

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MOBIL OIL EXPLORATION & PRODUCING
SOUTHEAST, INC., ET AL., Petitioners v.
UNITED DISTRIBUTION COMPANIES, ET AL.; and
FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner v. UNITED DISTRIBUTION COMPANIES
ET AL.

CASE NO: 89-1452 and 89-1453

PLACE: Washington, D.C.

DATE: November 5, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MOBIL OIL EXPLORATION & PRODUC- :

4 ING SOUTHEAST, INC., ET AL., :

5 Petitioners :

6 v. : No. 89-1452

7 UNITED DISTRIBUTION COMPANIES, :

8 ET AL.; :

9 and :

10 FEDERAL ENERGY REGULATORY :

11 COMMISSION, :

12 Petitioner :

13 v. : No. 89-1453

14 UNITED DISTRIBUTION COMPANIES, :

15 ET AL. :

16 - - - - - X

17 Washington, D.C.

18 Monday, November 5, 1990

19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States at
21 10:05 a.m.

22 APPEARANCES:

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25 behalf of the Federal Petitioner.

1 REX E. LEE, ESQ., Washington, D.C.; on behalf of the
2 private Petitioners.

3 ROBERTA LEE HALLADAY, ESQ., Washington, D.C.; on behalf of
4 the Respondents.

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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. 89-1452, Mobil Oil v. United Distribution Companies, and No. 89-1453, Federal Energy Regulatory Commission v. United Distribution Companies.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE FEDERAL PETITIONER

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

The court of appeals in this case struck down a rule adopted by the Federal Energy Regulatory Commission in 1986 to eliminate the substantial market distortions and inequities among consumers that resulted from the prior system of vintage pricing for old gas. Old natural gas is gas that was dedicated to interstate commerce prior to the enactment of the Natural Gas Policy Act of 1978.

Although the regulatory history and market context of this case may be somewhat complex, the case boils down to straightforward questions of statutory construction. On each we submit the text of the act clearly authorizes the Commission to do what it did, but if there were any question on that, the Commission's actions, in our view, rest on a reasonable interpretation

1 of the act.

2 Let me identify at the outset the two issues
3 that are presented here, principal issues. First is what
4 I will refer to as the pricing issue. Sections 104 and
5 106 of the Natural Gas Policy Act authorize the Commission
6 by rule or order to raise the ceiling price of any gas or
7 any category of gas, as long as the Commission finds that
8 the higher price is "just and reasonable within the
9 meaning of the Natural Gas Act." The court of appeals
10 held that this language did not authorize the Commission
11 to depart from the prior vintage pricing system for old
12 gas, but instead permitted the Commission only to grant
13 special relief from applicable ceilings where it believed
14 warranted..

15 The court ignored the plain meaning of the
16 statutory text, which contemplates price increases of
17 general applicability. But beyond that, it also ignored
18 the broad and flexible interpretation given to the just
19 and reasonable standard by the Commission, by this Court
20 in its classic rate making cases, Hope Natural Gas,
21 Permian Basin, and Mobil Oil, and by the lower courts
22 immediately prior to the adoption of the Natural Gas
23 Policy Act and the incorporation of that language into the
24 act.

25 The second issue concerns the abandonment of

1 service under Order 451. The court of appeals found fault
2 with the provision in Order 451 that permits a producer of
3 gas to abandon its sales to a pipeline or other purchaser
4 where the purchaser is unwilling, after negotiations, to
5 pay a higher price for old gas allowed by the order.

6 QUESTION: Mr. Kneedler, may I ask you about the
7 abandonment question --

8 MR. KNEEDLER: Yes.

9 QUESTION: -- that we have in front of us. Is
10 it possible that an individual plaintiff could come in and
11 challenge an abandonment and assert specific grounds and
12 get a hearing? Do we know whether that is possible?

13 MR. KNEEDLER: Well, there -- the Commission's
14 regulations specific -- the answer is yes. The
15 Commission's regulations specifically provide for the
16 filing of complaints, and if a purchaser objected to a
17 proposed abandonment on the grounds that the standards
18 prescribed in Order 451 have not been met in the
19 particular case, it could file a complaint and seek an
20 adjudication of that.

21 QUESTION: It wasn't clear to me from your brief
22 whether that is the position that FERC was taking.

23 MR. KNEEDLER: No, that is, that is clearly our
24 position. Let me, let me just explain the setting for
25 that.

1 QUESTION: Yes.

2 MR. KNEEDLER: What the Commission -- the
3 standard for abandonment under section 7(b) of the Natural
4 Gas Act, the Commission may authorize abandonment if it
5 concludes that the present or future public convenience or
6 necessity warrants the abandonment. And it also says
7 after due hearing. And what the Commission concluded here
8 that it was, that upon the occurrence of certain
9 conditions subsequent, a producer would be authorized to
10 abandon the gas service. So what the Commission did was
11 give particular content to the general statutory standard
12 of public convenience and necessity in Order 451 itself.

13 And this Court has held in numerous cases that
14 an agency, and particularly the Commission's predecessor,
15 the FPC, may do that under the Natural Gas Act. And then,
16 upon the occurrence of those, satisfaction of those
17 standards, the producer is permitted to abandon the sale
18 of gas. There is, the pipeline has no right to an
19 individualized hearing on the general standards that were
20 promulgated by rule, because the pipelines and others had
21 an opportunity to participate in the hearing afforded by
22 that rule making. What could be challenged in a complaint
23 is whether the producer satisfied those conditions.

24 Now there has also been a question raised as to
25 whether there might be an opportunity for waiver of the

1 general standards under the rule, and that is a procedure
2 that has been referred to in several of this Court's cases
3 discussing general stan -- abandonment or similar, not
4 abandonment, but similar generalized determinations under
5 which parties may obtain rights. And the Court has
6 discussed those in several other cases, Storer and FPC v.
7 Texaco.

8 But -- in WNCN, for example, the Court noted
9 that it had not resolved the question of whether a
10 provision for waiver would be necessary. And in fact it
11 doesn't make a lot of sense in the context of this case,
12 because what triggers the opportunity for abandonment
13 under this, under Order 451, is the purchaser's refusal to
14 pay the rate requested by the pipe, by the producer up to
15 the new ceiling prescribed by Order 451. In other words,
16 what triggers abandonment under this order is a
17 purchaser's refusal to pay a rate of general applicability
18 that the Commission has prescribed. The rates are, by
19 their nature, items of general applicability that do not
20 require, at least short of constitutional insufficiency,
21 the opportunity for waivers or special exceptions, as
22 under Permian Basin. So we don't believe that, that the
23 nature, intrinsic nature of Order 451 and the pricing
24 schedule, or ceiling set in place by that requires an
25 opportunity for a waiver.

1 But if a pipeline or other purchaser thought
2 that a waiver was nevertheless appropriate, as we point
3 out in our reply brief, the purchaser would have an
4 opportunity to file a petition under the general rules
5 governing the filing of petitions under the Commission's
6 regulations. And in fact, Williams Natural Gas argued in
7 the court below that the Commission had authority under
8 section 16 of the Natural Gas Act to grant a waiver from
9 the provisions of Order 451 in appropriate circumstances.

10 Although Williams made a passing request for an
11 exemption or waiver in its rehearing petition in these
12 rule making proceedings before the Commission, that is not
13 the right place for an individual pipeline or purchaser to
14 request an exception. The proper procedure is to file a
15 petition with the Commission, where the Commission can
16 focus on the equities of the particular purchaser, outside
17 of the context of adopting a rule of general
18 applicability.

19 QUESTION: Would that petition necessarily be
20 given a hearing?

21 MR. KNEEDLER: I think that what would be
22 required is that the, that the purchaser would at least
23 have to make a showing of pretty substantial reasons why
24 an exception should be made to the general standards in
25 Order 451.

1 QUESTION: So if I think that the, that the word
2 hearing in 7(b) in that context requires an individualized
3 hearing, it is not your contention that this waiver
4 procedure through petition would necessarily satisfy it?

5 MR. KNEEDLER: Well, I -- I think the place --

6 QUESTION: I mean, you say the waiver, the
7 waiver procedure is available, but you are not arguing
8 that that necessarily fulfills the requirement, if there
9 is one, which you contend there is not, of an
10 individualized hearing.

11 MR. KNEEDLER: Well, not across the board. But
12 in the context of this case, again going back to what this
13 Court said in FPC v. Texaco, which concerned the same sort
14 of argument about a right to a hearing under section 7(c)
15 of the Natural Gas Act; and what the Court said, it was
16 fine for the Commission to weed out at the threshold,
17 solely by virtue of not satisfying the standards and the
18 rule adopted by the Commission, various private entities
19 were applying for special relief. But it left open the
20 possibility of applying for a waiver. I think the same
21 thing would apply here.

22 What the pipeline could not contest in such a
23 hearing is the general standards set forth in the rule
24 itself, because again, those were adopted after due
25 hearing in the rule making proceeding on the order itself,

1 which is again the conclusion the Court reached in FPC v.
2 Texaco. What the pipeline could request in such a waiver
3 application would be to show that his particular condition
4 so departed from the premises of the order that special
5 relief was warranted.

6 Now again, I am not in a position to speak on
7 behalf of the Commission as to what its response would be
8 to a particular waiver application. My only point here is
9 that the Commission's regulations do not foreclose it, and
10 that none of the respondents in this case has pursued the
11 procedure that would be appropriate under the Commission's
12 regulations to present that claim.

13 QUESTION: Mr. Kneedler, perhaps it isn't
14 significant, but we are talking about kind of an
15 abandonment of a particular customer, rather than
16 abandonment of service in the sense of the supply of gas
17 is, doesn't come off the market, it just goes to some
18 other purchaser, doesn't it?

19 MR. KNEEDLER: Yes. In fact, under the good
20 faith negotiation procedure set up by the Commission in
21 Order 451, the producer cannot abandon, may not abandon
22 until it has entered into a contract with another
23 purchaser to purchase that same gas. And the Commission
24 deemed this to be an important protection in the public
25 interest, public convenience and necessity, because it

1 assures that the gas will be, will remain in the market
2 and not be lost forever.

3 And it is that purpose that in our view lends
4 considerable support to the Commission's approach.
5 Because not only, not only has the Commission determined
6 from the overall needs of the market that it's proper to
7 release that gas to a new purchaser under the
8 circumstances, but even comparing the two competing
9 purchasers, as it were, the existing purchaser and the new
10 purchaser, the Commission has concluded that the, if the
11 new purchaser is prepared to pay more, or under more
12 favorable circumstances for that particular gas, that the,
13 that as between those two purchasers, the subsequent
14 purchaser, market indications show, has a greater need for
15 it. And that -- the Court, again in WNCN v. FCC,
16 concluded that it is proper in circumstances for an agency
17 to rely on the market to resolve questions of comparative
18 need, or in that case, diversity of programming. And so
19 it is -- and the Commission made that point on rehearing,
20 relying on WNCN, that it is really the same sort of
21 comparative needs of the two pipelines.

22 QUESTION: Mr. Kneedler, do you agree with the
23 statement I see in the brief on the other side, the
24 Commission has admitted that the new ceiling price for old
25 gas would not be just and reasonable if it were actually

1 collected?

2 MR. KNEEDLER: No, we do not. The Commission,
3 as we point out in our reply brief, the Commission
4 repeatedly and explicitly said that the new ceiling is
5 just and reasonable within the meaning of the Natural Gas
6 Act. And in fact what the Commission did was set that
7 ceiling at the same level as was already applicable to one
8 of the ceilings for post-1974 gas.

9 QUESTION: What do they mean, if it were
10 actually collected?

11 MR. KNEEDLER: Well, again, this ties into this
12 good faith negotiation procedure. Although the Commission
13 determined that the rate which was carried forward by
14 statute for one category was just and reasonable, it
15 concluded that it wouldn't be appropriate for a producer
16 to automatically collect that higher rate under particular
17 contract provisions that many pipelines and producers had
18 entered into. Now, let me explain how that works. 90
19 percent of contracts between --

20 QUESTION: Well, it sounds like you do agree
21 with the statement.

22 MR. KNEEDLER: No, no, what we don't agree --

23 QUESTION: You mean this contractually, it
24 wouldn't be fair.

25 MR. KNEEDLER: Well, it wouldn't be fair -- this

1 rule was in fact set up for the protection of respondents
2 and pipelines and consumers, not for the protection of
3 producers. But beyond that the Commission concluded it
4 would not make sense for the market as a whole. Let me
5 explain why that is so. The 90 percent -- 90 percent of
6 the contracts between producers and pipelines contained
7 contract provisions, typically indefinite price escalator
8 clauses, that would have allowed the price the pipeline
9 was required to pay under existing contracts to rise to
10 the new ceiling level. That new ceiling level was and is
11 above the market price.

12 And the Commission concluded that the market
13 distortions it was trying to eliminate by raising the
14 ceiling would be reintroduced if the market, if the price
15 of old gas went from substantially below the market to
16 substantially above the market, and that it would also be
17 appropriate to mitigate the impact on individual
18 pipelines. And so what the Commission did was to say that
19 as a prerequisite to collecting this higher rate, the
20 producer would have to trigger negotiations with the
21 pipeline to enter into a mutually agreed upon price. Only
22 if the pipeline refuses to pay a price up to the ceiling
23 would abandonment occur. In other words, only if the
24 pipeline refused to pay a price that it was contractually
25 obligated to pay under the escalator clauses could

1 abandonment occur.

2 And so, contrary to the court of appeals' view
3 of the good faith negotiation system, this is not
4 one-sided or unfavorable to the, to the pipelines.

5 QUESTION: What about the other 10 percent that
6 didn't have an escalator clause? Doesn't this --

7 MR. KNEEDLER: If the --

8 QUESTION: Doesn't this provision apply to them?

9 MR. KNEEDLER: No, it does not. If -- under
10 this Court's Mobil Sierra Doctrine as incorporated in
11 section 101(b)(9) of the act, the contract price controls.
12 And if there is no provision in the contract between the
13 producer and the pipeline to increase the prices, there is
14 no contractual authority and no right of the producer to
15 charge the higher price.

16 QUESTION: But Mr. Kneedler, it is true, just
17 following up on Justice White's question, that the ceiling
18 price is presumably above the market price for most of the
19 old gas, and that that price is nevertheless, in your
20 view, just and reasonable?

21 MR. KNEEDLER: Yes.

22 QUESTION: Yes.

23 MR. KNEEDLER: And the reason that is so is
24 because the Commission con -- this price is based on
25 calculations the Commission did in 1974, which have been

1 updated over time by inflation. It's an estimate of the
2 replacement cost, the long-term replacement cost of these
3 supplies of old gas. The current spot market for old, for
4 gas generally is below that long-term replacement cost,
5 but that doesn't detract from the justness and
6 reasonableness of the ceiling the Commission has
7 prescribed. And in fact, the Commission also concluded,
8 strongly reinforcing this, that the new price ceiling and
9 allowing the prices to increase would elicit 11 trillion
10 cubic feet of additional supplies of old gas, which would
11 compete with new gas, bring down prices, and stabilize the
12 market.

13 If the Court has no further questions at this
14 time, I would like to reserve the balance of my time for
15 rebuttal.

16 QUESTION: Very well, Mr. Kneedler. Mr. Lee,
17 we'll hear now from you.

18 ORAL ARGUMENT OF REX E. LEE

19 ON BEHALF OF THE PRIVATE PETITIONERS

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

22 The single dispositive point to which the
23 respondents have no answer is that sections 104 and 106 of
24 the NGPA specifically and unequivocally authorize the
25 Commission to set a new ceiling price for old gas, so long

1 as it is higher and so long as it is just and reasonable.
2 And that is all that has happened here. That is
3 specifically what has happened here. And you have to ask
4 yourself then, under those circumstances, what is it that
5 FERC did that was wrong?

6 Our opponents' only real answer to that is that
7 this amounts to de facto regulation. That is nothing more
8 than substituting a label for what the statute says.
9 Moreover, Order 55 did not in fact deregulate. What it
10 did was to set a new ceiling, a higher ceiling, just as
11 the statute requires. But regardless of what happens to
12 the market, in the event that it might go above the
13 ceiling, that is still a ceiling and therefore still a
14 regulated price.

15 The oft-repeated assertion that the effect has
16 in fact been to increase the prices of old gas is totally
17 beside the point. Consumers do not buy old gas as such,
18 and the price that consumers pay at the burner tip for the
19 mix of old and new gas that they in fact buy has in fact
20 significantly declined since Order 451. And among the
21 reasons that this may be the case are those that the
22 Commission itself predicted, namely the 11 trillion cubic
23 feet that would be at issue in the event that Order 451
24 were not enacted. That has two effects on the price. One
25 is it puts more gas onto the market, and the second is

1 that the increment that it puts onto the market is
2 low-priced to mix with the higher price.

3 The contention that Congress relaxed the pricing
4 structure only for new gas, while carrying forth the
5 existing vintages for old gas, and that that was the
6 compromise that Congress reached, is true as far as it
7 goes, but it tells only half the story. And the half that
8 it leaves out is the half that is dispositive of this
9 case. It is true that Congress itself did not alter the
10 old gas ceilings. It simply carried them forth. But in
11 words that could not be more plain, in sections 104 and
12 106, it gave the Commission the authority to exercise its
13 traditional NGA authority to decide just and reasonable
14 ceilings, and to alter those ceilings in light of
15 subsequently changed conditions in the event it chose to
16 do so.

17 So that the only issue, the only issue in this
18 case is whether those rates are just and reasonable. And
19 it is an issue that is really not a proper basis for
20 invalidating Order 451. The Commission determined that
21 they were just and reasonable. The Fifth Circuit did not,
22 did not disturb that. And the only argument that our
23 opponents have as to why this is not just and reasonable
24 is the one to which Mr. Kneedler referred, that the
25 Commission said it would not be just and reasonable to

1 charge that price without first going through a
2 negotiation procedure whose ultimate effect would probably
3 be and has been to get the price lower.

4 The claim that the Commission's GFN procedure is
5 too one-sided simply ignores the central purpose of that
6 procedure. The ceiling itself was borrowed from what
7 Congress itself did. Moreover, it had been judicially
8 approved. So clearly, if that is all they had done, it
9 would have been all right to charge up to that ceiling.
10 But they said that was not the just and reasonable
11 procedure. First, as a condition to charging that higher
12 price, the producer was required to initiate a procedure
13 which might bring the price lower.

14 Now, in light of the fact that there were these
15 price escalation charges, something like that negotiation
16 process was absolutely essential, and in fact it has
17 worked very well. In the great majority of instances what
18 has happened is that the parties have not used the GFN
19 formal procedure, but rather have simply renegotiated
20 their contracts. And the effect has been to eliminate not
21 only the distortions on the lower end, the old gas price
22 distortions over which Congress, excuse me, the Commission
23 did have some authority, but also has been to bring the
24 producers to the bargaining table and put the new gas on
25 the bargaining table as well.

1 Now, the second major issue in the case concerns
2 what kind of hearing is due under section 7(b). We submit
3 at the outset that this falls well within the Vermont
4 Yankee Rule, that agencies enjoy particular deference with
5 respect to their own procedures. There is a very good
6 reason why the hearing that was due in this case was not
7 the individualized one that the respondents advocate. And
8 that reason is bottomed on the FERC's governing
9 substantive standard for abandonments, which is not
10 challenged here.

11 The old standard, which focused on the
12 comparative needs of the two prospective parties to the
13 contract, that is the one that would, then had the gas and
14 the one that would get the gas in the event of
15 abandonment, necessarily concentrated on the needs of the
16 individual parties. But the new standard is concerned not
17 with comparative needs, but rather with the overall needs
18 of the market. And as a result, the hearing that FERC
19 held was not concerned with any facts relevant to
20 particular companies or particular contracts, but rather
21 with overall market needs.

22 The respondents have never really -- well, they
23 do not dispute the substantive standard, nor do they
24 dispute that that substantive standard is not at issue in
25 this case. But they have never faced up to the

1 interaction, the bearing that that unchallenged
2 substantive standard has on the procedural argument that
3 they are making in this case.

4 Finally, the Court has held on several occasions
5 that generic hearings do satisfy the statutory requirement
6 that there be a hearing, and that is particularly
7 appropriate in the context of this case, where the statute
8 says due hearing. And that language is, by its nature
9 implies a great deal of discretion in the Commission in
10 determining what kind of a hearing is due.

11 What Mr. Kneedler said in response to Justice
12 Scalia's question about whether there would be opportunity
13 for not only consideration by the Commission, but also the
14 hearing, even if we assume that an individualized hearing
15 is required, which has not been decided really, and even
16 if we assume that the Commission wouldn't grant it -- and
17 that has not yet been determined, that issue ought to be
18 decided, if at all, at such time that anyone actually asks
19 for a hearing -- then you still have the question, or you
20 still have the point that the proper remedy is simply to
21 let them go back, and if they are entitled to a hearing,
22 then FERC will be entitled, FERC will be obligated to give
23 them a hearing. But you don't upset the entire pricing
24 provisions of Order 451 for that reason.

25 Mr. Chief Justice, unless the Court has

1 questions, I have nothing further.

2 QUESTION: Thank you, Mr. Lee. Ms. Halladay,
3 we'll hear now from you.

4 ORAL ARGUMENT OF ROBERTA LEE HALLADAY

5 ON BEHALF OF THE RESPONDENTS

6 MS. HALLADAY: Thank you, Chief Justice
7 Rehnquist, and may it please the Court:

8 This is not a basic rate case. This case
9 involves an effort by the Federal Energy Regulatory
10 Commission to overturn the pricing and regulatory policies
11 for natural gas prescribed by Congress in precise and
12 detailed language set forth in the Natural Gas Policy Act
13 and the Natural Gas Act. In Order No. 451 the Commission
14 has taken three interrelated actions that are directly
15 contrary to the plain language of those statutes.

16 First, the Commission upset the pricing policy
17 of Congress embodied in title I of the NGPA by placing
18 significant incentives for additional production of old
19 gas for the expressed purpose of displacing any further
20 development of new gas. Second, the Commission removed
21 virtually entirely any kind of regulatory rate control
22 over old gas, and stated repeatedly in Order No. 451 that
23 the purpose it had taken its action was to allow gas to be
24 priced by the market, that is deregulate it. And finally,
25 the Commission surrendered to the marketplace the very

1 specific statutory responsibilities it long had held under
2 the Natural Gas Act and that Congress had expressly
3 preserved in the Natural Gas Policy Act to regulate the
4 sale and abandonment of gas sold to the interstate market.

5 In vacating Order No. 451, the Fifth Circuit
6 closely examined the language, history, and purposes of
7 the Natural Gas Act and Natural Gas Policy Act. It then
8 looked to the actual end result of Order No. 451 and
9 determined that the Commission had taken an action that
10 only Congress could take or that only Congress could
11 authorize the Commission to take, namely to deregulate old
12 gas and to remove all remaining controls on the sale and
13 abandonment of that gas to the market.

14 QUESTION: Ms. Halladay, the statute says that
15 FERC can raise the price ceiling on any gas, so long as it
16 is just and reasonable. It doesn't talk about maintaining
17 vintage pricing. And FERC has interpreted its powers as
18 allowing this particular order. Isn't that the end of it
19 as far as we are concerned?

20 MS. HALLADAY: It cannot be the end of it
21 unless, of course, we ignore the statute as a whole. Now
22 what should be made clear at first is that sections
23 104(b)(2) and 106(c) did not just carry forward the just
24 and reasonable rate making authority that the Commission
25 previously had had in the Natural Gas Act. It changed

1 that authority by stating that the Commission could only
2 raise rates. It did not allow them to lower rates. In
3 the past, when the Commission could raise or lower, it
4 could take a much more involved role in trying to make gas
5 market-responsive. The limitation of its authority only
6 to raise rates suggests that Congress had some different
7 purpose in mind than in the past.

8 The second thing is, the Commission itself
9 repeatedly interpreted this provision to state that it
10 required that, it provided an outlet, rather, for those
11 producers whose actual costs of production exceeded the
12 average ceiling prices set by Congress, and thereby would,
13 without relief, have a constitutional, unconstitutional
14 compensation through property.

15 QUESTION: Well, certainly the Commission can
16 change its mind and its approach, so long as it's within
17 its statutory authority.

18 MS. HALLADAY: It can change its mind. It can't
19 change Congress' mind, and here that is what they did.
20 Congress decided that there should not be great incentives
21 placed on the incentives of old gas, that incentives
22 should be given to new and hard-to-produce gas, because
23 that is precisely where new sources of supply would come
24 to the market.

25 QUESTION: Well, Congress decided that that

1 should happen at the moment when it passed its
2 legislation. But it did not decide that that should never
3 happen, did it?

4 MS. HALLADAY: I think --

5 QUESTION: I mean, does that appear anywhere in
6 the statute? I, I would think from the way the crucial
7 provision is worded, that Congress essentially said right
8 now we are not going to do it, but we are not taking away
9 the power of the Federal Energy Regulatory Commission to
10 do it.

11 MS. HALLADAY: And yet the Federal Energy
12 Regulatory Commission also ruled in Order 72 that one of
13 the key components of the overall pricing scheme of the
14 NGPA had been the continued availability of sections 104
15 and 106 to old gas. Now what the Commission has done here
16 in Order 451 is it has melded together approximately
17 one-half of all of the pricing categories that Congress
18 established, and it has set a rate that is equal to an
19 incentive rate the Commission set under another provision
20 of the NGPA, 107(c)(5).

21 Now that provision states that the Commission
22 can only when it is reasonably necessary set a new
23 incentive based price for gas in this, in the 107(c)(5)
24 case, that is produced at extraordinary cost or risk. And
25 in a prior proceeding the Commission determined that the

1 ceiling price now set here in Order 451 represented such
2 an incentive price. Now they say for gas that they admit
3 is low-cost in production and does not involve
4 extraordinary risk, it should get the same incentive. And
5 it has thereby read 107(c)(5) right out of the act.

6 But the bottom line is that whatever authority
7 the Commission had in sections 104(b)(2) and 106(c), and
8 they previously had said it was a special relief
9 mechanism, they also have very clearly stated that it is
10 not the authority to deregulate the price of gas. And
11 that is in fact what they have done in this case, and let
12 me explain why.

13 There is no doubt in this case that there are no
14 effective controls presently on the market actually
15 setting the price of old gas. The Commission has admitted
16 as much in its reply brief. It stated that at the present
17 time, and I would submit, and the record establishes this,
18 that since the rule was adopted this ceiling price has had
19 no teeth. It cannot control what happens. It allows the
20 market to set the rate, and that is assuming if the GFN
21 process works as intended.

22 But as Mr. Kneedler pointed out, the only way
23 that a pipeline can be assured of actually keeping the
24 supply of gas under contract is to agree to pay a price
25 that the Commission itself stated would be unjust and

1 unreasonable if automatically collected. Now in making
2 that --

3 QUESTION: That is the ceiling price, Ms.
4 Halladay? The, the price you just referred to --

5 MS. HALLADAY: Is the new ceiling price --

6 QUESTION: Is the new ceiling. Now, as these
7 GFN procedures have worked in practice, have most of them
8 ended up with the pipeline paying the ceiling price or
9 paying something less?

10 MS. HALLADAY: There have been, as Mr. Kneedler
11 pointed out, a number of negotiations. We don't even have
12 record of all of them, because in many cases they don't
13 have to file anymore with the Commission what happens.
14 But there are in some instances voluntary negotiations
15 that have been at a market price, in other words a price
16 that would have been established had this gas been
17 deregulated. However, there are many other instances
18 where pipelines, some of whom are respondents in this
19 proceeding, have offered to pay the market price and the
20 producer has come back and stated that is not sufficient,
21 and then cancelled the contract.

22 Now, there is another point that bears repeating
23 here, and that is that the agreement to actually pay the
24 market price does not mean that any new gas will be
25 produced from these existing production reserves. That of

1 course was the whole point of the rule making, was to
2 bring an additional 11 TCF to the market. But if any
3 change in the contract term is offered by the pipeline
4 purchaser, that can be grounds for the termination of the
5 contract by the producer.

6 So if the pipeline purchaser states to the
7 producer that I will pay the new ceiling price, that is
8 admittedly now nearly twice the spot market price for gas,
9 but in return for that agreement I would ask that you
10 agree to actually produce more gas from these reserves,
11 that could be viewed as a change in contract terms and it
12 would enable the producer to walk away from the contract.
13 Furthermore, nothing in this rule even requires the
14 producer to actually produce any more gas.

15 QUESTION: When you say the pipeline offers to
16 pay the market price, that suggests that the price it is
17 paying under the contract is lower than market?

18 MS. HALLADAY: In many cases the prices were
19 lower than market. They had --

20 QUESTION: So you have really three kinds of
21 prices. One, the contract price which is lower than
22 market, then a market price, and then a ceiling price
23 which is above market?

24 MS. HALLADAY: Yes, quite grossly above the
25 market ever since the rule was adopted. And the

1 Commission's theory was that it could help to resolve some
2 regional disparities by bringing the gas closer to
3 market-responsive levels. Now, the interesting thing is
4 that Congress --

5 QUESTION: Which it has succeeded in doing.

6 MS. HALLADAY: It has in some cases succeeded in
7 doing that --

8 QUESTION: Overall it has succeeded in doing
9 that. I mean, the overwhelming record is that it has been
10 a success in that objective, isn't it?

11 MS. HALLADAY: Yes, but now, if that is true, it
12 is interesting because precise language in section 121 of
13 the act stated where Congress intended to deregulate and
14 where it did not intend to price deregulate. And
15 primarily it chose to deregulate new and hard-to-produce
16 gas, and let them be market-responsive. It did not
17 include old gas. Moreover, in this rule making the
18 Department of Justice proposed as an alternative to the
19 procedure actually adopted that the Commission simply
20 allow the parties to negotiate in the market any price
21 that they wanted, and then once they negotiated it, simply
22 file it with the Commission. And if they couldn't agree,
23 then under the Department of Justice proposal, the
24 producer would then file and seek expedited abandonment of
25 the contract. So, as we will see later, the producer

1 actually in that case had a greater burden to comply with
2 the abandonment requirements than what the Commission
3 required in Order 451.

4 But the Commission rejected that Justice
5 Department proposal on the specific grounds that it had no
6 authority to allow the market to set the rates. So what
7 did it do? It turned right around and did the same thing.
8 And the only difference between the purportedly
9 unlawful -- or the, no, the actual unlawful action that it
10 found the Department of Justice had proposed, and what it
11 did here was to set some ceiling price. But, as the
12 Department of Energy recently stated, any ceiling price
13 that is this far above the market effectively deregulates
14 the gas. It cannot have teeth, as the Commission states.
15 It achieves the same deregulatory result that the
16 Commission found in Order 451 it had no power to take.

17 QUESTION: Well, it does have these teeth at
18 least. If you have a gas sales contract that is binding
19 on both parties that has an escalator clause, you could
20 charge above that ceiling price and impose it on the
21 purchaser. But because of the ceiling price you can't.
22 Doesn't it have at least that constraint upon the parties
23 that operate under it?

24 MS. HALLADAY: The Commission, of course, that
25 is its position. The interesting thing is that in all

1 prior proceedings these automatic escalator clauses in
2 fact had operated to permit collection of the new rate.
3 Here the Commission found that they had done something
4 quite different. This was a new animal. They had set a
5 rate so high and far above the market that they could not
6 follow the normal pattern of conduct that had been
7 followed in the past, and let the contracts operate as
8 they had operated in the past. It had to protect
9 consumers from a just and reasonable rate, a paradoxical
10 statement in and of itself.

11 Now, the good faith negotiation or GFN procedure
12 was supposed to provide this protection, or as Mr.
13 Kneedler just said, provide a mitigation of the just and
14 reasonable rate. It cannot do that. By the Commission's
15 own words, the GFN is one-sided. They stated in the rules
16 that the only time a producer would ever invoke the GFN
17 process is when it had weighed the risks and benefits of
18 doing so, and after such cautious review, and that was
19 their word, determined that they stood to gain more than
20 they could lose by getting into this process.

21 And furthermore, the GFN process is, one, it is
22 just, it is not in anyway capable of assuring that a gas
23 supply that is actually needed by the consuming public
24 will remain there. Remember, the gas we are talking about
25 had been purchased and sold under contracts, some of which

1 had been in place for 40 and 50 years, and provided the
2 bedrock of service to the general public. Now the
3 producer was going to decide if that gas should even
4 continue to come to the market at all.

5 And let me turn specifically to the abandonment
6 procedures that are authorized here. They are absolutely
7 contrary to section 7(b), the prior holdings of this
8 Court, and they cannot be squared with the actions the
9 Commission took in the Felmont case or the KP&L case.
10 First of all, Justice O'Connor, you asked Mr. Kneedler if
11 it were true that there is a complaint procedure
12 available. Nowhere in the rule making did the Commission
13 ever mention that complaint procedure. The first time we
14 heard about it was when we received their brief in this
15 case.

16 And all they have stated on brief is that we can
17 file such a complaint with them if we prove that the
18 producer did not comply with the good faith negotiation
19 procedure. That is precisely our concern, that the
20 producer will comply with the good faith negotiation
21 procedure. That he will invoke it when he determines that
22 there is a net benefit to him. And if he doesn't like the
23 price we offer, including even a market price, he will
24 simply cancel the contract and walk away. That result is
25 the very thing this Court found in United Gas Pipeline v.

1 McCombs is unlawful.

2 QUESTION: If the producer walks away when you
3 offer the market price, can't you find other people to buy
4 from at the market price?

5 MS. HALLADAY: Under present conditions that is
6 likely to happen. But, as the Commission itself stated,
7 no one knows what the future holds. And as these
8 contracts disappear we may or may not be able to do that.

9 QUESTION: Well, whatever the future holds, it's
10 a truism that you can always buy a commodity at the market
11 price. Isn't that a truism? That defines the market
12 price. It's what you can buy it at.

13 MS. HALLADAY: Well, that would be a truism, but
14 for, in this case, Order 451. You cannot necessarily buy
15 it at the market price. Precisely when a pipeline has the
16 greatest need to keep gas under contract to meet its
17 service requirements, it must pay the ceiling price or
18 bear the risk of losing the gas.

19 QUESTION: I don't see why that is, Ms.
20 Halladay. If the market price is lower than the ceiling
21 price, and the producer tells the pipeline to in effect
22 get lost after the GFN, why can't the pipeline go out and
23 buy at market?

24 MS. HALLADAY: In many cases they are able to
25 make a substitute because the market does provide that

1 opportunity. But remember, the reason the NGPA was
2 adopted was because of severe shortages of supply. The
3 market has tended to go up and down. Those supplies may
4 not always be available.

5 QUESTION: Well, true, and the market won't be
6 what it, the same today as it is 3 months from now. But I
7 don't see how that deflects the force of the argument, at
8 least to me --

9 MS. HALLADAY: Well, the further point is in
10 fact that that is what Congress specifically intended as
11 to new and hard-to-produce gas by virtue of section --

12 QUESTION: You say that is what Congress --

13 MS. HALLADAY: The ability to go out and shop in
14 the market for gas supplies.

15 QUESTION: Which you, which the pipelines now
16 have.

17 MS. HALLADAY: But in the NGPA, what Congress
18 said is the pipelines should make that kind of a shopping
19 excursion as to new gas and hard-to-produce gas. Section
20 601 of the NGPA expressly removed the Commission's
21 authority to regulate sales and abandonments of new or
22 hard-to-produce gas. But in direct contrast, Congress
23 retained the Commission's regulatory control over old gas.
24 It did not want the market to be the protector of consumer
25 interests as to that gas.

1 QUESTION: Unless perhaps the Commission wanted
2 it to. I mean, it retained the Commission's authority to
3 prevent the market from being the determinant, but it
4 didn't, it didn't command that the market not be the
5 determinant.

6 MS. HALLADAY: In this case in fact the
7 Commission alleges that it has regulated in some sense the
8 abandonment of old gas. But when you look at this rule
9 there is no regulatory presence at all. If and when any
10 abandonment occurs is solely at the discretion of the
11 producer. And in the -- there are really two what I might
12 call generations of abandonments involved. One is the
13 first set of abandonments that occurs under the GFN
14 process. Both the Commission and the producers seek to
15 defend only that abandonment. They claim the procedures
16 they have adopted fully met with the procedural
17 requirements of section 7(b).

18 But there is an entirely different set of
19 abandonments at issue here. Once the contract expires
20 from the renegotiation under the GFN, then the producer is
21 free to do anything that it wants with that gas until the
22 reserves are depleted. Any future abandonments that it
23 may have required, absent the Commission's action in this
24 proceeding, are now removed.

25 The Commission has granted a blanket certificate

1 and a blanket abandonment to authorize all future sales
2 and abandonments of old gas. Now what that means,
3 bluntly, is that private parties and the contracts they
4 enter into now control the entire process of how old gas
5 reaches the market. This Court held, in McCombs, in the
6 Sunray case, and in the Southwind case, that private
7 contracts, expiration of leases, and the private conduct
8 of a party cannot meet the clear and express demands of
9 section 7(b), which required Commission intervention.

10 Moreover, even as to the first generation of
11 abandonments here, there is no opportunity for an
12 interested party to take part in the abandonment process.
13 There is no notice to the Commission that a producer has
14 invoked the GFN process against a particular pipeline.

15 QUESTION: What, what use would it be for an
16 individual party to participate, unless he is
17 contradicting one of the, compliance with one of the
18 general requirements that the Commission has set forth by
19 rule. What purpose would there be? The Commission has
20 set forth we are going to grant all abandonments if A, B,
21 and C occur. Unless the party comes forward and says A,
22 B, and C does not exist, what use is there for the private
23 party?

24 MS. HALLADAY: Well, that is our whole concern,
25 because the Commission has said if you don't say A, B, or

1 C, don't even bother coming to us. We don't want to know
2 about the hard impact it may have on consumers.

3 QUESTION: Isn't the Commission entitled to set
4 forth the conditions on which it will permit abandonment?
5 I think it -- doesn't the Commission always have to do
6 that?

7 MS. HALLADAY: The Commission --

8 QUESTION: Whether by rule or by adjudication,
9 it is going to set forth criteria for abandonment. It
10 can't act willy-nilly.

11 MS. HALLADAY: But it has to, it has to provide
12 some regulatory presence for itself. You know, at the
13 time they approved these particular procedures, the GFN
14 process was not yet even in effect. They could not know
15 at that point what abandonments might or might not occur
16 in the future. They could be occurring right now and they
17 know nothing about it. The bottom line is, they have
18 chosen, as a form of "regulation" to simply absent
19 themselves from the whole process. And the extent to
20 which they have absented themselves is shown by the fact
21 that there is no requirement that the producer file with
22 them, provide an opportunity for, say, a local
23 distribution company served by a pipeline to come in and
24 show that this gas is necessary to meet its market
25 requirements, which are even more closely tied to the

1 consumer. There is no opportunity to demonstrate that
2 private-party interests are not in some way impairing
3 consumer interests under this rule.

4 Now, the bottom line is that when you read the
5 order as a whole, this was exactly the result that the
6 Commission intended. It set a ceiling price that it says
7 it doesn't want to be collected. It wants the market to
8 set the rate.

9 QUESTION: Well, do you -- are there escalator
10 clauses in your clients' contracts?

11 MS. HALLADAY: Yes, there are.

12 QUESTION: And what do they mean? That if the,
13 that the price charged under the contract can be escalated
14 right up to a ceiling price?

15 MS. HALLADAY: Exactly.

16 QUESTION: I would think, I would think you
17 would like to get out of that contract -- if the market is
18 lower, if --

19 MS. HALLADAY: That, of course, was a problem as
20 to these high-cost contracts that were contributing to the
21 take or pay problem. Up until the Commission's action in
22 this proceeding it had never been a problem, because quite
23 frankly the Commission had never provided such an
24 unprecedented increase in the price of old gas.

25 QUESTION: Well, that may be, but under -- I

1 suppose under your contract you would, if the producer
2 said, pay me the ceiling price or else, you are supposed
3 to pay it, aren't you?

4 MS. HALLADAY: Under the contract as it stood,
5 that is true. But, you see, the difference is in Order
6 23, which was issued --

7 QUESTION: Well, yes, but if the producer has
8 said to your clients either pay the ceiling price or not,
9 or the contract is cancelled, I suppose you would prefer
10 the contract was cancelled.

11 MS. HALLADAY: In some instances that might be
12 true, but where you --

13 QUESTION: Well, what instances wouldn't you, if
14 you --

15 MS. HALLADAY: Well, when you -- for example, --

16 QUESTION: Because if the contract is cancelled,
17 you can automatically go get gas at the market.

18 MS. HALLADAY: But you can't always buy the
19 volume that you need or when you need it, and so the
20 problem is that we have --

21 QUESTION: Well, I know, but -- are you saying
22 then you would stick to the contract and pay the ceiling
23 price?

24 MS. HALLADAY: There have been instances when
25 respondents have had to stick to the contract because they

1 needed the gas supply. Now you see, the interesting thing
2 is is that the Commission keeps talking about the fact
3 that automatic collection is a bad thing because it causes
4 market distortions that are just as unjust and
5 unreasonable, they say, as the old vintage structure did.
6 But the bottom line is, the only way you have any
7 assurance of keeping this gas under contract is to pay a
8 price that they say should not be collected.

9 QUESTION: Well, it looks to me like the good
10 faith negotiation provision is really in your favor.

11 MS. HALLADAY: That was their statement, but any
12 kind of a hard look at that indicates it cannot be. We
13 offered a number of changes to that procedure --

14 QUESTION: Well, I know, but if there hadn't
15 been that process provided for and -- why, the producer
16 can, is in charge anyway. He can just say pay up to the
17 ceiling or not. If you want out, why, get out.

18 MS. HALLADAY: And had there not been that
19 process, the Commission would have taken an action that it
20 itself conceded was unlawful. It defined the --

21 QUESTION: When did -- wait a minute.

22 MS. HALLADAY: The Commission defined --

23 QUESTION: What is the basis for that statement?

24 MS. HALLADAY: The Commission stated that the
25 GFN process is an integral component of the rate itself.

1 It is essential to the justness and reasonableness of this
2 rate. Therefore, while they now claim that it was put in
3 for our protection, and they certainly hoped that it would
4 operate that way, they knew they had to have that rate
5 there, that condition and procedure there to make the rate
6 they set just and reasonable. They have never done
7 anything like this before, because they had never provided
8 this type of a price increase for old gas.

9 The interesting thing is that what they did here
10 is they wiped out in one fell swoop not only all vintage
11 prices for old gas, but one-half of the pricing categories
12 that Congress established on the face of the NGPA itself.
13 They did so for the express purpose, they said, of
14 delaying production of new gas. And yet any reasonable
15 reading of the NGPA indicates that Congress wanted just
16 the opposite. They wanted to produce that new gas, and
17 they withheld incentives from old gas.

18 Then, when you look at the operation of the
19 procedure established, there is no fundamental difference
20 in how this rule operates and the way the Department of
21 Justice proposal would have operated that they proposed.
22 It allows, if it goes according to plan, for the market to
23 set rates. Congress expressly refused to let the market
24 set rates for old gas. It did not include old gas in
25 section 121, which is the deregulatory provision.

1 And then, only 2 months before the Commission
2 initiated this rule making, it stated in its block billing
3 rule making proposal that old gas is not market-responsive
4 specifically by legislative intent. And that legislative
5 intent was that the price incentives be focused on new and
6 hard-to-produce gas. And then 2 months later it suddenly
7 found that old gas should be priced at the market, and it
8 offered no reason whatsoever why its statement 60 days
9 before was wrong.

10 The bottom line is that the end result of the
11 action taken just on the pricing mechanism is that old gas
12 is now priced much higher than the average price of new
13 and hard-to-produce gas that has been deregulated. That
14 result simply cannot be squared with what Congress
15 intended. It said the market, upon deregulation, should
16 provide the maximum incentive. Well, the Commission has
17 provided a much greater incentive for old gas, as is shown
18 in Appendix C to our brief. The price of old gas is now
19 substantially higher than the price of new gas.

20 QUESTION: You mean the ceiling price?

21 MS. HALLADAY: The ceil -- the price of -- the
22 average wellhead price paid for old gas is now higher than
23 the average price of all other wellhead gas, including new
24 gas that has been deregulated. That can't be squared with
25 what Congress intended in this statute.

1 Every aspect of this order, as the court of
2 appeals found, was designed for one reason. The
3 Commission decided it just wasn't wise any more for them
4 to exert any kind of a regulatory presence over old gas.

5 QUESTION: Well, if the market, if you say the
6 Commission really deregulated it and said the market is
7 going to set the price for old gas, is that what you say?

8 MS. HALLADAY: Um hum.

9 QUESTION: And they deregulated new gas --

10 MS. HALLADAY: Congress deregulated new gas.

11 QUESTION: Well, all right. So it, so -- I
12 would suppose new gas is going to be sold at the market,
13 isn't it?

14 MS. HALLADAY: In many cases it is. The only
15 problem is that --

16 QUESTION: Well, why -- if the market is
17 determining both kinds of gas, why do you say old gas is,
18 in the marketplace is getting a higher price than new gas?

19 MS. HALLADAY: Because, in fact, its price has
20 gone up under this rule in some instances. The average
21 price paid --

22 QUESTION: Well, why would it? Why would it, if
23 it is set by market forces --

24 MS. HALLADAY: The procedure --

25 QUESTION: -- I don't know why it wouldn't --

1 MS. HALLADAY: The procedure apparently isn't
2 working in all respects as they anticipated. You see,
3 that's -- the best that could be hoped for here, the best
4 thing that could happen if this rule operated as intended
5 would be that the price of old gas would actually be
6 deregulated. But there was something worse here. If you
7 needed the gas, the only way you could keep it was to
8 actually pay the ceiling price, and then you were paying,
9 as the current circumstances are, twice what the market
10 allowed.

11 QUESTION: Ms. Halladay, Congress wanted this
12 great disparity in the prices and the much higher price
13 for new gas at the time the statute was passed, which was
14 a time of severe gas shortage.

15 MS. HALLADAY: Um hum.

16 QUESTION: Which has been transformed in, or was
17 transformed into a period of gas glut, was it not?

18 MS. HALLADAY: That is true.

19 QUESTION: And this is what the, what the
20 Commission is doing, is scrambling to take account of
21 those vastly altered, of that vastly altered situation.
22 Which Congress allowed it to do by giving it, although it
23 said we won't deregulate, if you want to use that word,
24 old gas now, Congress, in the sections that are central to
25 this case, did not take away the power of the Commission

1 to do that. And it may be a good thing, because the whole
2 situation changed.

3 MS. HALLADAY: No, no, Congress never said that
4 the Commission could deregulate old gas, and the
5 Commission in Order 451 specifically said it could not.
6 Congress left a piece of the Commission's just and
7 reasonable rate making authority changed in a very
8 significant respect. They can only raise the price. Now,
9 that fits precisely with the prior definitions the
10 Commission had given of how that should be interpreted.
11 It was a special relief mechanism.

12 QUESTION: You think it's a good thing that
13 there should still be a great incentive for the production
14 of new gas as opposed to old gas, so that the glut can be,
15 can get even bigger?

16 MS. HALLADAY: Well, --

17 QUESTION: That's the --

18 MS. HALLADAY: Actually, the Commission --

19 QUESTION: That's the condition you want to
20 perpetuate?

21 MS. HALLADAY: I just want to follow a scheme
22 that Congress proposed. The Commission here said it
23 wanted to put more gas on the market, with the hope that
24 that would cause other prices to come down in problem take
25 or pay contracts, and it didn't even work on that point.

1 The bottom line is Congress had a very clear pricing
2 scheme --

3 QUESTION: The bottom line is your time has
4 expired, Ms. Halladay. Mr. Kneedler, do you have
5 rebuttal?

6 (Laughter.)

7 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER
8 ON BEHALF OF THE FEDERAL PETITIONER

9 MR. KNEEDLER: Thank you, Mr. Chief Justice.
10 Justice O'Connor is correct. The plain meaning of the
11 statutory text here answers the question. The Commission
12 is expressly authorized to increase ceiling prices if they
13 are found to be just and reasonable within the meaning of
14 the Natural Gas Act.

15 QUESTION: Mr. Kneedler, could you explain the
16 apparent contradiction that the Commission says a ceiling
17 price is just and reasonable but does not allow it to be
18 charged --

19 MR. KNEEDLER: The Commission doesn't
20 prohibit --

21 QUESTION: -- without later negotiation. How
22 come is that?

23 MR. KNEEDLER: Well, first of all, what the
24 Natural Gas Act provides, allows the Commission to set a
25 rate within a zone of reasonableness, as the Commission

1 has said in Permian Basin.

2 QUESTION: It says the ceiling is within the
3 zone --

4 MR. KNEEDLER: The ceiling was within the zone
5 and certainly the market, the current market price is
6 within the zone.

7 QUESTION: I have no problem with that. Right.

8 MR. KNEEDLER: And what the Commission has said
9 is that because automatic collection of the higher price,
10 not that it is a just and reasonable rate in the abstract,
11 but that automatically allowing producers to charge rates
12 above the market would distort the market, and therefore
13 not be just and reasonable within the context of a rule
14 that is trying to bring order and regularity to the
15 market. That's, that's the reason why the Commission has
16 concluded that. The Commission can regulate practices as
17 well as prices, and what the Commission has done here --

18 QUESTION: You think the Commission could do
19 that to rates? I mean, can it say \$30 is a just and
20 reasonable rate, so long as somebody is willing to pay
21 that?

22 MR. KNEEDLER: Well, no --

23 QUESTION: I mean, is that the definition of a
24 just and reasonable rate?

25 MR. KNEEDLER: No, no. There is another point

1 that --

2 QUESTION: If you can coerce somebody into
3 paying it, it is just and reasonable. Otherwise it is
4 not.

5 MR. KNEEDLER: No, because there is an important
6 limitation here, and it is also the complete answer to the
7 respondents' position that this price is deregulated. The
8 Commission did not pull the price out of thin air. The
9 price, the ceiling that all of this gas is subject to is
10 the ceiling price for post-1974 old gas, which was carried
11 forward by Congress itself in the NGPA. That is a
12 statutorily, statutory touchstone for this ceiling.

13 Also, it is important to reinforce the point
14 that the Chief Justice made. If, if pipelines cannot
15 purchase gas from the current producer, they can go out
16 and get it at market from other producers. Respondents
17 have not identified any pipeline that has been unable to
18 replace supplies by going to the market.

19 QUESTION: Mr. Kneedler, can you help me on one
20 concept on the abandonment part of the case? Is it
21 correct that under the rule that really two abandonments
22 are approved on a wholesale basis? First, the shift to a
23 different pipeline purchaser, and then the subsequent
24 abandonment when the producer decides to go, to
25 discontinue production. Are both stages approved --

1 MR. KNEEDLER: No, no. The subsequent
2 abandonment that is authorized is if the producer then
3 chooses to sell it to yet a third pipeline. That's
4 the --

5 QUESTION: What if the producer decides that
6 it's no longer economic to produce gas from that
7 particular well?

8 MR. KNEEDLER: Well, the Commission's position
9 on that is that its jurisdiction does not extend to
10 additional productions of gas from wells, that that is
11 subject to State jurisdiction. The Commission set that
12 forth in the Northwest Central Pipeline case. And that is
13 one of the reasons why the Commission concluded it was
14 necessary to have a price incentive, to encourage
15 producers to continue to produce old gas. Otherwise 11
16 trillion feet of natural gas would have been lost, the
17 Commission determined, to the market. Respondents do not
18 challenge that determination by the Commission, and has
19 exhaustively talked --

20 QUESTION: So this order doesn't, this order
21 just doesn't deal with the problem of abandonment that we
22 normally think of in other regulatory contexts of
23 discontinuing production?

24 MR. KNEEDLER: Right, this is -- this speaks of
25 abandonment of sales.

1 QUESTION: Okay.

2 MR. KNEEDLER: And again, only in circumstances
3 where the, where the pipeline is unwilling to pay the
4 market-responsive price and a price that it is obligated
5 to pay by contract. I should also point out that this has
6 been a hugely successful order. The market price of old
7 gas at the end of 1989 exactly equaled the market price of
8 gas generally, \$1.69 per thousand cubic feet.

9 What this, this order has been a success in
10 eliminating the distortions and the unfairness among
11 consumers, and the long-time disparity with respect to
12 replacement cost, and bringing this sort of order to a
13 nationwide market that Congress wanted to have when it
14 enacted the Natural Gas Policy Act. This Court said that
15 the Commission's goal under that act is to assure adequate
16 supplies at fair prices.

17 And surely a regulatory system that requires, in
18 the end, pipelines to pay what the market will bear and
19 producers to charge what the market will bear, with a
20 touchstone to the market pricing system that Congress set
21 loose in the Natural Gas Policy Act itself, is fair and it
22 is also, within the meaning of the act, just and
23 reasonable.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
25 Kneedler. The case is submitted.

1 (Whereupon, at 11:03 a.m., the case in the
2 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:
89-1452 & 891453 MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
ET AL., Petitioners v. UNITED DISTRIBUTION COMPANIES, ET AL.; and
FEDERAL ENERGY REGULATORY COMMISSION, Petitioner v. UNITED DISTRIBUTION
COMPANIES ET AL.

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

BY *Robert A. Antel*
(REPORTER)

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