of Arkansas is beyond their constitutional power,
24 and for that reason, we think that the decision of the
25 Supreme Court of Arkansas should be reversed.

1 CHIEF JUSTICE BURGER: Mr. Broadwater.

2 ORAL ARGUMENT OF JEFF BROADWATER, ESQ.

3 ON BEHALF OF THE APPELLEE

4 MR. BROADWATER: Mr. Chief Justice, and may it
5 please the Court:

6 AECC's argument that state regulation of its
7 rights is precluded by the Commerce Clause was heard and
8 rejected by the Arkansas Public Service Commission and
9 by a majority of the Arkansas Supreme Court.
10 Specifically, as you've heard AECC argue, that this
11 Court's decision in Attleboro and the line of cases on
12 which the Attleboro court relied, precludes state
13 regulation of its sales to the retail cooperatives.

14 We disagree. AECC has interpreted Attleboro
15 as barring state regulation of wholesale sales in
16 interstate commerce, and it is argued that its sales to
17 the retail cooperatives are such sales.

18 Now, although these sales are physically
19 intrastate, we agree that for purposes of determining
20 the scope of congressional power under the Commerce
21 Clause, these sales are in interstate commerce. We do
22 not, however, agree that Attleboro requires a reversal
23 of the result below.

24 Factually, Attleboro is clearly distinct.
25 That case involved physically intrastate sales between

1 utilities in different states. This case involves
2 physically -- excuse me, Attleboro involved physically
3 interstate sales between utilities in separate states.
4 This case involves physically intrastate sales between
5 utilities in the same state.

6 AECC has not really relied on the factual
7 similarities in the two cases, but it has relied on some
8 of the language and analysis in Attleboro and in the
9 Attleboro line of cases. The Attleboro court I think
10 started with the premise that the states could not
11 impose a direct burden on interstate commerce.
12 Wholesale rights were generally seen to be in interstate
13 commerce. Retail rights were generally seen to be
14 essentially local. Rate regulation was seen to be a
15 burden on commercial activity. Therefore, the states
16 could regulate the retail rates but they couldn't
17 regulate the wholesale rates.

18 AECC's mistake, I think, is in assuming that
19 this Court's analysis of Commerce Clause issues has not
20 evolved beyond this point. The doctrine that a state
21 can never impose a direct burden on interstate commerce
22 is simply no longer the law.

23 Professor Lawrence Tribe, in his book,
24 "American Constitutional Law" discusses the Attleboro
25 decision. He doesn't criticize the result reached

1 there, but he does say this of the analysis. He says,
2 the opinion was couched in terms of the now-discredited
3 direct/indirect dichotomy. And then quoting from the
4 opinion, "Being the imposition of a direct burden on
5 interstate commerce, it must necessarily fall..."

6 I think the later decisions of this Court
7 support Professor Tribe's characterization of the
8 direct/indirect dichotomy as a now-discredited
9 doctrine. For example, in South Carolina --

10 QUESTION: Or maybe you should say Professor
11 Tribe correctly read our decision.

12 MR. BROADWATER: I think so. For example, in
13 the South Carolina State Highway Department versus the
14 Barlowe Brothers, the court says that indeed, in many
15 instances, state regulation of interstate commerce has
16 been upheld. Mr. Justice Stone, writing for the Court,
17 recited dozens of cases in which state regulation of a
18 variety of subjects -- railroads, navigable waterways,
19 highways, quarantine laws, game laws -- had been upheld,
20 even though, he said, in each of these cases, regulation
21 involves a burden on interstate commerce. But so long
22 as the state action does not discriminate, the burden is
23 one which the Constitution permits because it is an
24 inseparable incident of the exercise of a legislative
25 authority which, under the Constitution, has been left

1 to the states.

2 I think a more recent case reflecting the
3 court's departure from the direct burden analysis used in
4 Attleboro is FERC versus Mississippi, decided just last
5 term. In that case, the court said that retail rates
6 were in interstate commerce, but noted -- and I don't
7 think anyone doubted it -- that the states retained the
8 power to regulate retail rates.

9 Now, under the direct burden test, if retail
10 rates are in interstate commerce, the states can't
11 regulate them.

12 The fact that retail rates are now seen to be
13 in interstate commerce and yet, the state's power to
14 regulate them isn't contested, I think is evidence of
15 how far the court has come from the direct burden
16 analysis used in Attleboro.

17 Now, the Colton case doesn't endorse the
18 position -- doesn't the support the position of AECC,
19 and doesn't endorse the Attleboro decision. The Colton
20 case cites an earlier case interpreting the Natural Gas
21 Act, the Illinois Natural Gas Company case. And in both
22 those cases, the court says that two lines of cases
23 dealing with state power under the Commerce Clause
24 exist. The Attleboro line and the more flexible line.

25 And the court says that -- I think implicitly

1 in Colton and expressly in Illinois Natural Gas -- that
2 it doesn't have to choose -- that in those cases it
3 didn't have to choose between the two lines of cases.
4 That when Congress passed the Natural Gas Act and when
5 it passed the Federal Power Act, it had Attleboro in
6 mind, and it was trying to remedy what it saw as the
7 jurisdictional back credit by Attleboro.

8 The court interpreted the Natural Gas Act and
9 the Federal Power Act accordingly to simply achieve the
10 intent of Congress, and Congress had Attleboro in mind
11 when it passed those statutes.

12 QUESTION: Counsel, let me ask a pragmatic
13 question. Why is the Commission so anxious to regulate
14 these rates? Isn't there a kind of a built-in safety
15 factor that the Board and the members themselves would
16 keep these rates at a reasonable level?

17 MR. BROADWATER: Well, I think whether or not
18 the Commission ought to regulate AECC is a legislative
19 question, and the legislature of the state of Arkansas
20 has decided we ought to. And I think there are some
21 factors that support that.

22 I don't think AECC has really presented any
23 evidence to us exactly how the self-regulation works. I
24 know it takes the Commission a team of accountants and
25 engineers and economists and lawyers to set and design

1 electric rates. I think it's really unlikely that the
2 average customer or the average retail cooperative is
3 going to be in a position to be able to really
4 participate in the making of AECC's rates.

5 I don't see how self-regulation would
6 necessarily protect the interest of a minority within
7 the cooperative. I don't know what's to stop a majority
8 within the cooperative from deciding they're going to
9 force the minority to subsidize them. And something I
10 would note just in passing -- each one of the
11 cooperatives has the same representation on AECC's
12 board, regardless of the size of the cooperative. Which
13 means the one man/one vote rule that this Court has said
14 is required in the legislative bodies doesn't even exist
15 on the AECC's board. So I wonder how representative it
16 may be of the members.

17 I think this Court in recent cases has,
18 indeed, chosen between the rigid test selected in
19 Attleboro and the more flexible test, and I think in
20 Pike versus Bruce Church and in subsequent cases it has
21 adopted the more flexible test.

22 QUESTION: How do you respond to the argument
23 of the appellant that even under the more flexible test,
24 the Arkansas regulatory attempt must be found invalid?

25 MR. BROADWATER: I don't agree with that,

1 because I think that first, the sales are essentially
2 local. They're between an Arkansas buyer and an
3 Arkansas seller. Virtually all the electricity is
4 consumed in Arkansas. AECC has three plants in
5 Arkansas; it owns partial interest in three others;
6 virtually all of the power is generated in Arkansas.
7 All the parties to the transactions have ready access to
8 the political and legal processes of the state of
9 Arkansas for the protection of their interests.

10 Now, AECC has said that well, since some of
11 this power may come from out of state, it's not
12 essentially local and the state shouldn't be allowed to
13 regulate it. In response to that, I would say that same
14 power is the power that's sold at the retail level, and
15 we're there allowed to regulate that. So that the aside
16 of generation may not necessarily be controlling.

17 So I think under Pike versus Bruce Church,
18 first, we should prevail because it's essentially local,
19 and second, really the only burden that the AECC has
20 alleged, I think, is the burden of having to participate
21 in a rate-making procedure before a state regulatory
22 commission.

23 Well, that burden is no different than the
24 burden we're allowed to impose at the retail level, and
25 it's no different than the burden that Congress has

1 imposed on the wholesale sale of investor-owned
2 utilities before the Federal Energy Regulatory
3 Commission. So I think that a burden that is clearly
4 permissible in these other contexts shouldn't be held to
5 clearly outweigh the state interest in essentially local
6 commercial activity.

7 And I think Pike versus Bruce Church is the
8 proper test.

9 QUESTION: What is the reason that these rates
10 aren't subject to the Federal Power Act?

11 MR. BROADWATER: The Federal Power Act -- the
12 Federal Power Commission held that it didn't have
13 jurisdiction over the rates, and the Federal Court of
14 Appeals I think for the District of Columbia Circuit has
15 also held --

16 QUESTION: And what was the reason it didn't
17 have jurisdiction?

18 MR. BROADWATER: I think there's an exemption
19 in the Federal Power Act for government
20 instrumentalities.

21 QUESTION: That's what it really turned on,
22 isn't it?

23 MR. BROADWATER: I think on that --

24 QUESTION: Not on its position with respect to
25 wholesale rates in interstate commerce.

1 MR. BROADWATER: No, Your Honor. And I think
2 it was that and also, we should remember that the
3 Federal Power Act was passed, I think, in 1935. The REA
4 was passed in 1936, so when Congress passed the Federal
5 Power Act they didn't have really a clear idea of what
6 form the cooperatives were going to take.

7 And I think in part because of that, the
8 Federal Power Commission was hesitant to exert
9 jurisdiction over something that didn't really exist
10 when the Federal Power Commission was created. But it
11 wasn't the distinction between wholesale and retail
12 rates that was crucial.

13 The purpose that the Commerce Clause is
14 designed to achieve is to, I think, promote free trade
15 among the states and to prevent economic warfare among
16 the states. And I think that the more flexible test in
17 Pike versus Bruce Church would better accomplish that
18 purpose than a mechanical distinction between wholesale
19 and retail rights.

20 For example, imagine a generating cooperative
21 selling electricity -- doing business in one state,
22 selling electricity to a small rural retail
23 cooperative. And imagine a large investor-owned utility
24 selling large amounts of power to a multi-national
25 manufacturing concern. Which has the greater impact on

1 interstate commerce and on the national economy? I
2 suggest the retail sale to the large manufacturing
3 company may really be of greater significance.

4 And I would also suggest that the abuses the
5 Commerce Clause was designed to prevent may be more
6 likely to occur in the case of the retail sales because
7 there, the state commission may be tempted to set that
8 industrial customer's rates very high so he can
9 subsidize other customer classes, and then they'll
10 expect him to recover his added costs through sales in
11 other states or even in foreign countries.

12 The mechanical distinction between wholesale
13 and retail rates would have the Commerce Clause I think
14 ignore those kind of political and economic realities.

15 AECC in its brief argued the virtue of
16 self-regulation. It was the opinion of the Arkansas
17 legislature that self-regulation was not the answer.
18 Twenty-five states have placed retail cooperatives under
19 the jurisdiction of state regulatory commissions. Yet,
20 AECC is one step farther removed from the ultimate
21 customer than are the retail cooperatives. And for that
22 reason, I would suggest that the need for state
23 regulation in the case of AECC is even greater than the
24 need for state regulation in the case of the retail
25 cooperatives.

1 And neither is REA regulation sufficient.
2 AECC admits that REA gives it considerable discretion in
3 setting its rates, and no real evidence has been
4 presented that REA examines, say, questions of rate
5 design. Even though the commission noted in its brief
6 that we consider rate design issues to be as important
7 as questions dealing with the level of rates.

8 I think the reason for the lack of scrutiny
9 from REA is obvious. There are over a thousand
10 cooperatives subject to the jurisdiction of the
11 administrator of the REA. If only a fourth of those
12 cooperatives seek rate increases annually, the
13 Administrator of the REA is reduced to reviewing one
14 rate case virtually every working day.

15 QUESTION: Well, REA is basically a loan
16 organization.

17 MR. BROADWATER: That's right. That's right.
18 And there's even very little statutory authority that
19 would, I think, justify their getting in the rate-making
20 business. Section 904 of the REA provides that before
21 the administrator makes loans, he should certify that
22 reasonable adequate security exists. And that's really
23 all there is, I think, in the Act from which you can
24 infer any REA authority over the rates.

25 As a matter of fact, when the Rural

1 Electrification Act was pending before Congress, the
2 first administrator of the REA testified before a
3 congressional committee that he thought the setting of
4 rates was entirely a state matter, and that he didn't
5 have any jurisdiction over the setting of rates within a
6 single state.

7 Now, you might ask, did he have retail -- only
8 retail rates in mind or was he thinking in terms of
9 wholesale rates. I think it's very likely that the
10 testimony went to both wholesale and retail rates
11 because the original Act provided for the creation of
12 both wholesale and retail cooperatives.

13 So I think clearly, --

14 QUESTION: Was this Administrator Cook that
15 you're referring to?

16 MR. BROADWATER: Yes, sir. So I think
17 clearly, if these rates are to be given any real
18 scrutiny, it's going to have to come from the state
19 level.

20 AECC has argued that there could be conflict
21 between state regulation and the REA. Yet, 25 states
22 regulate the retail rates; a dozen states regulate
23 wholesale rates, and despite this extensive history,
24 AECC has not produced a single example of an actual
25 conflict between state regulation and the end regulation

1 under the REA.

2 I would suggest that this failure of proof
3 demonstrates that this alleged conflict is really mere
4 speculation and that if it ever does occur, I think
5 that's something that Congress could remedy.

6 Madame Justice O'Connor in her opinion in FERC
7 versus Mississippi observed that the utility regulation
8 is a field marked by valuable state innovation. That,
9 indeed, the whole body of experience in this area has
10 developed at the state level. We are simply --

11 QUESTION: That opinion didn't persuade enough
12 of my colleagues to agree, though, did it?

13 MR. BROADWATER: That may be unfortunate. But
14 we're simply asking that this Court allow that
15 development to continue. Thank you.

16 CHIEF JUSTICE BURGER: Do you have anything
17 further, Mr. Cabe?

18 ORAL ARGUMENT OF ROBERT D. CABE, Esq.

19 ON BEHALF OF THE APPELLANT -- REBUTTAL

20 MR. CABE: Only one point, Your Honor, and
21 that is that it would be our observation that the
22 decision in FERC versus Mississippi is not inconsistent
23 with the finding in the Attleboro line of cases of
24 paramount national importance in matters of wholesale
25 sales, in view of the Court's approval of the

1 congressional finding. Retail sales now have an
2 immediate effect on interstate commerce and can be even
3 totally preempted by Congress. Thank you very much.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.
5 The case is submitted.

6 (Whereupon, at 11:41 a.m., the above-entitled
7 case was submitted.)
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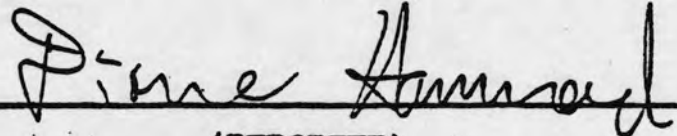
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

ARKANSAS ELECTRIC COOPERATIVE CORPORATION, Appellant
v. ARKANSAS PUBLIC SERVICE COMMISSION #81-731

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

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", written over a horizontal line.

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