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OF THE
UNITED STATES

CAPTION: NEW ORLEANS PUBLIC SERVICE, INC., Petitioner, v. COUNCIL OF CITY OF NEW ORLEANS, ET AL.

CASE NO: 88-348

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

NEW ORLEANS PUBLIC SERVICE, INC.,

Petitioner,

v. No. 88-348

COUNCIL OF CITY OF NEW ORLEANS, ET AL.

Washington, D.C.

Tuesday, April 25, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

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

RICHARD J. LAZARUS, Assistant to the Solicitor General Department of Justice, Washington, D.C.; United States and FERC, as amici curiae, supporting Petitioner.

CLINTON A. VINCE, Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

10:07 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 88-348, New Orleans Public Service, Inc. v. the Council of the City of New Orleans.

Mr. Lee.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF PETITIONER

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

This is an abstention case. The question presented is whether the court of appeals and the district court properly abstained from deciding a threshold preemption challenge to the jurisdiction of the Respondent, City Council, to consider disallowing in its retail rates wholesale costs that have been determined by the Federal Energy Regulatory Commission.

The short reason why the Fifth Circuit's judgment must be reversed is that that judgment is based on an abstention standard that everyone sitting at the council table today agrees was wrong. But we all phrase it a little differently, all three of us.

The Petitioner, Respondents, and the government are in basic agreement concerning the preliminary assessment that a federal court should make in deciding

whether to abstain in a preemption case.

Frankly, I think the Respondents say it best. Twice in their brief, at page 25 and again on page 30, they reiterate that the responsibility of a federal court in deciding whether to abstain from deciding a preemption claim where there is a pending state court proceeding is to decide whether the federal issue is facial, direct, readily apparent, and dispositive.

Very frankly, very simply, the Fifth Circuit simply did not do that. Though the court did not formally reach the preemption issue, any objective reading of its opinion leaves no doubt that it regarded the federal preemption issue as controlling and correct and of a quality that placed the Council's prudence inquiry, in the language of the Fifth Circuit's opinion, beyond the Council's retail ratemaking authority.

What the Fifth Circuit has held, therefore, is that abstention is required even where the preemption claim deprives the state of jurisdiction and regardless of how correct and dispositive the preemption claim must be.

The net effect of that holding is to overrule this Court's consistent decisions. But one of the three prerequisites for Younger v. Harris abstention is the existence of a substantive state interest -- something

apart from an adjudicatory interest -- which would be infringed if the federal court were to decide the federal issue.

QUESTION: Mr. Lee, what if we had before us a state criminal case and the defendant raises, for example, a federal constitutional double jeopardy claim and says the state has no right to try him at all, and that issue would be completely dispositive of the state's right to try the case.

We abstain, typically, in those cases --

MR. LEE: That is correct.

QUESTION: -- in the federal court.

MR. LEE: That is correct.

QUESTION: How is that different from your case?

MR. LEE: It is different in this crucial respect, Justice O'Connor, and the answer to that question is pivotal to this decision because I am well aware of the post-Younger cases that have involved that kind of constitutional challenge to a state proceeding.

On at least three separate occasions subsequent to Younger v. Harris, the Court has reiterated and each time has made a little more explicit what was really said in Younger v. Harris itself. And that is, that one of the reasons -- I think the reason -- for Younger v. Harris' abstention is that it gives, in those

constitutional challenge cases, an opportunity to the state court to place a narrowing construction on the state statute in such a way that it will mediate between state and federal interests.

Now, the classic example of where that is possible is when you have such state statutes as were involved in these post-Younger v. Harris cases, such as obscenity statutes, criminal syndicalism statutes, lawyer disciplinary proceedings.

QUESTION: I don't see how that fits --

QUESTION: That's not true in double jeopardy.

QUESTION: -- the double jeopardy claim though.

MR. LEE: With a double jeopardy claim even so, there is still the possibility that the state court might be able to -- depending on the circumstances of the case -- that you might be able to have a narrow construction.

Now, in the event that in the particular instance there was not the opportunity for mediation because of a narrowing construction, then I would say it should come out the same way as here.

QUESTION: Do you think a double jeopardy claim then -- if there was no question of state law involved, a federal court should be able to intervene prior to trial?

MR. LEE: It would depend so much. It is, after all, really a balancing test. What you really have to look at --

QUESTION: Well, but you said just a minute ago it would come out the same way. Is that your answer?

MR. LEE: In the event -- yes. In the event -- In the event that there were no opportunity for mediation by narrowing --

QUESTION: Well, what do you mean by --

MR. LEE: -- by the narrowing of the statute.

QUESTION: What do you mean by mediation? I mean, I thought the reason for Younger v. Harris was the idea that we would trust state courts to give a fair interpretation of federal constitutional claims as well as state claims.

I didn't think mediation was any big reason for it.

MR. LEE: Well --

QUESTION: And I don't think any of the opinions say that.

MR. LEE: Well, I submit, Mr. Chief Justice, that that really is said in Moore v. Sims, perhaps most prominently, in Pennzoil, and in Trainor v. Hernandez.

And the notion that state courts ought to be able to decide these federal issues as well as federal

courts can is certainly one of the underpinnings of Younger v. Harris, but it is not the only one.

Another one is that there must be -- and the Court has consistently said that, and it is reiterated again in Pennzoil that it is more just an adjudicatory interest, more than just an interest. In the state courts deciding cases that are before it, there must be a substantive interest.

Now, in this case, the Petitioner -- excuse me, the Respondents suggest two such interests. The first is an interest in retail rate regulation, which is certainly important to states. But, it simply is not at stake in this case because out of the total package of constituent elements that go into retail rate regulations, such as determining rates, the rate of return, what the rate base ought to be, and so forth, the only component that this federal suit would carve out and remove from the state's jurisdiction is the very one over which the Council has no jurisdiction anyway.

The other state interest that is advanced is this one in setting the state's own house in order. That is nothing but an exhaustion of state remedies argued, which the Court has consistently rejected. And it proves too much because school desegregation actions, for example -- and, indeed, I think virtually every

Section 1983 suit will inevitably involve allegations of wrongdoing by local governmental officials.

Surely, the federal courts are not required to bar the courthouse door to those kinds of suits in order to permit the state to set its own desegregation and civil rights violation house in order.

The other basis on which the Fifth Circuit held in --

QUESTION: Excuse me. Doesn't -- in the context of a 1983 suit or a federal civil rights suit, doesn't your thesis also prove too much? Do you say that -- Do you say that when there is a state interest involved, when there is a possibility of a state statute being interpreted in a certain fashion that a federal court must abstain in civil rights and desegregation in 1983 situations as well?

MR. LEE: What we say, Justice Scalia, is almost that, but not quite. But in the final analysis, it must be a balancing test, that you have to see to what extent federal interests are really involved and to what extent state interests are really involved.

Younger v. Harris itself said that what we need is a sensitivity to the legitimate interests of both state and national governments. And among the factors to be taken into account are these that I said.

But, in this instance, the case is clear because we come into Court not with a blunderbuss but with a rifle and the one issue, what you have -- what is being reviewed here is a Fifth Circuit judgment that assumed we were right on the preemption issue.

QUESTION: Well, Mr. Lee, there is no question, is there, that the Louisiana courts could decide that preemption issue?

MR. LEE: There is absolutely no question about that, Justice O'Connor, and I think that that poses the issue very neatly because if the Fifth Circuit's judgment is upheld, then the rule for abstention cases will be that abstention is proper whenever a state court can decide the federal issue.

That is not the law, has not been the law, and should not be the law because it makes a judicial comity, a street that runs only in one direction and does not take into account the competing federal interests.

QUESTION: Do you contend that you were entitled to federal court intervention before the initial state hearing was concluded here?

MR. LEE: Yes. Yes. It is easier, Justice Kennedy, once it has been concluded, for reasons that will be developed more by Mr. Lazarus. But we would

have been entitled to abstention in the earlier -- in the early phase.

We agree in this respect with the Ninth Circuit, that in most cases where the sole issue before the federal court is preemption, a decision to abstain is necessarily a ruling on the merits.

And the reason is this: the controlling inquiry under Burford is whether the issues are predominantly local, and under Younger v. Harris it is whether there are legitimate state interests.

A ruling that the -- that there are predominantly local interests, or that there are legitimate state interests is necessarily a ruling that there is no preemption. Because if there were preemption, then federal law would trump and there would be no state issue and no state interests.

QUESTION: Well, under that analysis do we give any deference at all to the importance of allowing state procedural and adjudicatory mechanisms to operate?

MR. LEE: Of course we do. Of course we do. But that is strictly an adjudicatory interest, and the Court is already past the point of deciding whether adjudicatory interests alone are enough to do the job. And every member of the Court in Pennzoil said that they were not.

Moreover, much more is at stake in this case than whether NOPSI's FERC-mandated costs are to be honored in its retail rates.

At issue in this case is nothing less than whether judicial comedy really is a two-way street or whether it favors only state courts. The crucial fact is that the Fifth Circuit -- this is an abstention case. It is not a preemption case, and the Court need not and should not reach the merits of the preemption issue.

The reason is that the Fifth Circuit has abstained on the broadest possible ground. What it has said is we agree, in effect. We assume that the preemption is argument is correct. And notwithstanding that assumption, and notwithstanding the fact that that preemption argument, if correct, deprives a state court of jurisdiction to proceed at all, it's still abstained.

QUESTION: Well, what is the preemption question were an open one?

MR. LEE: Then it would be harder. Then it would be harder. But the federal court at least -- at least -- should make this preliminary assessment.

But what you're dealing with here is a judgment that held, in effect, that abstention is required whenever the federal issue can be raised in a pending

state proceeding.

QUESTION: Well, then -- but what's your position, Mr. Lee? That if the district court were to decide on the merits that the preemption claim was correct, then it should go ahead and decide that? With no -- well, what preliminary inquiry do you make to decide whether --

MR. LEE: Basically the same one the Respondents are talking about and what most of the lower courts have said, which is that you make a preliminary assessment to determine -- something like the quick-look doctrine in antitrust. Now --

QUESTION: Well, how do you go about that? I mean, that is not -- by no means self-evident --

MR. LEE: Well -- well --

QUESTION: -- from the phrase.

MR. LEE: It is easy in this case. It is easy in this case because in this case the Fifth Circuit had no difficulty assuming at the outset that we were right on our preemption claim.

But, in most instances, what you would do is to determine whether that claim is substantial. Whether on its face --

QUESTION: What does "on its face" mean?

MR. LEE: Well, whether -- whether -- perhaps

"on its face" is not the right word. As a preliminary first look matter, whether it has some merit. And I would simply point out in that respect --

QUESTION: That's a very, very --

MR. LEE: No, but --

QUESTION: -- nebulous test.

MR. LEE: But the courts of appeals have had no difficulty dealing with them.

QUESTION: Well, we're in this Court.

MR. LEE: I understand. I understand. But all I'm saying is that the experience of those courts of appeals teaches. Instances are cited in our reply brief where what the courts of appeals have done is to make this first look and then often after they decide, yes, this preemption challenge needs to be considered, they eventually conclude that indeed they should abstain because the total balance of factors after they look at it as a total matter leads to the conclusion that they should abstain.

QUESTION: Mr. Lee, you're saying it is not enough if the federal court satisfies itself that there is some state substantive interest involved outside of the adjudicatory interest?

MR. LEE: We're saying --

QUESTION: You have to weigh whatever state

substantive interest there is against the federal preemption interest? Is that your --

MR. LEE: That is correct. And there will be instances, Justice Scalia, in which it's going to be a hard decision to make and which is not going to be an easy one. But this one is easy, and in this case affirmance of this judgment on the ground that it was handed down by the Fifth Circuit would open a gaping hole in the ability of the federal courts to enforce federal rights across a broad range of issues, including 1983 --

QUESTION: Well, this one is easy, you say, if we adopt the test that's a hard test to apply. I mean, -- but the issue before us is whether we ought to adopt the test that's a very hard test in the ordinary case to apply, or, rather, adopt the more categorical test that goes one way or the other and let Congress fiddle with the niceties that you want to -- you want to --

MR. LEE: Well, if you want to --

QUESTION: -- by these balancing tests.

MR. LEE: Yes. Yes, but if you wanted to adopt a categorical test, then you would simply say that if the claim -- if the claim has been made, then -- and if it isn't -- if it isn't rejectible on its face, then federal courts are there to decide federal issues and

they ought to decide that one.

QUESTION: Mr. Lee, what was the non-adjudicatory interest of the state in Younger v. Harris?

MR. LEE: Oh, it was in this narrowing -- this narrowing construction that the state might be able to give to its own criminal syndicalism statutes and thereby mediate between state and federal interests.

I'd like to save the rest of my time for rebuttal.

QUESTION: Mr. Lazarus.

ORAL ARGUMENT OF RICHARD J. LAZARUS

AS AMICI CURIAE, SUPPORTING PETITIONER

MR. LAZARUS: Thank you. Mr. Chief Justice, and may it please the Court:

There is no question under this Court's precedent that the hypothetical described by Justice O'Connor in which a double jeopardy defense was raised to a pending state criminal prosecution that in those circumstances abstention would be warranted.

This case, we believe, is --

QUESTION: Well, what is the state's non-adjudicatory interest in the double jeopardy case?

MR. LAZARUS: In the double jeopardy case you have an ongoing criminal prosecution. In this case we

think there is no ongoing state proceeding that is necessary for the vindication of an important --

QUESTION: So, if -- but if the state proceeding had started before the federal, then this would come out differently?

MR. LAZARUS: No, no. In this case we have a completed administrative proceeding. And then we have three pending state court proceedings.

But I think if you look at each of those three pending state court proceedings, you'll see that they're very different from the kind of proceeding at issue in Younger or in any of the other cases in which this Court has upheld Younger abstention.

QUESTION: Well, but what is -- what is the non-adjudicatory interest in the double jeopardy case?

MR. LAZARUS: In the ongoing enforcement of criminal laws in the state.

QUESTION: Well, why doesn't the state have the same interest here in the ongoing processing of these state court actions?

MR. LAZARUS: Because you have to look at each of the three state -- the one, for instance, there is a NOPSI lawsuit against the City Council. Let's go through each of the pending state proceedings so I can try to show you where our position comes out.

Starting with NOPSI's own lawsuit against the City Council -- but that is a suit which is not brought to vindicate a state interest. NOPSI brought that suit in order to vindicate the integrity of FERC's allocation order. It's merely protective in nature.

If the Court were to rule that that was a basis of abstention, this case would be a mere sport because in the future utilities, such as NOPSI, would not initiate such protective filing.

The second pending state proceeding is the City Council's lawsuit against NOPSI for declaratory relief. But we believe that is an equally unnecessary proceeding within the meaning of Younger.

The sole purpose of that proceeding is to confirm the results of an already completed administrative proceeding that has resulted in a final agency order with legal effect. It is, therefore, unlike any of the proceedings in which this Court has upheld Younger abstention. There is no ongoing criminal prosecution, no ongoing nuisance enforcement, no employment discrimination investigation.

The sole purpose for that suit for declaratory relief is to have the state courts, rather than the federal courts, determine the constitutional issue. And in that way it really is most like the type of

first-right collateral litigation that Younger was designed to discourage, not to encourage.

Finally, there is the suit that had been brought by the Alliance for Affordable Energy in state court. But that suit, too, is not even directed immediately at NOPSI. The City Council is the defendant in that suit. NOPSI is simply a third party defendant.

And it raises the wholly secondary question of whether NOPSI should have been denied an even greater share of Grand Gulf by the City Council. That entirely secondary state law issue shouldn't deny NOPSI its right. And then --

QUESTION: Well, Mr. Lazarus, I thought Mr. Lee suggested in the criminal case I posed of the pure double jeopardy claim that maybe there shouldn't be abstention.

MR. LAZARUS: And I'm suggesting that there would be abstention because of the different nature of the proceedings. There would be abstention in that case.

I don't think he meant to say what I think that we --

QUESTION: I thought Younger and some of the other cases emphasized very heavily the fact that it was a criminal proceeding. To say that an unusually strong interest --

MR. LAZARUS: That's right.

QUESTION: -- enforcing its criminal law.

MR. LAZARUS: That's right. And there was an ongoing enforcement action. Here we don't have that. The final argument is --

QUESTION: It's not true of Trainor against Hernandez, Moore against Sims, the Ohio Civil Rights case. Certainly, there are civil cases in which --

MR. LAZARUS: There are civil cases which the Court -- where there are ongoing enforcement actions. Here we don't have that. It's completed.

The final argument that the City Council makes is that you should assume for Younger purposes that the City Council administrative proceedings are in effect ongoing because of the availability of subsequent state court review.

We think that simply proves too much. It's Burford, and not Younger, that describes the discrete set of circumstances where the working relationship between state courts and state agencies in fashioning state policy is so close that abstention is required.

Burford does not call for abstention whenever a constitutional challenge is brought to state -- completed state agency action which is subject to state court review. Burford, instead, provides that such

abstention where a federal claim is raised is warranted only if two factors are present, neither of which are present here.

First, an especially close working relationship between state courts and state agencies in the fashioning of state policy, and second, where the exercise of federal court review will require the resolution and inquiry into predominantly local factors.

Neither is present here. There are no expert courts or specialized courts. We simply have courts of general local jurisdiction who are reviewing the City Council's determination not de novo, as in Burford, but under the substantial evidence test.

QUESTION: Now, how do you fit Pennzoil into this?

MR. LAZARUS: We Pennzoil we had an ongoing state proceeding and we had a state court that was enforcing a judgment against them. And it was attacking the proceeding itself. Here what NOPSI is challenging is the administrative proceeding, not the ongoing state proceeding.

QUESTION: You mean --

MR. LAZARUS: Here we had an ongoing state court proceeding, and the constitutionality of that was under challenge, an aspect of it.

QUESTION: You mean if the state court proceeding here had proceeded to the point where there was an order issued and then the federal court was asked to set aside that order, we'd be in the Pennzoil situation?

MR. LAZARUS: Actually, we wouldn't be in the Pennzoil situation because still -- I think it would be a very different case -- but, still, there they would be basically challenging what the City Council had done.

In Pennzoil it was a direct attack on the procedures of the state courts themselves. And it was the constitutionality of that which the Court upheld had an independent adjudicatory interest that was sufficient.

Turning quickly back to the second aspect of Burford abstention, which we also think isn't present here -- but it is Burford which really governs these kinds of cases. There is no predominantly local factor that needs to be required to determine the federal preemption issue like there was in Burford for the economic due process issues there.

This Court reached and disposed of a virtually identical preemption claim in the Mississippi Power & Light case. There was no need whatsoever for any inquiry into the predominantly local needs of the different operating companies as there was in Burford

and in the Alabama Public Service Commission.

Instead, indeed the thrust of the Court's opinion in that case was that it was appropriate to treat the four operating companies as a system, as one system. And it was appropriate for FERC in allocating the shares of Grand Gulf to ignore and to overlook the particular needs of each operating company.

This case simply does not depend on a logical application of Younger and Burford. It demands a dramatic expansion of Younger at the expense of the important limitations expressed on abstention in Burford.

QUESTION: Does your argument assume, Mr. Lazarus, that we agree that there is no substance whatever to the -- to the assertion that the utility here could have complied with the federal requirements of FERC and nonetheless done what the municipality here wanted it to do by reselling the power it was committed to take?

MR. LAZARUS: To the extent that I'm talking about Younger initially --

QUESTION: Yes.

MR. LAZARUS: -- our initial argument, the necessary preceding argument is independent of that inquiry. To the extent that it doesn't matter -- with a federal preemption issue or another kind of

constitutional issue.

To the extent that I'm talking about Burford, it still doesn't require it because all you really need is to determine whether resolution of this particular type of federal claim requires inquiry to predominantly local factors. And we think under the Federal Power Act, as a general class that won't be the case.

There may be federal preemption issues which could be raised which would require such inquiry. But we certainly don't think it is here.

We have a secondary argument which is, even if this Court thinks -- which is outlined in our brief -- that there is a Younger-type proceeding that abstention would still not be warranted. But there is this threshold very significant other argument, and that is that there is really no proceeding here at all like in any of the other cases in which this Court has upheld Younger.

QUESTION: Well, the federal issue could be decided in one or more of those cases.

MR. LAZARUS: In the state court. Yes, it could, but that's --

QUESTION: Well, what if it's -- what if you -- what if the state court beats the federal court to the issue?

MR. LAZARUS: If the state court beat the federal court to the issue, then we might have a res judicata problem that we --

QUESTION: A rather severe one, wouldn't we?

MR. LAZARUS: But we don't have here.

QUESTION: But you're not -- are you saying that the federal court should be able not only to deny abstention, but to enjoin the state proceedings?

MR. LAZARUS: No. And there is no request here for any injunction on the state court proceedings.

Thank you.

QUESTION: Thank you, Mr. Lazarus.

Mr. Vince.

ORAL ARGUMENT OF CLINTON A. VINCE

ON BEHALF OF RESPONDENTS

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

The principal issue in this case is whether the lower federal courts should be required to step in and review state ratemaking decisions which are subject to full review in ongoing state court proceedings when a debatable preemption claim is raised.

Justice Scalia asked about the relationship of the Pennzoil case to our present case. NOPSI here is seeking a utility company exemption from normal state

court review in much the same way that Pennzoil or Texaco sought a Fortune 500 exemption in the Pennzoil case improperly.

In Pennzoil -- our fact pattern is considerably stronger in favor of abstention than Pennzoil. In Pennzoil the lower federal courts found that the Texas state courts were inadequate. They found exceptional circumstances. They found irreparable harm on the basis that Texaco could not meet a $13 billion bond.

In our case, the lower federal courts, both courts, found that the state court system was perfectly adequate to handle all of NOPSI's claims, including the preemption claim. They found that the track record of state courts in Louisiana on preemption issues was very good, and that the tract record nationally on preemption issues for state courts was very good. That the states had essentially developed the Narragansett doctrine that is the core filed rate doctrine that NOPSI relies upon.

QUESTION: Did they make that same finding as to the Agency?

MR. VINCE: Could you repeat the question.

QUESTION: Did they make that same finding as to the Agency, the New Orleans Council? Did that have a good track record too?

MR. VINCE: Yes, your Honor. The Federal

District Court found in the NOPSI-won case that specifically that the City Council was acting in good faith at a point when NOPSI raised the issue that the City Council was not acting in good faith.

And there has never been in this case an argument that the City Council or the state court systems have been acting in bad faith or in a harassing manner. There simply has been no exceptional circumstance argument here, your Honor.

In Pennzoil there were private litigants and so Texaco argued that there was no legitimate state interest. Here, we have the state level regulatory body directly involved in the conflict.

QUESTION: Well, if there is only the federal claim of preemption presented and there is no undecided issue of state law at all remaining -- just make that assumption -- then what is the comity based interest that says the federal court should abstain?

MR. VINCE: I think there would be three basic state interests, if I understand your assumption correctly.

The first state interest would simply be that the state courts have an interest in governing their local regulators and making sure that they make correct decisions, particularly if there is a preemption claim.

If there is a preemption claim and a problem, the state courts should be allowed to address that and develop state policy.

The second legitimate interest, I believe, would be the profound interest that the state has in local ratemaking. And that interest exists whether or not NOPSI wins on the merits of this case.

The third interest is much more specific to our case, and it is hotly contested. That would be the state interest in making sure that utilities attempt to reduce risks to local -- to retail customers if it's reasonable and feasible to do so.

QUESTION: Well, you strayed from my assumptions in your response. But, it is difficult to understand what strong state interest remains if the assumption is that only the federal preemption claim remains.

MR. VINCE: Your Honor, if only the federal preemption claim remains, the state still needs to look at what the state regulator did and compare that to what the federal regulator did. And that is a balancing and there is a legitimate state interest in conducting that balancing and putting -- allowing the state to put its own house in order on that subject.

QUESTION: Mr. Vince --

MR. VINCE: But more -- excuse me, your Honor. I would just put a tag on that the real factor here is that your assumption is not present in our fact pattern. That is, we have had a horror story in terms of multiple track litigation.

When NOPSI -- NOPSI first brought its preemption claim before the state regulator and it then exited the state system when it got an adverse ruling and brought a collateral attack or tried to bring a collateral attack in federal court on the identical issue but in isolation of the administrative record.

At the same time, it pursued all of its other challenges to the rate order, the state challenges in the state court system. That immediately set up a dual litigation track.

This Council has been sued three times in federal court in three years, with 20 major motions, continuous appeals up to the Fifth Circuit.

QUESTION: Well, that's understandable, perhaps, if the City Council persists in trying to trap the costs. I mean, that gets into the merits of the case. But I don't -- I don't see that that should resolve the abstention question.

MR. VINCE: Your Honor, if you assume that the City Council was wrong, that still is a matter that

should properly be addressed in the state court system. As a practical matter, there is a very debatable issue -- at least, we feel there is and the lower federal courts have felt so -- that the preemption issue is not the lay-down hand that the government and NOPSI contend.

QUESTION: Mr. Vince, you rely in part, I think, on Younger v. Harris in that line of cases. But that generally assumes that there is an ongoing state proceeding that is commenced before the federal action is going to -- what is the state proceeding here that you say was commenced before the federal action was brought?

MR. VINCE: Mr. Chief Justice, that would be a two-part answer. There is a generic ongoing proceeding in the sense that all you have now is the lowest echelon order of the state in the form of the local rate order.

QUESTION: Issued by the City Council?

MR. VINCE: That's correct, your Honor. And the ongoing proceeding would be the fact similar to Younger, that this can still be reviewed and is subject to judicial review in the state court system where the state courts no doubt will develop additional policy on this point.

It may be that if the states do their job correctly and Justice O'Connor's assumption is exactly

right, which we disagree with, the state courts could still deal with that and this matter might not need to reach this doorstep at all -- this Court's doorstep.

As a practical matter, the multiple state litigation is a matter of concern not just with reference to this local controversy, but multiplied across the country. The major organizations of state and local governments and the major national organization of state regulators have come in on the City Council's side, not simply to validate our position on the merits, which they agree with, but they are concerned about a much larger problem.

And that is, state regulators with limited resources having to immediately face a multiple litigation track any time that a competent team of utility lawyers can draft a federal conflict into their complaint.

That's not difficult to do under the Federal Power Act which is essentially -- contemplates dual regulation, dual federal/state regulation.

The preemption test that NOPSI gave is not exactly identical to ours, but they fail their own facial preemption test. The Federal District Court here, and later two state courts, have made specific findings that there is no facial preemption in this case.

QUESTION: Do you have a definition of "facial preemption" that's any different from Mr. Lee's?

MR. VINCE: Your Honor, I -- yes, I believe that facial preemption should be determined within the four corners of the FERC order in the four corners of the Council's orders so that you can look at those two orders and see with relatively little assessment that there is a clash.

QUESTION: You wouldn't look at any statutes?

MR. VINCE: Yes, your Honor. The relevant statutes would have to be looked at as well.

QUESTION: Well, then how does facial preemption differ from other kinds of preemption?

MR. VINCE: Because basically what it does not require is an adjudication of the merits of the case in order to determine whether implicitly there has been some violation. And, frankly, --

QUESTION: Well, wait a minute. You're talking about something short of the merits and yet you look to the statute, you look to the conflicting orders. How is that different than a determination on the merits?

MR. VINCE: I believe the example would be exactly what the Federal District Court did in our case, your Honor, and that is he looked at the Federal Power Act and he looked at the two orders and he saw no direct

clash. He saw that the Council's rate order was ostensibly guided towards something that was allowable under the Federal Power Act for retail ratemakers.

Basically the question you pose is a frustration for us in terms of saying how does a Federal District Court draw the line? We know here there is something less than facial. But how does he draw the line in terms of a strong preemption claim or a red-hot one?

We know that any utility company coming in with a preemption claim is going to argue that it's a very strong claim. If there is no facial clash that can be discerned with relatively -- with relative ease by a competent Jurist at the Federal District Court level --

QUESTION: Kind of a time question. He spends 15 minutes and if it's not apparent that it's not facial --

MR. VINCE: No, your Honor. I don't think so much the time of how long it takes to review the respective orders. I think the matter is that the judge does not need to go through a full-fledged look at the -- for example, the administrative record, to determine what it really was that the Council did.

And NOPSI here makes the statement and made the allegation in their complaint in this case that there

was no set of facts that could sustain the City Council's order. But in their briefs and in our arguments we have gotten into some very difficult disputed facts that really should be sorted out in the state court system before the consideration of the merits of preemption is reached.

As I pointed out a moment ago, the concern of the Council and the state courts involved has been that there's been much more than simply utility company hauteur towards the state courts here. There has been a very real disruption of a state regulator's ability to function.

This Council, whether its ruling on the merits ultimately will be upheld or not, was sued at the commencement, during, and after its regulatory proceeding in federal court. The Council members individually and personally were sued for a billion dollars in federal court.

There is -- there comes a point where it's much more sensible, we contend, to allow a single track to proceed. A single track will achieve just as good a result, it will be fair to all parties. This Court will still have the opportunity to vindicate, if it wishes, through the certiorari process.

But the whole question of multiple litigation

and depletion of resources is then removed.

QUESTION: How is that any different from exhaustion of remedies?

MR. VINCE: I believe that it is -- it is analogous to exhaustion of remedies in the sense that there is an ongoing proceeding that the company should become involved with in order to resolve this in one single proceeding. I don't feel that it is the same legal doctrine as exhaustion.

QUESTION: Well, it's certainly the same result the way you describe it. I fail to see the difference.

MR. VINCE: Well, I think that it is essentially the result that the Younger and Huffman line of cases says is appropriate in Younger-type of abstention, your Honor, where there is the ongoing opportunity for judicial review in the state court system.

QUESTION: Mr. Vince, refresh my recollection. What is the posture -- present posture of the various state proceedings? Are any of them about to be decided?

MR. VINCE: Yes, Justice Stevens. The principal state case that is deciding the very issue of preemption that's been raised here is ongoing. It's been -- the pre-trial briefs have been filed, the case has been argued.

The parties agreed on a post-argument schedule, and that has been delayed with the agreement of both parties so that we could file our briefs and argue this case. And it will resume immediately and presumably be resolved within the next several months.

Our concern is that NOPSI basically has pole-vaulted out of the ongoing state proceedings with its preemption claim up here and basically in their briefs present a rather full argument on the merits even though this is a relatively narrow procedural question concerning abstention.

QUESTION: And what is the rate structure right now? Did they get -- have they gotten any relief in the matter of rates or is that --

MR. VINCE: Absolutely, your Honor. The track record in terms of rates was this. The Council first invited the company to come in when they were making their initial procedures for rates and invited the company to seek interim relief. Instead, the company sued the Council. That was the billion dollar lawsuit.

The Federal District Court conducted a preliminary injunction hearing and said there is no irreparable harm here, and told the company to go back to the Council. When they did that, the Council gave interim relief.

Then the Council entered into a settlement with the company that put essentially the full rate package into effect, minus $51 million that the company voluntarily agreed to absorb.

That rate has been -- was in effect all during the pendency of the prudence investigation. When the prudence investigation was completed, the Council gave a ruling that for a ten-year period instead of being able to collect six percent increases annually, NOPSI would only be able to collect four and a half percent rate increases annually.

So, the company has been receiving rate relief and the district court -- Federal District Court in our case made a specific finding that the Council was acting in complete good faith on this point and using everything that it possibly could, all reasonable measures to keep the company in a positive cash position.

To conclude, your Honors --

QUESTION: May I -- if you're about to conclude, may I ask, would those findings be necessary to sustain your theory? Supposing they had granted no relief at all, your legal position wouldn't be any different, or would it?

MR. VINCE: If they had granted no relief at all, the legal position would not be different, Justice

Stevens, for this reason.

The company would then immediately be able to go into state court and seek an indication. And the case that I would give you that's directly on point is the Louisiana Power & Light case that we cited in our brief, which is the sister company to NOPSI.

At that time the Middle District was considering the Louisiana application for Grand Gulf costs at the same time that the Council was in litigation in federal court in the Eastern District.

Both -- both courts not only abstained, but ruled that there was a Johnson Act prevention from a federal court considering the issue. That's since been overturned by the Fifth Circuit.

But when Louisiana Power & Light was forced to go into state court, they got a $119 million emergency rate relief ruling within one to two months, which demonstrates that the state court system here is not broken, it is able to handle these cases if there is a viable claim.

And that simply brings me to my conclusion, that I would urge this Court not to accept or put its imprimatur on the basic essence of NOPSI's case. And that is that the federal courts are going to be the protectors of federal questions and that state courts

are going to be the enemy and not do the job.

Here the track record in Louisiana is quite good.

QUESTION: It is critical, your position, is it not, that the preemption issue is debatable?

MR. VINCE: Yes.

QUESTION: Yeah.

MR. VINCE: Well, Justice Stevens, let me clarify that, please.

Our position is that if there is facial preemption, the Federal District Court then has the discretion not to abstain. But it is still within the Federal District Court's discretion.

QUESTION: I have some of the same difficulty that Chief Justice did, with the concept of facial preemption. It seems to me it's either -- you know, you feel very strongly that the issue isn't all that hard or it's very debatable. And maybe that's the difference, whether it's the degree of difficulty of the issue.

It seems to me you do rest on a case in which there is a debatable issue of preemption. If we thought it was clear-cut the other way, your argument would really not be quite so strong.

MR. VINCE: I think it would seriously diminish our argument, Justice Stevens. But the example, again,

that I would give is in the Younger case.

The criminal syndicalism statute, or one very similar to the one considered in Younger, was actually deemed invalid in the Brandenburg case which occurred, I believe, 19 months earlier. And yet the Court felt, even though there was a substantial possibility that the statute was invalid -- they still felt that abstention under those circumstances was appropriate.

QUESTION: Yes. Of course, at that time the fact that it was a criminal case was more important than maybe it is today here.

MR. VINCE: That's absolutely correct, your Honor. But I think the -- the point is that the state courts here are adequate to give this type of relief and that there are not the type of exceptional circumstances that might exist in a civil rights case or a case that simply is not present here.

QUESTION: Thank you, Mr. Vince.

Mr. Lee, do you have rebuttal?

REBUTTAL ARGUMENT OF REX E. LEE

ON BEHALF OF PETITIONER

MR. LEE: Just briefly, Mr. Chief Justice. A few items.

First of all, Justice Stevens, what Mr. Vince told you is substantially correct. We are at the

present time not collecting one million dollars per month in FERC-mandated costs, but we have been assured by the City Council that if we win this lawsuit, then those amounts can eventually be recovered.

Now, I want to stress that this question of whether the preemption issue is debatable or not really isn't relevant in this particular case because of the nature of the Fifth Circuit's holding. They agreed with us that it was correct, but still abstained.

In other instances -- not this case -- the Court will have to make an inquiry into the substantial -- whether it is substantial. But that is the kind of inquiry that federal courts make on a regular basis in deciding the pendent jurisdiction claims.

We agree that there should be --

QUESTION: Excuse me. Then all you're asking us to do is to send it back to ask the Fifth Circuit --

MR. LEE: That is correct.

QUESTION: -- to decide whether it's clear or not?

MR. LEE: That is correct.

QUESTION: You're --

MR. LEE: That is correct. What you're reviewing is the Fifth Circuit's abstention judgment. And it was clearly wrong. It's the Fifth Circuit, if

there is any question about it, that ought to make -- ought to make that threshold inquiry.

QUESTION: It was clearly wrong. It was clearly based on the wrong reason, you're saying?

MR. LEE: That is correct.

QUESTION: It might still be right.

MR. LEE: That is correct. Their abstention standard was wrong. Their abstention standard was wrong.

We agree with the single track proposition. But where the preemption claim disposes of the whole case and can be decided without inquiry into any state law or any facts that are set before the state administrative body, then it's the federal court that ought to decide it.

And in this case, Justice O'Connor, I really think this case is your hypothetical because the only argument in the federal complaint is that this case is preempted and it deprives the state of jurisdiction. And what you are reviewing is a Fifth Circuit judgment that requires abstention even where there is no jurisdiction.

What the case really comes down to -- What the case really comes down to is a rule that requires abstention under Younger v. Harris on only one single showing, and that is the pendency of the state court

proceeding.

It is a rule that is squarely inconsistent with the non-exhaustion of state remedies argument. There is no basis for distinguishing the number of cases that have held that there is no requirement of state exhaustion from the holding of the Fifth Circuit in this case, and that judgment has to be reversed.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

The case is submitted.

(Whereupon, at 10:57 a.m., the case in the above-entitled matter 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:

New Orleans Public Service, Inc., Petitioners v. Council of City of New Orleans, et al - Case No. 88-348

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BY Judy Freilicher

(REPORTER)