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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARCADIA, OHIO, ET AL., Petitioners
-v- OHIO POWER COMPANY, ET AL.

CASE NO: 89-1283

PLACE: WASHINGTON, D.C.

DATE: October 1, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARCADIA, OHIO, ET AL., :

4 Petitioners :

5 v. : No. 89-1283

6 OHIO POWER COMPANY, ET AL. :

7 - - - - - X

8 Washington, D.C.

9 Monday, October 1, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:05 a.m.

13 APPEARANCES:

14 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
15 the Petitioners.

16 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; as Federal
18 Respondent in support of the Petitioners.

19 EDWARD BERLIN, ESQ., Washington, D.C.; on behalf of the
20 Respondents.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

CARTER G. PHILLIPS, ESQ.

On behalf of the Petitioners

3

LAWRENCE G. WALLACE, ESQ.

As Federal Respondent in

support of the Petitioners

17

EDWARD BERLIN, ESQ.

On behalf of the Private Respondents

24

REBUTTAL ARGUMENT OF

CARTER G. PHILLIPS, ESQ.

On behalf of the Petitioners

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 89-1283, Arcadia, Ohio v. the Ohio Power Company.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

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

Petitioners are 15 small villages and towns in Ohio that purchase electricity from the Ohio Power Company for the purpose of reselling it to their residents. Ohio Power is an electric utility company that sells electricity at wholesale, and is part of a public utility holding system called the American Electric Power Company. That company is registered under the Public Utility Holding Company Act, and as a consequence of that, Ohio Power is subject to regulation by both the Federal Energy Regulatory Commission and the Securities Exchange Commission.

At issue in this case is the division of regulatory authority specified in section 318 of the Federal Power Act between these two agencies in connection with Ohio Power's wholesale electric rates. The rates

1 Ohio Power charges to petitioners are significantly
2 affected by the cost of coal. Coal represents
3 approximately 50 percent of the total cost of the
4 production of electricity by the Ohio Power Company.

5 The issue in this case arises because Ohio Power
6 does not purchase its coal on the open market, but rather
7 it purchases most of its coal from a wholly owned
8 subsidiary called the Southern Ohio Coal Company. Between
9 1971 and 1980 Ohio Power went to the Securities Exchange
10 Commission and asked for four separate orders with respect
11 to the coal mined by the Southern Ohio Coal Company.

12 The first one provided essentially for the
13 creation of the coal mining operation and asked for
14 securities to be issued for that purpose. The second one
15 followed up by an additional grant of securities in order
16 to provide an actual operating opportunity for that coal
17 company. And the last two orders also provided for the
18 issuance of securities in order to upgrade the quality of
19 the mining operations by that coal company.

20 Nothing in those orders specifically refers to
21 the Ohio Power and Southern Ohio Coal Company and the sale
22 of coal. They simply refer generally to these basic
23 transactions under a host of provisions of the security --
24 of the Public Utility Holding Company Act, but not section
25 13(b) of the Public Utility Holding Company Act which is

1 the provision that specifically regulates these kinds of
2 inter-affiliate coal transactions.

3 QUESTION: Mr. Phillips, what is the effect of
4 the SEC order? Does it require that coal be purchased at
5 cost, or is it just a ceiling?

6 MR. PHILLIPS: To the extent it applies at all,
7 it would -- it would clearly be just a ceiling. But what
8 it seems to me clearly, what I think is in fact the case
9 is it doesn't say anything about how it has to be
10 purchased. What it does is recite an intention by Ohio
11 Power essentially to comply with an unstated section
12 13(b), whatever section 13(b) requires. The way I would
13 read the order, it simply says we will comply with the
14 Federal standards. Since those standards incorporate a
15 market basis under rule 92, they could just as easily be
16 saying that we will comply with that requirement, whatever
17 it happens to be at the end of the day.

18 QUESTION: So you don't concede that at least
19 the SEC orders effectively set a ceiling?

20 MR. PHILLIPS: No, I don't believe that they
21 necessarily -- I mean, at some point they set a ceiling in
22 the sense that you cannot exceed either cost or the market
23 price. But I don't think they were designed to say
24 anything about what Ohio Power is required to do with
25 respect to the Southern Ohio Coal Company.

1 And it is difficult to see any requirements in
2 those orders, given that there is nothing that
3 specifically says anything about Ohio Power buying coal
4 from Southern Ohio, how much, at what prices. It only
5 says that Southern Ohio will sell to the American Electric
6 Power system. It doesn't even specify Ohio Power in
7 connection with that.

8 QUESTION: How did the court of appeals construe
9 the order?

10 MR. PHILLIPS: The court of appeals was able to
11 avoid having to construe the order, because it held that
12 it made no difference whether there was a conflict between
13 the -- its -- the SEC regulation and FERC regulation.
14 What it said was this is a matter subject to regulation by
15 the SEC under section 13(b). And the way they construed
16 section 318 meant that FERC was ousted of its otherwise
17 appropriate regulatory authority. So they didn't have to
18 construe those orders.

19 QUESTION: You don't really care whether the --
20 I mean, you wouldn't lose this case if the -- if it were
21 perfectly clear that the SEC purported to set a ceiling,
22 would you?

23 MR. PHILLIPS: No, Justice White, absolutely
24 not.

25 QUESTION: You don't really care, then?

1 MR. PHILLIPS: I think that --

2 QUESTION: Like the court of appeals.

3 MR. PHILLIPS: Yes, but except for precisely the
4 opposite reason, which is that I don't care because it is
5 clear to me that there is no conflict between what the
6 FERC has done here and what the SEC has done here, and
7 therefore it should make no difference how the SEC's
8 orders are characterized.

9 QUESTION: What would be the SEC's angle here?
10 What would be their purpose in setting a ceiling?

11 MR. PHILLIPS: Well, they want to -- they would
12 be reviewing to assess the relationships between the
13 Southern Ohio Coal Company and the Ohio Power Company in
14 order to ensure that there are no dealings going on beyond
15 whatever representations are being made in connection with
16 these orders. I mean, they have investment regulation to
17 take into account, and so they have a quite reasonable --
18 they might, potentially at least, want to exercise their
19 authority to promote those purposes.

20 QUESTION: Who are they protecting, or who are
21 they looking out for?

22 MR. PHILLIPS: Well, they could be -- in this
23 setting they could be looking out for debt holders or
24 preferred shareholders of Ohio Power Company, or debt --
25 anybody who might have debt with the Southern Ohio Coal

1 Company.

2 QUESTION: But I would think that they would --
3 aren't they supposed to look out for either the coal
4 company here or a subsidiary, rather than the principal?

5 MR. PHILLIPS: I think in general they are
6 supposed to look out for them. On the other hand, my
7 understanding of what the SEC's authority and mandate is
8 is to make sure that the transactions among affiliates
9 within a public utility holding company system are -- are
10 handled in a way that the public is informed as to the
11 operations, and that no one is injured, either the public
12 interest or individual companies within that system.

13 QUESTION: Well, don't you think someone would
14 be -- would be injured if an acquisition of a company that
15 has coal reserves that is entered into for the purpose of
16 using those reserves in the -- in the operation of a
17 utility run by another one of the affiliated companies, if
18 it turns out that that can't be done? Wasn't the SEC in
19 effect approving the acquisition of a subsidiary for the
20 very purpose of using the coal reserves of that subsidiary
21 in the generating?

22 MR. PHILLIPS: Yes, of the American Electric
23 Power System, no question about that. But nothing in what
24 the FERC provides here interferes with Ohio Power's
25 ability to purchase any amount of coal it wants from

1 Southern Ohio.

2 QUESTION: I am just trying to figure out what
3 the SEC approved, though. And the SEC approved --
4 approved that agreement which said that the sale would be
5 at cost? Is that what it said? What did it say?

6 MR. PHILLIPS: No, the SEC approved four
7 separate securities transactions that don't say anything
8 about the sale of coal between Ohio Power and the Southern
9 Ohio Coal Company. With respect to those contracts, those
10 contracts were not put before the SEC for review, and they
11 have never been approved by the SEC. All it said was we
12 will allow Ohio Power to invest essentially in these coal
13 companies in order to ensure that they have available
14 supplies.

15 Now, in the process of saying that they did
16 indicate, the SEC indicated, that it was the intention of
17 Ohio Power to purchase -- or not even Ohio Power, the AEP
18 system, to purchase its coal, because that would guarantee
19 a reliable supply. But it says nothing about the specific
20 cost that would be incorporated into that arrangement.

21 QUESTION: Well, Mr. Phillips, the SEC's brief
22 here purports to quote an order. It says that the SEC
23 specified that the price at which SOCCO -- I guess that's
24 the coal company --

25 MR. PHILLIPS: Yes, Your Honor.

1 QUESTION: -- sold coal to Ohio Power could not
2 exceed cost to SOCCO. And it purports to be quoting it.

3 MR. PHILLIPS: Well, the specific language of
4 the order doesn't refer to Ohio Power. It refers to the
5 American Electric System, frankly.

6 QUESTION: Well, I know, but at least it said --
7 it set the price at which SOCCO could sell the coal. It
8 said could not exceed cost.

9 MR. PHILLIPS: Yes, it does say that, Justice
10 White. The problem with -- with making much of that as
11 far as a requirement in any sense to be applied against
12 Ohio Power in the context of a FERC rate-making proceeding
13 is that that is precisely the same language that exists in
14 section 13(b), is that coal or these goods have to be sold
15 at cost. And since the first day that that statute was
16 enacted, the SEC has had a regulation on the books that
17 restricted the sale of coal or any other goods among
18 interaffiliate companies to the market price. So by
19 referencing language of cost, that doesn't necessarily say
20 anything about what is required in the relationship
21 between Ohio Power and the Southern Ohio Coal Company.

22 QUESTION: Even -- even where the market price
23 is above cost?

24 MR. PHILLIPS: In terms of what the charges are?

25 QUESTION: Yes, sir. Are you saying that

1 despite this commitment that -- that it would not -- it
2 would not violate the arrangement that the SEC approved to
3 sell above cost, so long as it's -- it's not above market
4 price?

5 MR. PHILLIPS: I would have guessed that it
6 might have been a risky venture, frankly, to try that. On
7 the other hand, rule 92 states unmistakably that you are
8 supposed to, that you have a market basis. And therefore
9 I think they could have at least gone to the SEC and said
10 despite these recitals in the order what we really want to
11 do is to be able to sell it at market price, and be able
12 to do that. I think they are still free to go to the SEC
13 and seek that kind of approval.

14 QUESTION: If cost means market, I don't -- I
15 don't even know how we can communicate anymore.

16 MR. PHILLIPS: Well, I'm not the one who says
17 cost means market. The SEC has since the first day said
18 cost means market, or at least the restriction based on
19 cost in section 13(b) is fully satisfied by a market price
20 standard within rule 92.

21 QUESTION: But that makes no sense at all in
22 terms of ordinary English usage.

23 MR. PHILLIPS: Well what does -- but see, the
24 reason for that is that section 13(b) doesn't say things
25 have to follow at cost. What section 13(b) says is you

1 cannot have an interaffiliate contract, period, unless you
2 satisfy certain requirements of the SEC. And one of those
3 requirements is language that says at cost economically
4 and efficiently allocated among the various parties. So
5 it is not a strict at-cost standard such that Congress
6 said in 13(b) this is how you have to operate in terms of
7 interaffiliate contracts. It's a delegation of authority
8 to the Securities Exchange Commission, and it has
9 exercised its authority in a way that in no way undermines
10 what went on here.

11 I think it's important to step back for a
12 second, because the truth is whatever the SEC has said
13 about how Ohio Power and the Southern Ohio Coal Companies
14 should entertain the idea of selling the coal between
15 themselves, that is nevertheless fundamentally different
16 from the question of how much the Ohio Power Company can
17 charge its rate payers. And that is really the essence of
18 what the issue is in this case under section 318.

19 The question here is is there a conflict between
20 those two provisions. And the reason we need to get to
21 that analysis is because I think we can all agree, or
22 should all at least agree that the D.C. Circuit erred in
23 its construction of section 318, which says that simply
24 because this is a matter within the jurisdiction of the
25 SEC under section 13(b), that for that reason alone FERC

1 is ousted of its important rate-making authority over a
2 component of cost that represents essentially 50 percent
3 of the rates that get charged to the petitioners in this
4 case.

5 What the -- what we know from both the SEC and
6 the Federal Energy Regulatory Commission is that they are
7 in complete agreement with the petitioners that the court
8 of appeals erred by over broadly construing the
9 restrictions on section -- in section 318.

10 QUESTION: Mr. Phillips, I take it that the
11 court below thought that the term "subject matter" could
12 be interpreted broadly, and do you think that the court
13 below made at least a reasonable construction of the
14 statute, a possible construction of the statute, so that
15 we get into a deference question? Is -- is their
16 interpretation a reasonable one?

17 MR. PHILLIPS: I think if you take the
18 combination of the statutory language, the structure of
19 the act, and the regulatory history under the act it is
20 not a reasonable construction of the statute, because --
21 and also it represents an incredibly malleable
22 interpretation of the term "subject matter."

23 And to a certain extent both the FERC and the
24 court of appeals, I think, and certainly Ohio Power, is
25 subject to some criticism for their handling of what the

1 term "subject matter" means. The court of appeals
2 criticized FERC for saying, well, this is rate making, and
3 therefore -- and the SEC doesn't engage in rate making and
4 therefore it must be a different subject matter. I think
5 that is an overbroad analysis of the question. I think
6 that there are certain -- it is certainly possible that
7 the SEC could enter an order that might affect rate making
8 directly by a requirement that could trigger section 318.

9 On the other hand, it certainly doesn't follow
10 what Ohio Power argues here, which is to say we all agree
11 on what the subject matter here is. It's the
12 interaffiliate coal transaction, and therefore we have
13 separate requirements regarding that.

14 The point here is that there is no obvious
15 definition of the term "subject matter." So what you need
16 to do is step back and see what is it you are trying to
17 get at under the statute by that language. And what you
18 are trying to get at by that language is you have one
19 requirement imposed by one agency, another requirement
20 imposed by a separate agency. They must be on the same
21 person and the same subject matter. And the consequence
22 is that only one requirement is then ousted. I take that
23 to be precisely the language of conflict.

24 QUESTION: How -- how do you define the phrase
25 "any subject matter" in section 318?

1 MR. PHILLIPS: I would say that it would not
2 restrict the scope of the possible conflicts to the
3 identified subject matters that are placed within that
4 provision regarding securities issuances.

5 QUESTION: You have given me a possible
6 application. How do you define it?

7 MR. PHILLIPS: Well, I don't think you can
8 define subject matter in the abstract, and the SEC and
9 FERC agree with that. They -- they frankly admit that
10 subject matter is not a term that you can simply say this
11 is what it means. Presumably, what I think it means is
12 any situation where both -- where both agencies impose
13 irreconcilable obligations. Because when you have got
14 irreconcilable obligations imposed, it is clear then that
15 they are involved in the same subject matter by
16 definition. And the reason why you do it that way --

17 QUESTION: That's an extremely narrow
18 definition.

19 MR. PHILLIPS: But that's -- the reason it's a
20 narrow definition is that that is the approach that best
21 effectuates Congress' purpose. Congress did not intend
22 for this to be a situation where the FERC and the SEC
23 would continue to collide with each other. What the
24 Congress intended was that they would largely operate in
25 their respective spheres, and there would be very few

1 conflicts. And our interpretation directly promotes that
2 purpose, and thereby ensures that public utility holding
3 companies are in all circumstances subject to direct and
4 comprehensive regulation by at least one agency.

5 QUESTION: What was the purpose of the SEC's
6 approving -- approving these contracts?

7 MR. PHILLIPS: I want to make it clear, Justice
8 Scalia, they did not approve any contracts. What they
9 approved were requests to enter into securities
10 transactions. And the reason that they approved those
11 securities transactions was because they thought that Ohio
12 Power engaged -- would be well served by having access to
13 coal, by having ready access to coal through an affiliate.

14 QUESTION: Well, don't you -- let's turn to
15 section 13(b). It says or otherwise into or take any step
16 in the performance of any service, sales, or construction
17 contract by which that company undertakes to perform
18 services or construction work for or sell goods to any
19 associate company. You are saying there was never any
20 approval of that?

21 MR. PHILLIPS: No, they never -- they were never
22 required to bring the contracts to the SEC. They have
23 never been submitted to them, and they have never been
24 approved by the SEC. The orders under review are the
25 orders that are cited by Ohio Power, are all securities

1 transactions that have been approved, that contain some
2 recitals about other contracts. But the specific contract
3 under which Ohio Power and the Southern Ohio Coal Company
4 operate are not at issue here, or have not been approved
5 by the SEC at least.

6 If the Court has no questions I will reserve the
7 balance of my time for rebuttal.

8 QUESTION: Very well, Mr. Phillips.

9 Mr. Wallace.

10 ORAL ARGUMENT OF LAWRENCE G. WALLACE

11 AS FEDERAL RESPONDENT IN SUPPORT OF THE PETITIONERS

12 MR. WALLACE: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 The question, the statutory question before the
15 Court involves the proper reconciliation of two different
16 levels of overlap and duplication. On one level there is
17 the problem of the imposition of duplicative and possibly
18 conflicting requirements on particular regulated entities.
19 But on the second level, there is the problem of the
20 extent to which the SEC is to be called upon to provide
21 the full panoply of rate regulatory functions and
22 expertise for holding company affiliates that FERC
23 otherwise provides if those functions are to be provided
24 at all in the context of holding company affiliates.

25 And the basic concern of the two Federal

1 agencies before the Court today is that the court of
2 appeals has interpreted section 318 of the Federal Power
3 Act in a manner that goes too far in eliminating overlap
4 and the mere possibility of conflict on the first level.
5 And the necessary effect of that interpretation is to
6 require impractical duplication of mission by the SEC and
7 FERC on the second level, because FERC will be disabled -
8 -

9 QUESTION: Mr. Wallace, the thrust of the power
10 company's argument was that the SEC orders were either not
11 enforceable, or that they didn't add a cost requirement.
12 Do you agree with the entire argument that was made by the
13 power company on this point?

14 MR. WALLACE: I don't -- I -- I can't say that I
15 agree with the entire argument. I agree that the argument
16 is a possible outcome. Those orders have not to this
17 point been interpreted by either the SEC or any court, and
18 --

19 QUESTION: You did take the position that the
20 power company can ignore the three orders of the SEC on
21 sales above -- sales at cost?

22 MR. WALLACE: The orders don't speak to sales as
23 such. They -- they approve the securities transactions.
24 The orders all appear in full in the joint appendix,
25 beginning at page 76, the series of four orders. And if

1 you look at them you will see that they consist of a
2 descriptive recitation of the application for the
3 securities transaction, which includes in one case the
4 words that the sales will be at cost, and in the others at
5 no more than cost.

6 QUESTION: So they are describing the contracts
7 as part of the representations on which the approval of
8 the financing transaction is based.

9 MR. WALLACE: Well, the anticipated future
10 contracts are being described in this recitation.

11 QUESTION: Oh, you don't consider that --

12 MR. WALLACE: But they --

13 QUESTION: -- a commitment. You're saying they
14 are just being described.

15 MR. WALLACE: Well, that's one possible reading
16 of them. This is what requires interpretation of what was
17 meant by then the paragraph at the end in which the SEC
18 says that these applications are approved, after reciting
19 the terms of the application.

20 QUESTION: So would you have any objection if we
21 wrote an opinion saying that this is just advisory
22 language and that the power company is not bound by them
23 in any respect?

24 MR. WALLACE: Well, as of these SEC orders,
25 because of its, in our view, misinterpretation of section

1 318 of the Federal Power Act on which it based its entire
2 decision.

3 QUESTION: Well, can't we discuss the case as if
4 this is a binding requirement? I -- because I take it
5 that your position is that you still prevail.

6 MR. WALLACE: Our position would be that we
7 would still prevail. These -- the question is how should
8 these orders be read in light of the two SEC rules that
9 are relevant, when the orders themselves did not refer to
10 section 13(b) or purport to be exercising the SEC's
11 authority under section 13(b) to govern and regulate
12 transactions between affiliated companies. I mean, it
13 would be possible to read the orders as merely a
14 prediction of how the application of rule 92 would result
15 in these sales. There are various contentions that could
16 be made about the reading of these orders.

17 The Commission has not to this date had occasion
18 to take a position on what these orders mean. The
19 Commission did not participate in the court of appeals or
20 before FERC in this case. Its first participation was in
21 the amicus brief filed in this Court, and it has not
22 addressed the question of how these orders should be
23 construed.

24 QUESTION: Well, has FERC taken a position as to
25 the meaning of "subject matter" in the statute?

1 MR. WALLACE: Well, FERC based much of its
2 decision on the notion that rate regulation is not the
3 same subject matter as what the SEC deals with in
4 prescribing the internal accounting measures to be taken
5 within a group of affiliates.

6 QUESTION: Was this a position taken by FERC in
7 a brief in an adjudicatory matter, I take it?

8 MR. WALLACE: In the court of appeals.

9 QUESTION: Does Chevron deference apply to such
10 matters, or does Chevron deference just apply to rule
11 making?

12 MR. WALLACE: No, Chevron deference applies to
13 interpretation of statutory provisions that an agency
14 administers.

15 QUESTION: This was a position taken in a rate
16 proceeding, wasn't it, that they would not allow the pass-
17 through of costs?

18 MR. WALLACE: That they would allow the pass-
19 through of costs only to the extent that they would be
20 passed through by the market criteria. They -- they used
21 a market criteria --

22 QUESTION: (Inaudible) by the SEC's orders.

23 MR. WALLACE: That is correct. That is correct.
24 In this Court both agencies agree that the proper
25 interpretation of section 318 is that FERC must yield to

1 the SEC when otherwise they -- the two agencies would be
2 imposing conflicting obligations. And that that is what
3 gives content to whether they are imposing requirements
4 with respect to the same subject matter.

5 QUESTION: And that we held that Chevron
6 deference is to be given to agency positions taken in the
7 course of litigation in an adjudicated matter, not rule
8 making.

9 MR. WALLACE: Well, yes, this is the kind of
10 thing that's -- that's has been --

11 QUESTION: Is that Cardoza Fonseca -- what is
12 our holding? Do you have authority for that?

13 MR. WALLACE: Well, I am trying to remember the
14 precise circumstances in which the Chevron cases came up,
15 but I --

16 QUESTION: They were rule making.

17 MR. WALLACE: I don't believe there was rule
18 making involved in CFTC against Schor, if I remember
19 correctly. I do think some of the others involved rule
20 making. I would have to look back at the cases.

21 QUESTION: We constantly defer to the NLRB, and
22 it hardly in its whole history has issued a rule.

23 MR. WALLACE: Well, as a matter of fact, there
24 is a case before the Court this term which is the first -
25 - that's quite correct, Mr. Justice, which is the first

1 rule making proceeding that the NLRB has issued. And
2 Chevron deference has been applied a number of times --

3 QUESTION: I think it's the first one to get
4 here. I think it is actually the second, but that's all
5 right.

6 MR. WALLACE: In any event, none of the Court's
7 previous cases in which they deferred to interpretations,
8 such as NLRB against Transportation Management, involved
9 rule making. That's -- that's a prime example of
10 precisely that point.

11 QUESTION: Mr. Wallace, whether you call it
12 Chevron deference, or whatever you call it, is it correct
13 that both of the Federal agencies feel there is no
14 conflict between their two positions?

15 MR. WALLACE: That --

16 QUESTION: As they read the statute, the two
17 orders can stand -- the FERC order can stand with the SEC
18 order.

19 MR. WALLACE: The most I can say is that the SEC
20 agrees that the no-conflict criterion is the proper
21 criterion, but has not yet taken a position on whether
22 there is in fact a conflict between the FERC order and the
23 orders that the SEC issued in this case.

24 QUESTION: Do you think we should remand?

25 MR. WALLACE: That is our position.

1 QUESTION: So that is the position of both of
2 the agencies?

3 MR. WALLACE: It's the position of both of the
4 agencies, Mr. Justice.

5 QUESTION: To which agency should we remand?

6 MR. WALLACE: Remand to the court of appeals --

7 QUESTION: I see.

8 MR. WALLACE: -- for a determination of the
9 meaning of the SEC orders.

10 QUESTION: Thank you, Mr. Wallace.

11 Mr. Berlin.

12 ORAL ARGUMENT OF EDWARD BERLIN

13 ON BEHALF OF THE PRIVATE RESPONDENTS

14 MR. BERLIN: Mr. Chief Justice, and may it
15 please the Court:

16 This case is indeed a case of statutory
17 construction, but before I get to the statute, which has
18 been avoided thus far this morning, I would like to take
19 up two questions that the Court asked.

20 Justice Kennedy, Chevron applies to the reasoned
21 decision making of the agency. It does not apply, and
22 this Court has never applied it, to the reformulation of
23 that position by appellant counsel.

24 And Justice Stevens, I respectfully suggest that
25 the SEC does not believe that the orders are not in

1 conflict. The SEC joined in the brief before this Court,
2 but the only time the SEC has spoken to the conflict
3 question was when Sherman Shad of the SEC testified before
4 Congress in 1982 when he was urging an appeal of the
5 holding company act. And he pointed out that section 318
6 was there to prevent overlapping jurisdiction, and that in
7 point of fact when it comes to affiliate transactions the
8 SEC applies a different price standard than the FERC
9 applies to utilities subject to its jurisdiction. So the
10 only time the SEC had occasion to speak to the
11 compatibility of these different regulatory requirements
12 it disagreed with the representation that was offered a
13 few moments ago.

14 QUESTION: That wasn't speaking to the facts of
15 this case.

16 MR. BERLIN: It was speaking to the fact that --

17 QUESTION: The general problem.

18 MR. BERLIN: -- just a few months before,
19 Justice Stevens, the FERC, which itself from 1935 until
20 November 1981 applied a cost standard to affiliate
21 transactions, in November 1981 it decided to apply a
22 market standard.

23 QUESTION: Yes, but when it applied a cost
24 standard it was saying the price may not be above cost,
25 wasn't it?

1 MR. BERLIN: The price should be at cost. It
2 couldn't be below cost, because that would be confiscatory
3 --

4 QUESTION: It should be at cost even if cost was
5 higher than market.

6 MR. BERLIN: The FERC --

7 QUESTION: The FERC set the standard --

8 MR. BERLIN: The FERC had never introduced the
9 concept of market until November of 19 --

10 QUESTION: But one of the ironies of this case,
11 as I understand it, is the cost is higher than market. Is
12 that right?

13 MR. BERLIN: That is correct. That was --

14 QUESTION: And has the SEC addressed the
15 question what should be done in that kind of situation?

16 MR. BERLIN: It has -- it has not. It addressed
17 the fact that different principles were articulated as
18 governing.

19 QUESTION: So it hasn't addressed the precise
20 situation in this case.

21 MR. BERLIN: That is correct. But if I can, let
22 me get --

23 QUESTION: Excuse me, that's still on the books
24 that seems to address it?

25 MR. BERLIN: I'm sorry.

1 QUESTION: Does it not have a rule on the books
2 that seems to address the question?

3 MR. BERLIN: The SEC most certainly does have a
4 rule on the books. Its rule is that affiliate
5 transactions shall not be above cost except where the SEC
6 grants an exemption from the at-cost limitation.

7 This case, boiled down to its bare essentials,
8 is a case of statutory construction. Section --

9 QUESTION: Can I just go back to your
10 description?

11 MR. BERLIN: Certainly.

12 QUESTION: As you describe it, that position
13 would not be violated by the rate order in this case,
14 would it?

15 MR. BERLIN: It most certainly would.

16 QUESTION: How?

17 MR. BERLIN: The SEC applies a cost standard --

18 QUESTION: Unless, you said.

19 MR. BERLIN: -- unless it grants an exemption.
20 It has never, except for one instance in 1937 --

21 QUESTION: It shall not be above cost unless it
22 grants an exemption.

23 MR. BERLIN: It shall not be other than cost
24 unless it grants an exemption. Under the SEC's rules
25 there are two regimes, a cost regime and a market regime.

1 QUESTION: So that boils down to the question
2 whether when they specify cost they mean it as a direction
3 it must be at cost or that that is a ceiling.

4 MR. BERLIN: No, I don't -- I don't think so,
5 Justice Stevens. Let me -- let me tell you why. FERC --
6 I think it clear we should put this aside. Section 318
7 asks two questions. It asks first what is the subject
8 matter that each agency seeks to regulate, and has the SEC
9 imposed a requirement. There is no dispute, there can be
10 no dispute before you that the subject matter that each
11 agency seeks to regulate is in fact the same. The court
12 of appeals said that each agency is seeking to determine
13 the price that Ohio Power reasonably should have paid for
14 the coal that it purchased from its affiliate. That was
15 the essential holding of the FERC.

16 Yet before you no one seeks to justify, to
17 defend that subject matter rationale. It was the
18 essential rationale, Justice Stevens, of the FERC for a
19 very good reason. It would have made the FERC express
20 some confusion as to whether or not the SEC was imposing
21 cost in all places or only cost as a ceiling. I think, by
22 the way, that it was imposing cost in all cases, and I
23 will come back to that in a moment.

24 But what the FERC was saying, it said we assume
25 that it was cost as a ceiling, and it happened to be the

1 case that at the time the FERC issued its order, market
2 price was below cost. Hence it said there's no
3 irreconcilability.

4 But the FERC went on to explain the rationale of
5 its market decision, and it said very clearly, you can
6 find this on page 63a of the appendix to the petition, it
7 said under all rationale it is absolutely essential that
8 Ohio Power be able to charge market, irrespective of its
9 relationship to cost. That Ohio Power be required to
10 charge market even when it exceeds cost. That was the
11 essential underpinning of the FERC's holding.

12 So even if you believe that the SEC set cost
13 merely as a limit, it clearly is the case that FERC says
14 Ohio Power must be allowed, if it its rule is to have any
15 vitality, must be allowed to pierce that limit when market
16 exceeds cost.

17 QUESTION: That's a conflict rationale you are
18 describing, and that was not the rationale that was used
19 by the court below. I mean, you may well be right about
20 it, but -- and maybe those -- maybe the court of appeals
21 would agree with you.

22 MR. BERLIN: I believe it was the rationale,
23 Justice Scalia, used as a supplement by the court below.
24 But let me point out it was also not the rationale used by
25 the FERC, because it could not. The FERC recognized that

1 if it was allowing cost to gravitate to market, when cost
2 under the SEC's order was a limitation, it recognized that
3 there was an obvious irreconcilability. Ohio Power said
4 the effect of your pronouncement, FERC, and the SEC's
5 prescription is to constrain us to the lower of cost or
6 market. The FERC said no, you misconstrued. We are
7 allowing you to charge market in any case, because we are
8 dealing with a different subject matter.

9 QUESTION: Mr. Berlin, the orders that have --
10 we have been referred to entered by the SEC in this case
11 are somewhat ambiguous, it seems to me, as to just what
12 they are doing. What is the SEC's goal in regulating the
13 price paid by Ohio Power Company for captive coal?

14 MR. BERLIN: First, let me suggest that while
15 they could have been written a bit more clearly,
16 unquestionably the first order that initiated this whole
17 enterprise said it should be based on amount equal to
18 actual cost. And then the subsequent orders said it shall
19 not exceed cost --

20 QUESTION: Well, I think it's
21 a question to me whether the final paragraph of those
22 orders incorporates all the recitals. That is why I am
23 interested in getting an answer to the question that I
24 just asked you.

25 MR. BERLIN: I'm sorry, Chief Justice. Chief
Justice Rehnquist, I think it's very clear why 13(b) is in

1 the statute and why the SEC issued its orders under 13(b).
2 13(b) was put into the statute although Congress knew that
3 the FERC was to be the agency that ultimately was to
4 prescribe rates. In 13(b) Congress intended to affect how
5 rates were set. The whole purpose of 13(b) is to affect
6 the transfer price paid in an affiliate transaction.
7 13(b), I suggest to you very respectfully, is robbed of
8 all (inaudible) unless it is intended to affect rates.

9 QUESTION: But if I am sitting as a commissioner
10 of the SEC, this transaction comes in, Ohio Power is
11 talking about getting some securities, they recite that
12 they are going to pay so much for coal from a captive coal
13 company. What is the interest of the SEC in regulating
14 that particular transaction? Not the securities
15 transaction, but the price that Ohio -- Ohio Power is
16 paying to its captive company?

17 MR. BERLIN: Under the holding company act, you
18 cannot go forward with an affiliate transaction, wholly
19 apart from 13(b), without (inaudible) a whole host of
20 authorizations from the SEC.

21 QUESTION: Okay, but why is the SEC interested
22 in this particular price?

23 MR. BERLIN: The reason it is interested in this
24 particular price is because when the holding company act
25 was being considered by Congress, one of the evils that

1 was basic to congressional concern was the fact that it
2 was perceived that, as a consequence of interaffiliate
3 transactions, inflated prices were being passed along to
4 the utility purchaser within the holding company system.

5 Congress -- and this portion of legislative
6 history is conceded by everyone in this case -- Congress
7 was concerned about the effect on rates of affiliate
8 transactions, and it gave -- it made two basic policy
9 choices in the holding company act. It first gave
10 jurisdictional responsibility to deal with that concern to
11 the SEC. And then in a very unusual step it didn't think
12 to establish a broad regulatory standard. It said in
13 exercising that responsibility, SEC, we want you to apply
14 an at-cost standard.

15 I suggest to you that that was prescribed by
16 Congress precisely because it recognized that affiliate
17 transactions affect rates, and Congress wanted the SEC to
18 police them and to --

19 QUESTION: Yes, but Mr. Berlin, your description
20 suggests to me that they were concerned about the danger
21 the rates might be too high. There was no concern about
22 undercharging, was there? I mean, that's why it fits
23 right into the notion that this was intended to be a
24 ceiling.

25 MR. BERLIN: I think not, Justice Stevens. As

1 the petitioners correctly point out in their brief, the
2 holding company act had two objectives. Clearly a
3 consumer protection --

4 QUESTION: The first one, insofar as you have
5 described it, fits exactly into what I just said, I
6 believe.

7 MR. BERLIN: It also had an investment
8 protection objective. And if, if it is in fact the case
9 that as the result of the collision of these two
10 requirements Ohio Power Company will be constrained to the
11 lower of cost or market, then I would suggest to you that
12 the investors that petitioners correctly point out were
13 also a concern of Congress, are left exceedingly naked.

14 QUESTION: In other words, the purpose of this
15 order was to protect the stockholders of the parent
16 company?

17 MR. BERLIN: The purpose of this order was to
18 balance, was to balance the dual concern that Congress had
19 for both consumers and investors.

20 QUESTION: Investors in the sense of investors
21 in the company that owns all the affiliates?

22 MR. BERLIN: In the final -- in the final
23 analysis, Mr. Chief Justice --

24 QUESTION: Can you answer that question yes or
25 no?

1 MR. BERLIN: Yes, it was.

2 QUESTION: It was to protect the investors in
3 Ohio Power Company, which is the holding company.

4 MR. BERLIN: It was to protect both the
5 investors in Ohio Power Company (inaudible) American
6 Electric Power, and the consumers of the operating
7 utility, Ohio Power. The fact of the matter is that even
8 though the FERC may say that cost is X, it doesn't change
9 one iota the costs that are actually incurred by the
10 holding company. And if the X established by the FERC is
11 below the actual cost, then I suggest to you there is a
12 trapping of costs, and that trapping of costs
13 unnecessarily adversely impacts on investors.

14 And I further suggest to the Court that if in
15 fact as a product of this case affiliates of holding
16 companies are told that they are going to be constrained
17 to the lower of cost of market, which means that they only
18 have a potential for losing, and at best for holding
19 themselves even, you will not see holding companies go
20 into affiliate relationships --

21 QUESTION: Yes, but you're using the term cost,
22 you know, and this, as defined in this order the cost is
23 including all sorts of things, based ultimately on the
24 rate of return which is fixed by the rate-making body,
25 isn't it?

1 MR. BERLIN: That is correct, Justice.

2 QUESTION: The two are inevitably intertwined.

3 MR. BERLIN: That is correct, Justice Stevens,
4 and that (inaudible) the SEC has certainly used its
5 province, said that while we are going to specify and
6 police most of the costs, we are going to delegate to the
7 FERC, as it is permitted to do under 318, the
8 responsibility for setting the return. And interestingly,
9 what it said was the return on this transaction is to be
10 constricted by the regulated utility return, a concept --

11

12 QUESTION: It says will be no greater than the
13 return, which is language of ceiling.

14 MR. BERLIN: No greater than the return allowed
15 by the FERC. But that is an instance in which the SEC
16 recognized that it had to permit, that it had to open up
17 an area of jurisdiction if the FERC was to be allowed to
18 go forward, and it did so explicitly.

19 No matter how you view the SEC's order, Justice
20 Stevens, whether you view it as setting a cap or merely as
21 setting cost, that is cost, no more, no less, I think it's
22 the latter. Because I think that's what section 13(b) is
23 talking about. I think that is the only way you can
24 harmonize the interests of consumers and of rate payers.

25 QUESTION: 13(b) does refer, in fact, to both

1 investors or consumers.

2 MR. BERLIN: That is right.

3 QUESTION: It does say protect both investors
4 and consumers --

5 MR. BERLIN: That is correct.

6 QUESTION: -- which would seem to indicate that
7 you can neither be above cost nor below cost.

8 MR. BERLIN: I believe that is right, Justice.

9 QUESTION: And it does say such contracts shall
10 be performed economically and efficiently at cost, not at
11 no -- more than cost, but it says at cost.

12 MR. BERLIN: That is correct, Justice Scalia.

13 There was a question about the court of appeals'
14 dealing with this matter. I respectfully suggest that the
15 court of appeals paid total allegiance to section 318. It
16 followed the prescription of 318 precisely. It said what
17 is the subject matter that each agency is seeking to
18 regulate, and I think the subject matter is fairly clear.
19 It's the regulated activity.

20 That is what Congress was concerned about.
21 Congress wanted to allow these transactions to go forward,
22 and it recognized that if there was an inevitable clash of
23 two regulators dealing with the same subject matter, the
24 same regulated activity, frustration could take place. So
25 318 is intended to preclude that frustration.

1 QUESTION: It seems to me, Mr. Berlin, you come
2 in talking field preemption, as you -- as you are now, but
3 you ultimately end up defining the field by finding a
4 conflict. And I think that is probably right, because
5 that is the only way I could possibly define the field.
6 If you say that they are both dealing with the same
7 subject, you know, anything the FC -- SEC promulgates in
8 this field deals with holding companies, right? And any
9 order of the, of FERC dealing with holding companies would
10 deal with the same subject, if you want to define it that
11 broadly. How do you decide how broadly you define the
12 subject?

13 MR. BERLIN: Justice Scalia, if I have given the
14 impression that I believe field preemption is appropriate,
15 then I have misspoken. I do not believe this is a field
16 preemption case. My reaction was to petitioners'
17 quotation of physical impossibility cases. I do not
18 believe this is a field preemption situation --

19 QUESTION: Okay, you think it's a conflict case.

20 MR. BERLIN: No. I believe it's a question of
21 how one defines the field. If you define field preemption
22 to mean that once the SEC has spoken it has occupied the
23 field to the total exclusion of the FERC, that is not what
24 I am saying. That is not what 318 says.

25 QUESTION: That is what I mean by field

1 preemption.

2 MR. BERLIN: What I mean is what I think flows
3 out of 318, that if with respect to a subject matter the
4 SEC has imposed a requirement, then FERC may not impose a
5 requirement with respect to that subject matter. Now the
6 issue, of course --

7 QUESTION: Whether or not -- whether or not it
8 conflicts?

9 MR. BERLIN: Whether or not it conflicts,
10 although I believe in this case, as the court of appeals
11 went on to discuss, the conflict is inevitable.

12 QUESTION: Well, but that's field preemption.
13 That's field preemption, now you're back to --

14 MR. BERLIN: I think -- I believe (inaudible) a
15 situation where the FERC wrote the rule that it could
16 supplement the requirement imposed with respect to a
17 particular regulated activity that would not, in its
18 judgment, result in conflict.

19 QUESTION: And you'd say that's no good?

20 MR. BERLIN: And I would say that that is no
21 good under 318. But you do not have to reach that issue
22 in this case.

23 QUESTION: How do you determine the field? How
24 do you determine what the field is? Why isn't the field
25 all holding, you know, all holding -- regulating holding

1 company activities?

2 MR. BERLIN: If you look at the legislative
3 history, what the legislative history tells me is Congress
4 recognized that it was setting up two regulatory regimes,
5 each of which were going to speak to the same companies.
6 And it recognized that if it did not do something to
7 sharply divide jurisdiction, that you could have a
8 stalemate.

9 QUESTION: Yes. So the SEC issues rules
10 governing bookkeeping. It says you shall keep books in
11 this fashion. It is very clearly addressed to keeping the
12 corporate books. FERC comes up with a requirement and
13 says well, in order for us to do our job you have to, in
14 addition, do these things in -- in your books. Now is
15 that the same field? Supplemental requirement. It goes
16 beyond what the SEC said. Why doesn't your theory say,
17 well, this is the same field? Does it?

18 MR. BERLIN: But for the fact that your example
19 is covered elsewhere in the statute, and the issue of
20 accounting is one where the FERC is given --

21 QUESTION: Make believe it's not. You know,
22 don't make me make up another one.

23 MR. BERLIN: If you can construct a situation
24 where the SE -- where the FERC can supplement, without
25 creating conflict, then I would suggest to you that yes,

1 there would be supremacy in favor of the SEC.

2 And I come to that because I honestly believe
3 from looking at the legislative history that Congress
4 recognized in 1935 that while it was imposing a regulatory
5 regime, there could well be instances where too much
6 regulation would stifle the objectives of Congress.
7 Therefore it said where the subject matter is the same and
8 the SEC has spoken, the FERC should not. I believe that
9 subject matter is most clearly and easily understood to be
10 a regulated activity.

11 QUESTION: But the SEC comes in and says look
12 it, you have this all wrong -- or FERC comes in and says
13 you have this all wrong. The subject matter is not
14 bookkeeping. I mean, the SEC just said you had
15 bookkeeping rules 1, 2, 3, 4, 5. That was the subject
16 matter, rules 1 to 5. We have totally different rules, 6
17 to 10. Now they both pertain to bookkeeping, but they
18 also both pertain to holding companies. And you certainly
19 wouldn't say that simply because the SEC can do something
20 that pertains to the subject matter of holding companies
21 we can't do anything at all.

22 What I am saying, Mr. Berlin, is I think when it
23 comes down to it you are defining the nature of the
24 subject matter by looking for a conflict. You have to go
25 down the levels of generality until you find a conflict,

1 and you say ah ha, where there is a conflict, now I know
2 what the subject matter is.

3 MR. BERLIN: It probably is the case, and
4 perhaps I am biting off more than I need chew, that
5 anytime the SEC, the FERC imposes a requirement that is
6 different than the requirement imposed by the SEC, there
7 will be a conflict. And indeed, if the FERC imposes
8 exactly the same requirement, I am not sure anyone would
9 care.

10 I believe that if you look at section 318,
11 Justice Scalia, you will not find any support for the
12 notion that it is addressing conflicts of requirements.
13 Direct conflict does not appear in the text of 318. It
14 appears in the heading, but the heading talks about
15 conflicts of jurisdiction. And if you look back at the
16 legislative history you find that what Congress was
17 concerned about was overlapping jurisdiction. It did not
18 want to frustrate actions by regulated entities by having
19 too many regulators dealing with the same activity.

20 But I hasten to add that in this case the Court
21 need not go that far in reading section 318, because no
22 matter how you construe the SEC's order, whether you
23 construe it as establishing that the price must always be
24 at cost and no more and no less, or simply as a cost
25 ceiling, one thing is clear and has never been suggested

1 to the contrary. The SEC has not imposed a market
2 standard. It has never imposed a market standard on any
3 affiliate transaction since a single case in 1937.

4 QUESTION: Yes, but I don't understand how that
5 advances the argument, because if you treat it as a
6 ceiling that would mean a market that is lower than cost
7 would be permissible. So there would be no conflict.

8 MR. BERLIN: I think not for two reasons,
9 Justice Stevens. First, the essential rationale of the
10 FERC's holding was that we must allow Ohio Power to charge
11 market, even when market is above cost. That rationale
12 was offered in a response to a contention by Ohio Power
13 that if it were constrained to the lower of cost or market
14 --

15 QUESTION: Well, there might be a conflict which
16 would be present when market exceeded cost.

17 MR. BERLIN: As in fact it did on at least two
18 occasions before the FERC issued its final order in this
19 case. And we also must keep in mind, Justice Stevens,
20 that what the FERC did --

21 QUESTION: Are those two occasions described in
22 the findings? I didn't --

23 MR. BERLIN: No. They are referenced in a
24 footnote to our brief. What the FERC did, Justice
25 Stevens, in carrying out its rationale was to direct Ohio

1 Power Company to modify its fuel adjustment clause to
2 provide for the automatic pass-through of market prices,
3 irrespective of their relationship to cost. And in fact
4 in the Public Service of New Mexico case, where the FERC
5 in November of 1981 abandoned its adherence to cost-based
6 regulation and first adopted a market approach, in fact in
7 that case the FERC was allowing market prices in excess of
8 cost.

9 QUESTION: Has the SEC ever objected to that?

10 MR. BERLIN: The SEC in fact has stated on two
11 occasions -- the staff of the SEC, in filing comments in
12 another affiliate transaction case before the FERC, where
13 the staff recommended --

14 QUESTION: It would seem to me, just to jump
15 ahead a little bit, that if that situation developed and
16 the SEC thought it violated the basic order, they could
17 easily go in and say to, say there is a conflict here, in
18 the case of conflict our order prevails. And they would
19 win hands down, if they really felt that that was a
20 violation of the order.

21 MR. BERLIN: Well, the question, Justice
22 Stevens, is whether the FERC has a veto simply because it
23 has the opportunity to speak last.

24 QUESTION: You mean the SEC has the opportunity?

25 MR. BERLIN: Whether the FERC in effect can put

1 the SEC to the burden of justifying its decision.

2 QUESTION: Of enforcing its orders. That's what
3 it amounts to. You would certainly be able to call it to
4 the attention of the SEC right away. It would be a very
5 simple situation.

6 MR. BERLIN: I suggest one that has to also get
7 back to 13(b), and to --

8 QUESTION: Well, but if it means just we're
9 concerned about conflicts, it seems to me you are
10 adequately protected by your resort to go to the SEC and
11 say hey look, they are making us pay market and that is in
12 excess of cost.

13 MR. BERLIN: I think not, Justice Stevens --

14 QUESTION: And then the SEC could come back and
15 say in order to protect the stockholders of the parent
16 company we are going to insist on our order being obeyed.

17 MR. BERLIN: I think not, Justice Stevens.
18 There is a conflict even when market is below cost,
19 because costs are tracked. Ohio Power Company --

20 QUESTION: Excuse me, isn't a more direct answer
21 to that question simply that the SEC does not have the
22 option of enforcing its orders or not? If there is an
23 order on the book which you are entitled to have enforced,
24 if the SEC chooses not to enforce it you should be able to
25 come into a court and get it enforced. Isn't that right?

1 MR. BERLIN: That's absolutely correct, Justice
2 Scalia. And we do not have the option to do anything
3 other than what the SEC prescribed when it gave us the
4 authorization to enter into these transactions. It is in
5 fact the case that the SEC did not explicitly approve the
6 contract, but it set out the requirements that we were
7 obliged and directed to uphold in the contract.

8 QUESTION: What is the enforcement consequence
9 of a violation?

10 MR. BERLIN: Presumably the SEC can bring
11 enforcement action against Ohio Power and Southern Ohio
12 for violating the only condition upon which the SEC
13 determined that it was appropriate to allow this affiliate
14 transaction to go forward.

15 QUESTION: The mandatory injunction to reconform
16 your pricing scheme, or divestiture of shares? I mean,
17 how --

18 MR. BERLIN: I think it would be the former,
19 Justice Kennedy.

20 You should also keep in mind that under the
21 holding company act Congress was not desirous of
22 stimulating holding companies' entries into unregulated
23 activities. It was very cautious. It provided that you
24 can only engage in those activities that are reasonably
25 necessary, economically necessary to your utility

1 operations, that it mandated the SEC to enforce that.

2 I want to say one final word about regulatory
3 gap, because although it hasn't been mentioned today, much
4 has been made of it in the briefs. There is a parade of
5 (inaudible) suggested to you that if you allow the SEC
6 order to stand, if you over -- it you allow -- if you
7 overturn the FERC's order, allow the court of appeals to
8 stand, that there will be a regulatory gap. I
9 respectfully suggest that under the very proper reading of
10 219 by the court of appeals, there can be no regulatory
11 gap. If the SEC has not imposed a requirement with
12 respect to a subject matter, it itself has not filled the
13 regulatory gap --

14 QUESTION: Mr. Berlin, your time has expired.
15 Thank you.

16 MR. BERLIN: Thank you, Mr. Chief Justice.

17 QUESTION: Mr. Phillips, you have 3 minutes
18 remaining.

19 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

20 ON BEHALF OF THE PETITIONERS

21 MR. PHILLIPS: Thank you, Mr. Chief Justice. I
22 believe in evaluating the case as it comes to the Court at
23 this point it is important to keep in mind initially that
24 the FERC here is attempting to protect the consumers by
25 the rates that it allows to be charged and the charges

1 that it allows Ohio Power to pass through. And that that
2 exercise of authority should only be set aside in the most
3 unmistakable -- if supported by the most unmistakable
4 terms.

5 We turn first to section 13(b). It is difficult
6 for me to tell whether Ohio Power believes section 13(b)
7 ousts the FERC of its authority, but the SEC has clearly
8 said that it does not, and the SEC's rule clearly says
9 that it does not. And notwithstanding Mr. Berlin's
10 comment to the contrary, rule 92 does not set up an
11 exemption. Rule 92, if you read the SEC and FERC's -- or,
12 excuse me, the FERC's reply brief, says that the price is
13 "not limited to cost" when you are talking about
14 interaffiliate sales. So rule 92 provides no mechanism
15 for doing away with the FERC's effort here.

16 So the only question then are these four orders.
17 There has been a lot of discussion as to what those four
18 orders mean, but I submit to you the Court is not obliged
19 to have to worry about the specific meaning of those four
20 orders, because I am prepared to give Mr. Berlin the
21 fuller -- the fullest reading of those orders, which is
22 really what they want here, is for Ohio Power to pay a
23 certain price for the coal that it purchases from the
24 Southern Ohio Coal Company.

25 Even given that interpretation, which is the

1 broadest available and the broadest they've asserted, it
2 still remains available for the Federal Energy Regulatory
3 Commission to step in and say but we do not permit you to
4 charge that amount in the rates that you set for
5 electricity. Why? Because these are not irreconcilable
6 conflicts in the obligations of the Ohio Power Company
7 under these circumstances.

8 QUESTION: Well, it wasn't irreconcilable
9 conflict in Nantahala either, but one doesn't -- just as
10 one doesn't interpret a Federal-State relationship to
11 allow the trapping of costs, one should not interpret two
12 Federal agency relationships to trap costs.

13 Now as I understand it, the holding company
14 acquired this asset with an understanding under section
15 13(b) of the Public Utility Holding Company that the SEC
16 would -- would make sure that the contracts are performed
17 at cost.

18 MR. PHILLIPS: But that says nothing about what
19 the FERC was going to ultimately do with respect to those.
20 And again here I have to go back to the argument that
21 somehow because of the FERC order that that has in some
22 way frustrated the SEC's purpose.

23 QUESTION: I understand.

24 MR. PHILLIPS: But that is not the appropriate
25 conflict analysis, Justice --

1 QUESTION: You do not think that it was
2 envisioned by the Congress that enacted that provision
3 that you be able to get that money back when you sold it?

4 MR. PHILLIPS: Not if it turns out that it would
5 require the rates to be set at unjust and unreasonable
6 levels, no, Your Honor, I don't believe Congress would
7 have intended that. Mr. Berlin complains that this was a
8 statute not designed to provide too much regulation. I
9 submit to you it's a statute designed to provide just the
10 right amount.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Phillips.

13 The case is submitted.

14 (Whereupon, at 11:06 a.m., the case in the
15 above-entitled matter was submitted.)
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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: 89-1283

Arcadia, Ohio, et al., Petitioners -v- Ohio Power Company, et al

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

BY

Raymond H. Hartel

(REPORTER)

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