OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-568

TITLE NANTAHALA POWER AND LIGHT COMPANY, ET AL., Appellants v. UTILITIES COMMISSION OF NORTH CAROLINA, ET AL.

PLACE Washington, D. C.

DATE April 21, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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NANTAHALA POWER AND LIGHT :
COMPANY, ET AL., :
Appellants :
v. : No. 85-568
UTILITIES COMMISSION OF NORTH :
CAROLINA, ET AL. :

- -x

Washington, D.C.

Monday, April 21, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:43 o'clock p.m.

APPEARANCES:

REX E. LEE, ESQ., Washington, D.C.;
on behalf of Appellants.

LOUIS R. COHEN, ESQ., Deputy Solicitor General,
Department of Justice, for the United States,
as amicus curiae, in support of Appellants.

WILLIAM T. CRISP, ESQ., Raleigh, N.C.;
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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Lee, you may proceed whenever you're ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.

ON BEHALF OF APPELLANTS

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

Notwithstanding the length of the lower court's opinion and notwithstanding the variety of the Appellees' arguments, this is at bottom a simple case whose solution is controlled by one simple and eminently sensible principle of law, namely that the Federal Power Act requires state regulators, when they set retail electric rates, to include within those rates power supply costs incurred as a result of the Federal Energy Regulatory Commission's rate schedules and decisions.

Today much of our nation's electricity is distributed under interstate arrangements which are subject at one stage of the process to FERC's wholesale regulatory authority, and then at a later stage to local retail ratemaking.

It is also quite common that interstate electric suppliers have more than one source of power and that the costs of the different sources vary widely. Where that occurs, each affected state would

like to have for itself and its consumers as much as possible of the low cost power and as little as possible of the high cost.

Someone has to decide who gets how much of each. The logical candidate, indeed the only logical candidate, is FERC, because it is the only regulatory authority that, even as a theoretical matter, has no reason to favor the interests of one state over those of another.

Appropriately enough, it is a series of state supreme court decisions which have held that the Federal Power Act requires that logical result, that is that the Federal Power Act requires that state regulators include all FERC-regulated power supply costs in the retail rates.

This does not preclude the states from their customary function of setting the retail rates. It simply fixes one of the cost components. Here the question involves the competing interests of two states, Tennessee and North Carolina, and two electric retailers, both of which are wholly owned subsidiaries of Alcoa.

One of them, Nantahala Power and Light, serves exclusively a public load in North Carolina; and the other, Tapoco, Inc., serves only Alcoa's aluminum plant

in Tennessee.

QUESTION: Where is Tapoco located, Mr. Lee?

MR. LEE: A short distance over the North Carolina-Tennessee border, in eastern Tennessee.

QUESTION: How far from the border?

MR. LEE: I would say, Justice Rehnquist, on the order of 50, 60 miles, but I could be off by a few yards.

During the period at issue, Nantahala and Tapoco operated under two contracts that were filed with FERC as rate schedules. Under one of them, called the New Fontana Agreement, TVA incorporates the hydroelectric generation of these two companies into its system and then delivers back electricity which is lesser in quantity, but more dependable.

These NFA entitlements from TVA were divided between Nantahala and Tapoco by a 1971 apportionment agreement. Prior to that time, that is prior to 1971, Nantahala's entitlements had been sufficient for its customers' needs. But since then, Nantahala, like Tapoco before it, has had to purchase additional power from TVA.

And these TVA power purchases cost more than three times as much as the hydro entitlements. So that for each company, the power supply cost is a blend cost,

resulting in the consequence that an increase in the amount of its entitlements for either company means a decrease in its purchases and consequently a decrease in its total cost of power and in its customers' electric bills.

And that's what the dispute in this case is all about: How much of this low cost entitlement power should be allocated to Nantahala's customers, all of whom are in North Carolina, and how much to Tapoco's customers in Tennessee?

In one sense, the case varies from the usual pattern because it involves the allocation of low cost FERC-regulated power, where in each of the Narragansett and Northern States line of cases, the issue was high cost.

And yet, high cost power is also at issue here, because for both companies and both states the real cost is the mix of the entitlements and the purchases.

QUESTION: Well, Mr. Lee, what's the filed rate that the North Carolina Commission is bound by?

MR. LEE: The filed rate in this instance was the New Fontana Agreement, supplemented by the 1971 allocation. That is the filed rate.

QUESTION: The apportionment agreement?

MR. LEE: The apportionment agreement was filed as a supplement to the NFA.

QUESTION: Well, how could the North Carolina Commission have followed the actual allocation of entitlements --

MR. LEE: When it hadn't been made?

QUESTION: Yes. I mean, it just -- there's something missing here.

MR. LEE: I appreciate the opportunity to clear that up. Since it had been filed, under this Court's decision in the Montana-Dakota Utilities case, it was binding as a filed rate so long as it was not modified.

So that the North Carolina Utilities Commission during the interim period between the filing date and any modification made to it had available to it two options. It could have followed either one. One was simply to wait, to abstain and wait until FERC actually made the allocation.

The other option was to go ahead and deal with all of the issue except the power supply costs and regard itself as being bound by the power supply that was reflected in the filed rate, the NFA as filed, subject to any refund that might be due once FERC modified the schedules.

Clearly what it was bound by was the filed rate up until the time that it was actually modified.

QUESTION: So it's your view that North Carolina was bound by that apportionment agreement, even though FERC later changed?

MR. LEE: That is correct. And then once FERC made the change, then North Carolina could similarly go back and make the same change that was reflected in the FERC agreement. And that is the thrust of Narragansett and Northern States and these various state cases. The only exception is the North Carolina Supreme Court decision in this case.

What North Carolina did here, Justice O'Connor, by departing from that procedure was to take from Tennessee in effect a share that properly belonged to Tennessee. By sweetening its own mix, it increased the cost to Tennessee.

QUESTION: Well, what if Nantahala had gone out and purchased high cost power at a rate on file with FERC, which the North Carolina Utilities Commission subsequently decided Nantahala had imprudently and unnecessarily purchased? And why is this different?

MR. LEE: It's different for this reason, that that simply is not the fact in this case, and there was no issue of whether this particular purchase or this

particular arrangement, the NFA, in which it got low cost power, was or was not prudent

The question that you have just raised is the question that is raised by the Pike County and Sinclair Machine Products case. That is a difficult issue that this Court need not resolve, namely in those instances where FERC does not actually face and decide the question of how they should be allocated, where FERC could have decided it but did not, is that then binding on the states?

That's a difficult question and a close one, but it need not be resolved in this case, because in this case the only issue is how should these entitlements be allocated. FERC has made that decision, and under the Narragansett and Northern States line of cases that decision is binding on FERC.

It is also our position that the economic preference that North Carolina has erected for itself by sweetening its mix of the entitlements between the purchases and the entitlement power is a violation of the commerce clause. But this Court need not reach the commerce clause issue because of the availability of a statutory ground for the decision, and that statutory ground is the availability of this Narragansett-Northern States doctrine.

The Appellees really do not argue, or they do not purport to argue, with the basic Narragansett principle, but they contend that it's inapplicable here for a variety of reasons, none of which is on the mark. And I would like to examine just very briefly the three assertions that appear with greatest frequency in that respect.

Probably the most frequent is that the FERC rate schedules, the NFA as supplemented by the apportionment agreement, is not a proper basis for making cost allocations, because that agreement is the product of Alcoa's alleged domination of Nantahala and Tapoko.

The short answer to that allegation is that it comes too late. FERC squarely considered it and rejected it, and FERC's position was sustained by the Fourth Circuit in an appeal taken by these Appellees.

QUESTION: Well, why is North Carolina bound by that? They weren't a party to that proceeding.

MR. LEE: Oh, indeed they were. Indeed they were. It was initiated by Nantahala's wholesale customers, but apparently because they sensed that coming out of that proceeding would be an allocation of the NFA entitlements, the North Carolina Attorney General intervened in those FERC proceedings and

participated fully throughout them, and he made very clear that he was intervening on behalf of interests of all of Nantahala's retail customers.

And then, once FERC had made its decision, the North Carolina Attorney General appealed to the Fourth Circuit on the ground that FERC had not given enough of the entitlement power to the retailers.

QUESTION: Yes, I realize that. But so FERC's decision was upheld and North Carolina can't challenge that. But why is the North Carolina Commission bound by FERC's resolution of this issue? I mean, this isn't the filed rate doctrine at all.

MR. LEE: We submit that the reason that it is the filed rate doctrine is that the NFA as supplemented by the apportionment agreement did make an apportionment of the entitlements. FERC then considered this very argument, that it should not be a -- that it was not a fair basis for apportionment of the entitlement because of Alcoa's alleged domination of the two companies.

And what it concluded was that the NFA was in all respects fair, but that an adjustment needed to be made to the 1971 apportionment agreement, and it made the adjustment that in FERC's judgment was necessary in order to constitute just and reasonable rates.

Once FERC reached that determination as to

what was a just and reasonable rate, then under the Federal Power Act as interpreted by the state supreme court decisions that constituted a determination --

QUESTION: But we're not bound by those state supreme court decisions.

MR. LEE: That is correct, that is correct. I submit that they were correct.

QUESTION: Why?

MR. LEE: Because of the fact --

QUESTION: Well, why on this particular point? I mean, certainly Montana-Dakota doesn't stand for this proposition at all.

MR. LEE: Well, what Montana-Dakota stands for, of course, is that the filed rates are --

QUESTION: That you can't relitigate in a federal district court the reasonableness of the FPC's ruling.

MR. LEE: Yes, and you're right, Justice Rehnquist, this is an extension of the Montana-Dakota, of the Montana-Dakota principle. It is a correct extension, I submit, for these reasons. First of all, the very purpose of part two of the Federal Power Act was to close the Attleboro gap and to eliminate the overlap between the possible competing between state and federal jurisdictions, and to best -- and to give the

wholesale regulatory authority to the Federal Energy Regulatory Commission, then the Federal Power Commission, because of the fact that this Court in Attleboro had held that the states did not have it.

In the event that the states could then come along and, once these power supply costs had been determined at wholesale, could say, we disagree with them at the retail rate, it would simply permit the states to do by indirection what they cannot do directly, and that is to in effect overturn FERC's determination for the only purpose that really matters.

The purpose that really matters for the allocation of these entitlements and therefore the allocation of the purchases is in the setting of retail rates.

As Tennessee points out in its amicus brief, if North Carolina can do what it has purported to do, what it has attempted to do in this case, that is to key the amount of its entitlements to what it needs, rather than to FERC's determinations, there is no reason that Tennessee couldn't do the same.

QUESTION: Well, but I thought the issue you were answering me on was whether North Carolina can sort of pierce this corporate veil in some way, which wouldn't go to that general proposition you just

mentioned at all, I would think.

MR. LEE: That is the question of the procedure that can be used, that is whether it can pierce the corporate veil, whether it can use this roll-in. My answer to that is that the question of whether North Carolina can pierce the corporate veil is irrelevant to this case.

It adds nothing to the analysis, for this reason. If we're right that Narraganset-Northern States is good law, then it follows that the only allocation that the states can use is the allocation that was used by FERC.

And if we're not right, then the only issue, of course, is Narragansett-Northern States. But if we are correct, then North Carolina must use that allocation in determining its revenue requirements. So that the only relevant question is whether Narragansett is good law. We submit that it is, for reasons that I've just discussed.

The Appellees' argument that, because FERC made one modification to the apportionment agreement, this somehow frees North Carolina to make any allocations that it wants notwithstanding what FERC has done is a complete non sequitur.

If FERC is to do its job as a regulator, then

it must make whatever adjustments in the rate schedules it considers necessary to achieve just and reasonable rates. But when it does so -- excuse me, Justice O'Connor.

QUESTION: Well, it just, it seems to me that FERC didn't quite act by changing a filed rate or modifying the apportionment agreement. It just didn't give full effect to it. I mean, FERC didn't act in the way that one would expect FERC to act if it were really dealing with this as a filed rate.

MR. LEE: You might quarrel -- a quarrel might be had with the language that FERC used. But the argument that because FERC did or did not modify the filed rate would simply work to my clients' benefit rather than North Carolina's benefit, for this reason.

If it in fact was not a modification, then the original filed rate was still in effect, because the modification favored North Carolina rather than my clients. And nobody can contend that the original filed rate was not still in effect.

Moreover, it is quite clear to me, though this is actually against my clients' own self-interest, that FERC did in fact modify the agreement, because its job was to set a just and reasonable rate. In order to do that, it concluded that it had to give additional power,

additional cheap entitlement power, to Nantahala.

Once it did so, that modification of the agreement became the new filed rate, or in any event the new FERC decision that was then binding on the North Carolina courts.

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

CHIEF JUSTICE BURGER: Mr. Cohen.

ORAL ARGUMENT OF LOUIS R. COHEN, ESQ.,
FOR THE UNITED STATES, AS AMICUS CURIAE,
IN SUPPORT OF APPELLANTS

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

The North Carolina Supreme Court recognized that the New Fontana Agreement and the 1971 apportionment agreement were contracts filed with and accepted by FERC setting forth terms for the sale of power at wholesale in interstate commerce; and that the North Carolina Utilities Commission was -- and I'll quote the North Carolina Supreme Court because the point can't be said any better -- "was preempted from inquiring into the reasonableness of those FERC filed rates when it acts in fixing Nantahala's retail rate."

The North Carolina Supreme Court had, however, two defenses for what the North Carolina Utilities Commission did. First, the North Carolina Supreme Court

said that the State Commission was not questioning the FERC filed allocation of low cost power, that is to say the terms on which Nantahala acquired power at wholesale, but was merely determining what costs could properly be imposed on retail customers.

It analogized cases where state utility commissions have accepted the wholesale cost, but found that a particular wholesale cost was offset by savings elsewhere or was, as in for example the case of a research cost, not a particular cost that ought to be imposed on particular retail customers, or cases where state commissions have found that power purchase costs were unreasonable because power could have been acquired more cheaply from a different available source.

None of those things is what the North Carolina Utilities Commission did here. What it did here, as stated by the North Carolina Supreme Court -- I'm at page 15A of the joint appendix -- was to find that significant detriments and inequities to Nantahala arise out of the New Fontana Agreement and the 1971 apportionment agreement, and render use of the company's cost allocation formula based on the demand and energy entitlements under those contracts inappropriate for determining the costs fairly attributable to the North Carolina public load.

In other words, the State Commission simply subtituted a different and what it thought would be fairer arrangement among the same parties with respect to dividing the low cost power, instead of the 1971 agreement and instead of FERC's determination of a proper apportionment after FERC had reviewed that agreement.

Let me comment briefly on a distinction between two allocation decisions that North Carolina made. North Carolina decided that it would be appropriate to roll in, to combine the two utilities' costs for purposes of determining how their costs -- what their costs were of producing power.

That is not the major problem with what North Carolina did, and it would not necessarily conflict with either the filed agreements or the FERC modification. What North Carolina did that creates the problem here was to apportion the entitlements power that the two utilities received back from TVA in a way that different both with their contractual apportionment and with the apportionment that FERC found to be fair.

In sum, I think North Carolina was doing precisely what the Supreme Court had acknowledged it could not do, and that was altering the terms of the wholesale transaction.

Now, the North Carolina court's second line of defense was that the FERC proceedings themselves somehow freed the Utilities Commission to do what it did. The argument is that FERC found the apportionment unfair, but failed to modify it, and thus conferred the power on North Carolina to determine Nantahala's wholesale costs as it saw fit.

I think that's wrong for two reasons, apart from the commerce clause problem that would be presented. First, FERC had accepted the two agreements for filing, and North Carolina was bound to honor the apportionment set forth in those agreements unless and until they were modified.

North Carolina had a statutory right to challenge the rates, the apportionment, at FERC or to ask FERC to clarify if there were any doubt that the adjustment FERC made in favor of Nantahala could be assumed for retail rate setting purposes at all.

The North Carolina Attorney General did participate at FERC on behalf of North Carolina's retail customers, but he didn't like the outcome at FERC, and so North Carolina took the matter into its own hands and simply fixed its own apportionment. North Carolina was bound to honor the agreements until they were modified.

Second, while the opinions are not models of

clarity, I think there is no real doubt that FERC did modify Nantahala's entitlements for all purposes, including retail rate setting. FERC said when it accepted the 1971 agreement for filing, "The reasonableness" -- I'm quoting from page 266A: "The reasonableness of the apportionment arrangements shall be subject to the outcome of the proceedings."

FERC said in Opinion 139, the key document here, at page 298: "The effect of this opinion is to provide entitlements to Nantahala which will result in just and reasonable rates to its wholesale customers." There is a reference to wholesale customers.

But there is no excuse for reading FERC's statement that it is providing certain entitlements to mean instead that it is assuming entitlements for one purpose only. Of course, any doubt on this point could have been resolved in the FERC proceedings by the North Carolina Attorney General and by the Town of Highlands, which were there.

There are statements in the FERC opinions to the effect that FERC is not reforming the contract, but reforming contracts is not a normal FERC activity. As this Court explained in the Mobile and Sierra case, FERC's basic task is to review rates, which may or may not be embodied in private contracts, and, if it

determines that they are not just and reasonable, to set just and reasonable rates.

And I think it is reasonably clear that that is what FERC did here, and it accepted the 1971 agreement and then expressly made the reasonableness of the apportionment arrangement subject to the outcome of the then pending proceedings. And in those proceedings, it then modified Nantahala's entitlement.

The reformation question came up in connection with Highlands' request that FERC alter the obligation to Tapoco, the Tennessee utility, which the administrative law judge declined to do because Highlands had not made out a prima facie case that Tapoco had benefited.

That's where that question first arose. Then when both sides, in what FERC said were confusing contentions, raised issues about retroactivity and whether FERC was impermissibly retroactively changing rates, FERC said, we have not modified the contract, we have merely acted on the Nantahala wholesale rate filing which has been open since it was filed in 1976. But FERC's 1980 order had included the 1971 filing as well.

CHIEF JUSTICE BURGER: Mr. Crisp.

ORAL ARGUMENT OF

WILLIAM T. CRISP, ESQ.

ON BEHALF OF APPELLEES

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

I think the demurrage of the paper, briefs, briefcases, is ample testimony to how long this case has been going on, as well as the deluge of briefs and the record that's been filed with you. I hope to cut through much of that and get to the conceptual and theoretical aspects of the case and, more importantly perhaps, to a recharacterization of the facts, which we will begin by asserting to you have not been stated correctly to you by the Appellants.

Indeed, we don't think that you would have noted probable jurisdiction if the facts as we want to give them to you now had been before you when you made that decision.

QUESTION: Did you put them before us in your motion to dismiss?

MR. CRISP: We tried to. We tried to. But you've got some facts before you now in the form of Appellants' briefs and reply brief that make it very, very difficult for us --

QUESTION: You mean facts that aren't in the record?

MR. CRISP: No, sir, they're in the record.

They're just mischaracterizations, some absolute misstatements. And we've got those documented. I would urge the Court please to read not only our brief, but the amicus brief of the Town of Highlands and the North Carolina Commission, because among the three of us, you know, there is only so many pages we can use in the brief.

Among the three of us, we've got those mischaracterizations pretty well identified and corrected, Justice White. And I think you'll find out that my characterization of their mischaracterization is correct.

Now, if I may, and for that reason I would like to start by giving you a kind of a kaleidoscopic view of the facts. And when I say facts, I don't mean just facts in terms of evidentiary facts. I'm talking about facts in terms of what did FERC do in its order, what did the North Carolina Commission do in its order, as opposed to what the Appellants in this case say was done.

I begin with a negative. This case is not a case between North Carolina and Tennessee. This case is not a case of the economic interests on North Carolinians against the economic interests of the Volunteer State. It is not, in the final analysis, we

think you will conclude, a case of North Carolina jurisdictional assertion over retail ratemaking versus FERC jurisdiction over wholesale ratemaking.

What it is, and the history of how we got to this courtroom, which began in the early part of this century, what it is is the final coming to a judicial apex where you're going to determine whether or not Alcoa is going to be able, through the guise of public utility subsidiaries, to deprive the public -- not North Carolina and not the public of North Carolina, but the public of both states in this particular case -- of resources benefits unlawfully and through the ruse of invoking at this late date the protective jurisdiction of the Federal Energy Regulatory Commission, which it has steadfastly defied and tried for decades to keep from coming under.

QUESTION: When you speak of both states, what states are you referring to?

MR. CRISP: North Carolina and Tennessee.

In that regard, I think it's good for me now to give a more precise answer to Justice Rehnquist's question concerning the location of Tapoco. Tapoco was the Knoxville Power Company. It was incorporated as a public utility in Tennessee, with the power of eminent domain, which it exercised.

And only contemporaneously with coming into North Carolina, domesticating there and seeking and getting a certificate of convenience and necessity, which it had to do and could do only if it was a public utility in North Carolina, did it change its name to Tapoco.

It has four hydroelectric projects. Two of them lie across the Tennessee border in Tennessee, two of them lie in North Carolina. Corporately, it's domesticated in the state of North Carolina. So in effect, Justice Rehnquist, it occupies both states as a corporate entity, and it is a public utility in the state of Tennessee, as well as in the state of North Carolina.

I think next I should respond to Justice O'Connor's question about imprudence. Imprudence was an issue in this case. It was almost the issue in this case, because imprudence goes not only to the decision and choice of a supplier as to options that it has with regard to its power supply, but, given a determination properly that that option was not wisely and prudently exercised, it goes to the question, when we flow through the requirement of honoring FERC-set rates, who is to bear the burden of those rates as between the retail ratepayers and the stockholders.

One of the things, one of the parts of the lexicon of this case that you should be aware of is that the Appellants are constantly referring to Alcoa as a customer of Tapoco. It is a customer of Tapoco, but primarily in this case it is a utility company. Certainly in the state of North Carolina it's a public utility, and it owns two public utility subsidiaries, and as such is the sole stockholder in those.

Now, was there any reason for inquiring into Nantahala's prudence in letting itself be manipulated the way it could not otherwise do, being wholly owned by the master Alcoa? Let me quote to you from what our Commission's order said, affirmed, incidentally, by our Supreme Court. And I'm on 233A of the appendix:

"The Commission must conclude that Alcoa has so dominated these transactions and agreements affecting its wholly owned subsidiary Nantahala that Nantahala has been left but an empty shell, unable to act in its own interests, let alone in the interests of its public utility customers in North Carolina."

If you want to put that in the context of the Sinclair case and of the Pike Power & Light Company case in Pennsylvania, the analogy I think is pretty clear. Here is a captive subsidiary, owned not by a company that is primarily engaged in the production of power to

make money off of that, but to feed its own smeltering process with it.

And for that reason, the prudence rule gets abused because the helplessly owned subsidiary cannot make any choice except what the parent lets it make. They didn't even let Nantahala sign the first Fontana agreement. They committed the resources without even letting it sign the document.

Nantahala did not negotiate, it didn't participate in the negotiations of the apportionment agreement or the New Fontana Agreement. They did pay it the perfunctory honor of letting it execute those documents.

Now, given that kind of domination, massive domination, which is uncontested in this record, and a finding which is not up for review before this Court, I think you can see why someone had to play the role of surrogate for Nantahala. And we stand here today as that surrogate.

The Commission of North Carolina is the proxy for that company. We stand in its shoes, asking for what it ought to ask for.

QUESTION: Well, the Appellants of course say that this was all concluded in the proceedings before FERC, that it's too late for you now.

MR. CRISP: They're talking about a wholesale arrangement, Senator -- Senator.

QUESTION: Justice.

(Laughter.)

MR. CRISP: Justice Rehnquist. I would apologize, but I'm afraid there may be a Senator in here and that might get me into trouble.

(Laughter.)

MR. CRISP: What they're saying is that what North Carolina did was to fail to give heed to the NFA and the apportionment agreement, and for that reason it's got to fall under the Narragansett line of cases. Now, we say this to you about that. We didn't do anything in North Carolina that affected the continuation and the operation of the New Fontana Agreement and the apportionment agreement. Not a single thing did we do that affected that.

It has continued until it was succeeded by another agreement after the locked-in period. It has continued in effect. It has been honored accounting-wise and otherwise by the parties.

QUESTION: But the position of the Appellants is that by the sort of rate structure and redefinition of rates that your Commission put on Nantahala and Tapoco, you have in effect disregarded the wholesale

allocation.

MR. CRISP: Yes, I'm aware of that and I want to respond to that type of rationale right now. Justice Rehnquist, let us assume that all of Nantahala and Tapoco, and the Alcoa load too, as far as that's concerned, do in fact constitute one corporate entity. And like CP&L straddling the Carolina borders or Duke, which does the same thing, they are now before the North Carolina Commission to set rates.

That is done almost universally by determining what the total demand is that is being satisfied by those companies, then ratioing the portion of that demand that the retail public in North Carolina is putting on that system, and then you allocate costs accordingly.

That's purely and simply what we did here, and I say to you, sir, that that's what we should have done. We've already had the concession that piercing the corporate veil didn't particularly bother the Appellants. I'm glad to hear them say that, because when we did that we were dealing with one entity, we were dealing with one system.

And incidentally, the one entity, one system finding is unchallenged in this record. It is not an issue before this Court or subject to being upset by

this Court.

So that all North Carolina did was take the agreements as they existed and left them alone. We didn't like them. We didn't like them. We don't think they're reasonable. But it's like that old adage about the lovely lady: You can look, but don't touch. And we didn't touch. We looked, but we didn't touch. We did not disturb those agreements. We left them right where they were.

Now, the methodology arrived at certainly has historic actual and judicial foundations for honoring by this Court. It has been held -- and we have cited the cases in the briefs -- numerously that the methodologies employed in setting retail rates need not be the same as followed by the FERC.

Let me give you some of the largesse that the company got the benefit of in North Carolina. We let them redepreciate their war-depreciated assets. FERC denied it in 139A. We let them put on a purchase power adjustment clause in North Carolina. FERC denied it.

FERC is an original cost rate base Commission. We are a fair value rate base Commission. There is nothing that dictates that every nuance and refinement of methodology followed by the federal Commission has got to be adhered to by the Commissions

that regulate retail rates.

And if there were such a thing as that, I think you could certainly be looking at madness throughout the Union today, rather than a fairly logical and well-oiled scheme that allows a balanced and equitable sharing of these responsibilities as between the states and retailers on the one hand and the federal government and interstate wholesale transactions on the other.

QUESTION: Mr. Crisp, do you agree that the Commission must apply the filed rate that FERC has on file for wholesale power --

MR. CRISP: Let me say this to you.

QUESTION: -- in computing the retail?

MR. CRISP: We are in whole agreement with the Narragansett case. And my answer to you says simply this: In this case, that's not what we're dealing with. We think if we were talking about a truly filed rate, that would be a different proposition.

QUESTION: Well, what is the filed rate here in your view?

MR. CRISP: Well, a filed rate, among other things, is a rate that has been filed and has been accepted, or at least permitted to go into effect, by the Commission until and if it's changed by the

Commission.

QUESTION: Well, is it your position that the agreements on file were not filed rates?

MR. CRISP: Yes, ma'am. That is my position. And I want to elaborate on that by saying to you, Justice O'Connor, that here, when you go to 139, 139A, 139B, you're not in the classic wholesale power disagreement.

There were three wholesale customers: one university, one electric cooperative, and one Town of Highlands. And only in an ancillary sense did the NFA and the apportionment agreement get into it at all. They were looked at because we alleged that they were unfair and that they ought to roll the companies together for ratemaking purposes.

They did not do that. But I think it's important to give you the quotation from the FERC order on North Carolina's right to do that, because they paid deference to that right. And I'm on page 23 of our brief:

"According to the Commission's order" -- the FERC Commission's order -- "we recognize that the North Carolina Utilities Commission, based on a similar record, reached a different conclusion concerning rolled-in costing. However, the question of whether to

treat various entities as an integrated system for ratemaking purposes is not a purely factual question, but also rests on criteria which each ratemaking authority may deem relevant."

Now, we say to you that, if not expressly, certainly impliedly FERC was saying: Well, we recognize the fact -- and we were first. Our order had come down before this order was written, at least our initial order had.

So our final order has come down. We've gone one route on this issue of roll-in, which would have required in effect the piercing of the corporate veil, and North Carolina has gone the other way. Well, we recognize that different Commissions have different criteria, different standards in determinations for performing their particular rate regulating functions, and that's fine with us. We have no complaint with that at all.

So the concession that we could go that route is written into 139, and in a very real sense the FERC stands in this Court today and through briefing and argument is trying to reverse the Fourth Circuit Court of Appeals, which affirmed that order.

Now, we say they can't come back and have not only a second bite at that apple, but bite it from the

core up instead of from the top down. It can't be done that way.

QUESTION: Mr. Crisp, maybe you'd straighten me out. You started out by saying that some two groups have been fighting since the beginning of the century. Who are those two?

MR. CRISP: The two groups were Alcoa and the publics of North Carolina and Tennessee. They may have been fighting elsewhere also.

QUESTION: They're not parties in this case.

MR. CRISP: No, they're not, not elsewhere -- but the fight, and I did get off of this.

QUESTION: Well, what right do we have to pass upon them if they're not here?

MR. CRISP: Well, you don't.

QUESTION: Why aren't they here?

MR. CRISP: And that I'm saying to you is --

QUESTION: Or are they here?

MR. CRISP: -- that they are here, Justice Marshall. What I meant was that the company may have abused publics in other areas of the country, too, and they're not here.

But I'm saying this: The people whom they abused in North Carolina are here. I represent five counties, five towns, the Eastern Band of the Cherokee

Indians, Justice Marshall, and one Henry Truett, the consumers in the area served by the company.

QUESTION: I thought you represented the state?

MR. CRISP: I beg your pardon?

QUESTION: I thought you represented the state.

MR. CRISP: Mr. Thornburg, the Attorney General, is here and he represents the state of North Carolina. He's been in these cases from the beginning. I should say his office has.

QUESTION: Well, I read here Nantahala Power Company against the state of North Carolina.

MR. CRISP: Et al.

QUESTION: That's a mistake?

MR. CRISP: Et al.

QUESTION: That's a mistake?

MR. CRISP: No, that's not a mistake.

QUESTION: The state is here?

MR. CRISP: That's correct.

QUESTION: You represent the state?

MR. CRISP: No, sir. I am representing all of the Appellees in this argument. I was chosen by them for that purpose, Justice Marshall.

QUESTION: I give up.

MR. CRISP: Now, the battle that I alluded to, and I'm sorry I deviated from, was this. Alcoa came into North Carolina in the early part of this century and it wanted to dam up our streams, generate cheap hydroelectric power, gargantuan quantities of which are required to smelt aluminum.

And they suddenly ran into a phenomenon that is not indigenous to the mountain people of Tennessee and North Carolina. I think it pervades the country. People don't want their land dammed and lakes built on them. They don't want privately and voluntarily to sell out.

So what did Alcoa do? First of all, it bought a utility. That was Tallassee. Tallassee's name was changed to Carolina Aluminum. Carolina Aluminum's name was changed to Yadkin, Inc. See, we're getting farther and farther away from the concept of a utility. And yet, it was Carolina Aluminum who sold, transferred, the two dams in North Carolina to Tapoco.

What they did, they created these subsidiaries with the power of eminent domain, and they not only exercised that power with respect to condemnation proceedings, they pervasively exercised it in threatening people to give up their land who otherwise wouldn't do it.

And under the guise of a public utility they then went in and acquired the rights to build the dams, generate the power, and then by corporate manipulation, spinning off these facilities' ownership from Nantahala to Tapoco, drained all of the low cost power to Alcoa in Tennessee.

And the higher cost power was left to the people who were served in North Carolina, and it would have been true if they had been serving across the line in Tennessee as far as that is concerned, which we did for a while. We did for a while.

The wrongness of that was first recognized by our Supreme Court in 1954 in the Mead Corporation case, which we cite. As a matter of fact, I think we close with a quotation from that case.

It was found by our court to be a wrong in 1963, when Alcoa attempted to shed its public utility responsibility by selling off its distribution system and customers and retaining these hydro facilities for its own. And then, of course, it has attempted to do the same thing through the NFA and the apportionment agreement.

Now, let me conclude, if I may, by asking just three of four rhetorical questions and making one request and taking note of an historical marker which

today is.

Why do we stand here as proxy for the company? Why isn't the company up here arguing for what in effect is a real good deal for it under the North Carolina Commission's order? Why didn't it fight for that kind of benefit upstairs in FERC?

Well, the answer is very simple and I don't think they would even deny it. They're helpless to do otherwise. They're put in the absolute ridiculous posture of opposing their own best interests, which then of course flows down to the detriment of the customers, because they are captive to a wholly owned master who is not a public utility in the traditional sense, but is in business to make money by making and selling aluminum.

Why is our Commission acting as their surrogate? Who else is there to do it? Shall we go into court and ask for the appointment of a conservator or a trustor to bring this action on its behalf against its parent?

This is the logical way that the problem ought to be resolved. And I say to you that it has taken 35 years of litigation and over 50 years of discovery really to get this nasty picture out and revealed for the very, very terrible thing that it is. And it's nothing more nor less than an absconsion by a corporate

giant, a multinational corporate giant, of public assets preferred to its own benefit and to the expense of the public.

Surely that makes appropriate then this question. They come here as a last desperate effort. I say that for this reason. They never raised their federal questions until they filed their first brief on exceptions to the initial Commission order issued in September of 1981. Not in their pleadings, not in their objections to evidence, not in their production of testimony.

QUESTION: Well, if the Supreme Court of North Carolina considered their federal questions --

MR. CRISP: Yes, and I'm not saying, sir -- I want to make that clear. I'm not saying they're not here.

QUESTION: Well, why are you bringing this up?

MR. CRISP: I'm bringing it up solely for this reason, sir. This case has been literally through the Supreme Court and back twice in North Carolina. It's been to the district court and the Fourth Circuit Court. It has been litigated and litigated and litigated.

And not until that last moment, so to speak,

did they raise this question. And they had the right to do that. I'm not arguing that. But they are latecomers to that theory in this case.

Finally, today marks the 150th anniversary of the Battle of San Jacinto, and I think everybody in this room knows what happened there. A real smart Sam Houston, knowing that Mexican take siesta, waited until about 4:00 o'clock and then, with the sun behind his back and some 600 soldiers, really decimated Santa Ana's army.

How does that bear on what's going on here? Texas became a liberated, independent republic, and it waivered for several years before it opted as to whether to come into this Union. Very independent people, nobody would gainsay that.

But they finally opted to come, and one of the reasons they came -- and Sam Houston was one of the proponents for it -- was that the Constitution held this balance of powers between semi-sovereign states and a federal union.

And we're talking here today, Chief Justice Burger and fellow Justices, we're talking here today about balancing equity between the federal scheme of regulation and the state scheme of regulation. And the wrong that has been done, the wrong that has been done,

cannot be corrected by merely invoking carte blanche a set of principles that have come down in other, really inapplicable cases.

And so we hope that you, certainly not intentionally, will not do what this company is asking you to do, which is to become its handmaiden in extricating it from what was finally determined to be the proper and the equitable resolution of the problems it's created.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Lee?

REBUTTAL ARGUMENT OF

REX E. LEE, ESQ.,

ON BEHALF OF APPELLANTS

MR. LEE: Yes, Mr. Chief Justice.

CHIEF JUSTICE BURGER: You have two minutes remaining.

MR. LEE: What the Appellees are asking this Court to do, and the only thing they're asking this Court to do, is to perform the function of deciding what is a fair and just allocation of these entitlements. That is not the function of this Court. It is not the issue before this Court.

That is a decision that has already been made by the only authority that has the power to make it, the

Federal Energy Regulatory Commission. It can be asserted on the one side that it's a nasty picture, a terrible thing by a corporate giant. It can be asserted on the other side, as we have quoted in our brief, that Alcoa is the best friend that North Carolina ever had. These are the lowest rates in North Carolina.

This Court is not the Federal Energy Regulatory Commission. The only issue for this Court is who is going to call these balls and strikes. Is it going to be a neutral umpire, or is it going to be the catcher, or is it going to be the batter?

The only facts that the Appellees say are relevant to this case are all, every one -- count them -- facts that pertain to their allegations of unfairness. It is not the proper function of this Court and it would be a misallocation of this Court's resources to sift through those.

Our point is that there is a filed rate. It is the NFA and the apportionment agreement, and that controls unless and until it is modified. Once it is modified, then it is the modified version that must control.

And the only alternative is the kind of chaos that led to, 200 years ago, the invocation of a Constitutional Convention.

In the event that the Court should not decide this case on that ground, then in must reach the commerce clause issue. And there is no question that this case is indistinguishable from what happened in NEPCO.

The better procedure, we submit, is to follow the lead of the state supreme court decisions which have held that, where the Federal Energy Regulatory Commission has made a power supply cost determination, that that power supply cost determination then becomes binding on the state and local regulators when they make their retail ratemaking decisions.

Unless the Court has questions, I have nothing further.

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

(Whereupon, at 2:41 p.m., the oral argument in the above-entitled case was submitted.)

CERTIFICATION

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

#85-568 - NANTAHALA POWER AND LIGHT COMPANY, ET AL., Appellants V.

UTILITIES COMMISSION OF NORTH CAROLINA, ET AL.

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

BY Paul A. Richardson

(REPORTER)