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3 NEW YORK, ET AL., :
4 Petitioners :
5 v. : No. 00-568

6 FEDERAL ENERGY REGULATORY :
7 COMMISSION, ET AL.; :
8 and :

9 ENRON POWER MARKETING, INC., :
10 v. : No. 00-809
11 FEDERAL ENERGY REGULATORY :

12 COMMISSION, ET AL. :
13 - - - - -X

14 Washington, D.C.
15 Wednesday, October 3, 2001

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States at
18 10:02 a.m.

19 APPEARANCES:

20 LAWRENCE G. MALONE, ESQ., General Counsel, New York State
21 Public Service Commission; on behalf of the
22 Petitioners in No. 00-568.

23 LOUIS R. COHEN, ESQ., Washington, D.C.; on behalf of the
24 Petitioner in No. 00-809.

25 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

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Department of Justice, Washington, D.C.; on behalf of
the Respondents.

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CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-568, New York v. Federal Energy Regulatory Commission and the companion case, 00-809.

Mr. Malone.

ORAL ARGUMENT OF LAWRENCE G. MALONE

ON BEHALF OF THE PETITIONERS IN NO. 00-568

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

From 1910 until the issuance of the FERC decision under review, all 50 States regulated transmissions of electricity to retail customers. You didn't see the rates, terms, and conditions of that regulation, with a few exceptions, because the rates were bundled in bills that charged customers for all of the elements of retail service which are basically the energy itself, or the commodity, its delivery over transmission high voltage and distribution low voltage lines, and metering and billing.

The issue in this case is whether the 1935 Congress intended the Federal Power Commission, now FERC, to displace the State laws that required that regulation from 1910 until 1996 if the commodity, the energy -- not the transmission, but the commodity -- is unbundled from

1 the retail customers' bills.

2 The FERC, while conceding that unbundling was
3 never contemplated by the 1935 Congress, nonetheless has
4 taken the position that if the commodity comes out of the
5 bill, in order to give the customer knowledge to effect a
6 choice to buy energy from a utility or a non-utility, then
7 the transmission, although it still remains bundled with
8 other elements and is never shown on the bill, except in
9 the State of California, becomes a new and separate
10 service and that that transmission is subject to
11 preemption so that the States have to leave the scene for
12 only FERC --

13 QUESTION: What if there -- what if there were
14 no statute at all? Do you think that under the Commerce
15 Clause, with today's multi-state grids for transmission of
16 power, that the States could have directly regulated
17 energy transmission as a separate service?

18 MR. MALONE: I don't think there's any question,
19 Your Honor, that under today's Commerce Clause
20 jurisprudence, the States would be able to regulate retail
21 deliveries over transmission facilities, particularly
22 within their own States. Remember that retail is
23 essentially a local business. Retail electricity. We
24 have 127,000 customers in this country, and FERC certainly
25 is in no position to be regulating the rates, terms, and

1 conditions charged those customers for transmission. And
2 I think the -- the jurisprudence, under the dormant
3 Commerce Clause, leaves no question that the States would
4 be able to continue regulate retail transmission.

5 QUESTION: But the statute does give the FERC
6 jurisdiction over the transmission of electric energy in
7 interstate commerce. Are you saying this isn't the
8 transmission of electric energy in interstate commerce?

9 MR. MALONE: Exactly. We are saying, Your
10 Honor, that that transmission that was described in 201(b)
11 in 1935 was not transmission headed to retail customers.
12 The court -- the Congress at that time was attempting to
13 fill --

14 QUESTION: But in 1935, we didn't have these
15 interstate grids, and isn't it conceivable that you could
16 have a power company producing power within a State and
17 distributing it to customers within the State, everything
18 totally intrastate? That may have been a common
19 occurrence at the time the statute was passed. Today,
20 with the multi-state grid, it's hard to know how any
21 transmission that goes on that is other than interstate
22 commerce.

23 MR. MALONE: Well, Your Honor, the rate of
24 interconnection from 1920 to 1935 was actually greater
25 than the rate of interconnection that we have seen since.

1 The Indiana Consumer Council's reply brief points that
2 out. So, there's no question that the '35 Congress knew
3 that interconnection was coming. There certainly was
4 interconnection at the time in '35, and it recognized that
5 notwithstanding that interconnection, that retail
6 regulation was a local service and that the States should
7 continue it.

8 And that's why, in addition to crafting 201(b)
9 which referred to transmissions and sales -- and frankly,
10 the Congress wanted to give FERC jurisdiction to regulate
11 transmission independently of sales because if you have a
12 sale from company A to company C, you might have company B
13 that isn't taking title and is simply transmitting.

14 QUESTION: Are you -- are you saying either of
15 these two things? Either transmission regardless of the
16 rate at which it is billed is -- is not essentially
17 interstate commerce, or are you saying that you simply
18 cannot read the act to pick up that activity in interstate
19 commerce?

20 MR. MALONE: I'm saying that the -- the latter
21 with -- with one caveat.

22 QUESTION: So, you admit then that -- that it is
23 interstate commerce. It is subject to regulation if
24 Congress wants to regulate it. This statute just doesn't
25 do it.

1 MR. MALONE: It clearly is subject to regulation
2 by Congress if it wants to. We don't need -- the States
3 do not need to get into the question of which
4 transmissions are in interstate commerce and which aren't
5 in order to preserve its jurisdiction over retail
6 transmissions because Congress wanted the States to be
7 able to continue to regulate retail transmissions.

8 QUESTION: This is what I don't understand. You
9 -- why do you have to say that Congress wanted the States
10 to regulate transmissions?

11 As I read the statute, if -- if there's anything
12 wrong with -- with FERC's position, it is that the statute
13 divides the -- there are a lot of ways of dividing the
14 universe. The -- the statute divides it between
15 transmission and sale, and giving -- giving FERC authority
16 over transmission means it can regulate the manner of
17 transmission, who -- who is authorized to transmit, who is
18 required to transmit, and all that.

19 But the universe of sale is covered by the next
20 portion. And FERC is authorized to fix prices, to
21 interfere with the sales, only at wholesale in interstate
22 commerce. And once -- once you're dealing with a sale at
23 retail, FERC is just not given sales regulation authority.
24 It's still given transmission regulation authority, and it
25 could still forbid certain people from transmitting and it

1 could still impose certain requirements over transmission,
2 even at the local level, but it simply cannot regulate the
3 sales price.

4 Why isn't -- why isn't that the way to look at
5 it rather than --

6 MR. MALONE: Because the -- as the Colton case
7 held, there's a -- there's a bright line here between
8 retail and wholesale. There are -- with no exceptions is
9 what -- what the Court said.

10 QUESTION: That's what I'm saying.

11 MR. MALONE: All right.

12 Now, what FERC is saying is if you unbundle the
13 commodity, that transmission becomes unbundled and it
14 regulates transmissions to retail customers.

15 Your Honor, if -- what we're interested in is
16 the following: protecting the rates and the service to
17 the 127 million customers in this country, and we don't
18 want to lose the ability to do that if we take a pro-
19 competitive position and unbundle the commodity.

20 Now, when we do that -- you're right, Your Honor
21 -- the transmission is not even unbundled. It's not
22 separate. It's still -- it's not shown on -- on bills.

23 QUESTION: But you seem to concede -- and I
24 don't see why you do it -- that the right to regulate
25 transmission includes the right to regulate sale.

1 MR. MALONE: No, we -- we don't. We don't
2 concede that.

3 What I'm saying is that when unbundles -- when
4 one unbundles transmission, the States don't lose it, even
5 if it's out there by itself, if it's part of retail. Let
6 me give an example.

7 QUESTION: But doesn't it depend -- doesn't it
8 depend on what sale means? If it's sale of the commodity,
9 it says, sale of such energy at wholesale in interstate
10 commerce. Those are the words of the statute: sale of
11 such energy. The transmission cost is -- is not the same
12 as the energy itself. So, why couldn't one read this:
13 the sale of the energy, the commodity, at retail belongs
14 to the State, but not the transportation or transmission
15 cost?

16 MR. MALONE: Because when -- let's go back to
17 1935, Your Honor. When FERC brought this bill to
18 Congress, it said the main portion of the bill is
19 transmission. The retail transmissions are being
20 regulated by the State and that's the most important part
21 because that's the most -- that's the largest part of the
22 bill.

23 Now, if we take the position -- and -- and --

24 QUESTION: By bill, you mean the bill that the
25 customer gets.

1 MR. MALONE: Yes.

2 QUESTION: Okay.

3 MR. MALONE: Now -- now, this Court has said
4 many time, Your Honor -- times, Your Honor -- I know,
5 Justice Scalia, you don't reference the legislative
6 history, but you do accept reading provisions in harmony.
7 We have to read 201(b), the language, Justice Ginsburg,
8 that you're referring to, with 201(a), 206(d), and 212(h).
9 Those --

10 QUESTION: Where do we find these?

11 MR. MALONE: They are -- they are -- I'm sorry,
12 Your Honor. They're in the -- the statutory appendix to
13 our -- to our brief.

14 QUESTION: And whereabouts? Starting with 652a?

15 MR. MALONE: The -- I don't have the -- the page
16 reference off the top of my head. It's -- they are
17 recited in our briefs. And the language -- I don't -- I'm
18 not trying to quote the language specifically, Your Honor.
19 I'm just trying to give the conceptual strain that runs
20 through these statutes.

21 Basically what we have Congress saying is that
22 the Federal Government has to fill the Attleboro gap, and
23 that relates to wholesale transactions.

24 QUESTION: Well, you're summarizing a series of
25 statutory provisions in those words?

1 MR. MALONE: No. I'm -- no. I'm trying to get
2 to what -- what 201(a), 206(d), and 212(h) do
3 collectively, Your Honor.

4 The -- the FERC has drawn your attention to
5 201(b) throughout this case. The questioning has been on
6 the meaning of the word transmission in 201(b). The point
7 is that the other provisions of the statute, 201(a),
8 206(d), and 212(h), say something else. They say that
9 FERC's jurisdiction over --

10 QUESTION: Do you want to give us the U.S.C.
11 cites of those things? It's crazy when you people who
12 spend your whole life in this one statute use the old --
13 the old numbers instead of the United States Code numbers.
14 You're talking about 16 U.S.C. 824(a) and (b). Right?

15 MR. MALONE: Yes. That's correct, Your Honor.
16 That's correct.

17 And I -- and basically what -- what the first
18 provision says is that FERC's jurisdiction over
19 transmission is limited to that part of transmission that
20 involves transmissions for distribution, so that where
21 energy that is --

22 QUESTION: You're talking now about section (a)?

23 MR. MALONE: Yes, Your Honor.

24 And that's conceptually -- what it -- what it
25 says is that FERC's -- the universe of -- of transmission

1 that FERC is going to regulate is energy that is being
2 resold.

3 Now, the point here is that we all know what
4 Congress intended in 1935.

5 QUESTION: Well, just on that, is it the case
6 that if in 1935 Duke Power owns generating facilities in
7 West Virginia, owns lines from West Virginia to North
8 Carolina, and owns a distribution company in North
9 Carolina, all one company, does the FPC have any
10 jurisdiction at all in your opinion?

11 MR. MALONE: If there's a sale for resale --

12 QUESTION: No, no. Look. Take my example.

13 MR. MALONE: No.

14 QUESTION: Not what you're saying.

15 MR. MALONE: There is a case in 1934 at 2 P.U.R.
16 2d, where it's -- it's almost your -- your hypothetical.
17 It's Carolina Power & Light.

18 QUESTION: All right. So, your point then is if
19 my hypothetical is true in 1935, all we have in this case
20 is 1935, is my hypothetical, with the additional fact that
21 instead of Duke Power which really is generating that
22 power, there's also the possibility that Enron will come
23 in and supplant Duke Power.

24 MR. MALONE: That's correct.

25 QUESTION: That's your argument.

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1 MR. MALONE: Yes.

2 QUESTION: Okay. I understand it.

3 QUESTION: Mr. Malone, it would seem to -- is
4 that -- you're done?

5 MR. MALONE: I just wanted to add, Justice
6 Breyer, that if you look at 206(d), that calls on FERC to
7 provide costs in your hypothetical from West Virginia to
8 the North Carolina --

9 QUESTION: Then I would say if that's your
10 argument, the response to that argument will be this is an
11 unforeseen case in '35, the possibility of Enron
12 supplanting Duke, and it's close enough to wholesale
13 sales.

14 MR. MALONE: If Enron supplants Duke and sells
15 directly to a retail customer, it's going to be purchasing
16 electricity, selling retail, over a delivery system that
17 Enron does not own. It's our -- it's our position that we
18 regulate the rates for the delivery system.

19 We have here a case where FERC is admitting to
20 the Court that the sine qua non of preemption was not
21 contemplated by the '35 Congress. If Congress did not
22 contemplate the trigger point for preemption, it could not
23 have contemplated the preemption itself. So, the issue
24 before the Court is, can the Federal Government displace
25 the laws of 50 States that have required us to regulate

1 all aspects of retail service for 90 years when -- when it
2 is conceding that Congress did not intend its action?

3 QUESTION: May I ask you one question --

4 QUESTION: Mr. Malone.

5 QUESTION: -- about the words in the statute?
6 The statute uses an and. It says that -- that on the
7 Federal side, there's authority over two things, and one
8 is transmission of electric energy in interstate commerce
9 -- that's one thing -- and the sale of such energy at
10 wholesale in interstate commerce. Both (a) and (b) use
11 the and. But I take it from your argument that you're
12 saying the transmission has to be read as linked to the
13 sale as wholesale, that they're not discrete pieces.

14 MR. MALONE: Not quite, Your Honor. If you have
15 -- if we go back to Justice Breyer's hypothetical and we
16 have company A in West Virginia which is selling to
17 company C in North Carolina with an intermittent carrier
18 by a transmission line, we would concede that FERC would
19 have jurisdiction over the transmission, even though
20 company B is not taking title and is simply carrying. And
21 that was intended by Congress and that's why it did not
22 link the transmission and the sale. In other words, the
23 transmitter does not have to be selling the energy.
24 Either way, FERC has jurisdiction.

25 QUESTION: Mr. Malone --

1 MR. MALONE: But it should be a wholesale
2 transaction.

3 QUESTION: -- could I come back to Justice
4 Ginsburg's earlier question which focused on section
5 824(b)(2), which says that the provisions shall not apply
6 to any other sale of electric energy. And her question
7 focused on the fact that it just says, sale of electric
8 energy, and doesn't say, sale of transmission.

9 Now, it seems to me your response to that -- if
10 I were making the response, at least, I would have said
11 that if -- if sale of electric energy in (b)(2) is so
12 narrow that it just means the commodity and not the -- the
13 transmission and the servicing and -- and the metering and
14 everything else, if it is that narrow in (2), it would
15 also be that narrow in (1). And -- and (1) gives -- gives
16 FERC authority over the sale of electric energy at
17 wholesale. And I -- I assume that that authority over the
18 sale at wholesale includes authority over the price of the
19 commodity, the price of the transmission, the price of
20 everything else.

21 So, if you're going to give it an expansive
22 reading in (1), it seems to me you have to give it an
23 expansive reading in (2). And just as FERC has authority
24 over the whole sale at wholesale, so -- so the States have
25 authority over the whole sale at retail.

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1 MR. MALONE: Including the transmission.

2 QUESTION: Including the transmission.

3 MR. MALONE: Your Honor, I think that is a valid
4 reading of the statute.

5 Can I just take a quick minute and explain why
6 we care so much about this?

7 QUESTION: It's up to you.

8 (Laughter.)

9 MR. MALONE: Your Honor, we have situations in
10 New York State, for example, where we have -- FERC has
11 regulated curtailments over transmission systems. That
12 involves which customers stay in the light and which
13 customers go into the dark. When we have a decision to
14 make in New York, over the last 30 years that I've been
15 involved in this, we're going to look to try to minimize
16 the number of people who go into the dark. That's number
17 one. Number two, we're going to protect critical
18 customers: hospitals, prisons, people on life support
19 systems. We're on the ground and we're there to protect
20 retail customers.

21 When FERC preempts us on curtailment in this
22 case, it -- it says that curtailment under that situation
23 has -- has to be nondiscriminatory. It sounds wonderful,
24 and it's consistent with our economic plan. But it has to
25 give way to critical care customers and keeping the most

1 people in the light that you possibly can.

2 This is an example of where an agency has
3 overstepped its bounds. It's moved into retail
4 regulation, conceding that Congress didn't intend it.
5 There's a Federal/State balance that this Court has
6 protected, absent clear evidence from Congress that it
7 should change. And here that balance has changed and it's
8 creating difficulties. We now have two hands on the
9 retail wheel, and it doesn't work.

10 If there are no further questions, I'd like to
11 reserve the rest of my time for rebuttal.

12 QUESTION: Very well, Mr. Malone.

13 Mr. Cohen, we'll hear from you.

14 ORAL ARGUMENT OF LOUIS R. COHEN

15 ON BEHALF OF THE PETITIONER IN NO. 00-809

16 MR. COHEN: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 FERC's open access transmission tariff is
19 concerned with usage of the interstate transmission grid,
20 something that only FERC can effectively regulate. The
21 OATT does require that interstate transmission rates be
22 published and be proportional to usage, but its major
23 concern, as Pennsylvania's amicus brief says more
24 eloquently than we did, is rules of the road, access,
25 usage priorities, classes of service, reservation and

1 scheduling of service, access to real-time information
2 about the system, pro rata curtailment in periods of
3 constraint, and similar matters that the States don't and
4 can't regulate.

5 FERC found endemic, undue discrimination in the
6 provision of interstate transmission service by the
7 traditional utilities that collectively own most of the
8 grid. But FERC did not comply with the statutory command
9 to cure that discrimination. FERC imposed the OATT but
10 said it had no jurisdiction to apply it to transmissions
11 that are bundled with retail energy sales, and thus
12 exempted about 60 percent of the traffic from the rules of
13 the road.

14 QUESTION: Did it say it had no jurisdiction or
15 just chose, in its discretion, not to regulate them?

16 MR. COHEN: It said that the transmissions
17 should not be considered within the interstate
18 transmission clause giving FERC jurisdiction over
19 interstate transmissions, but rather, in the case of
20 transmissions bundled with retail sales, should be
21 considered part of the bundled retail sale.

22 The D.C. Circuit then said --

23 QUESTION: Which means what? Which means that
24 it doesn't have jurisdiction. When you say should be
25 considered part of, you mean discretionarily should be

1 considered or must be --

2 MR. COHEN: Well, the D.C. Circuit called it a
3 permissible policy choice, and -- but --

4 QUESTION: And you agree with that? You agree
5 it was a policy choice and not a jurisdiction --

6 MR. COHEN: I think FERC made a jurisdictional
7 mistake and I think the D.C. Circuit --

8 QUESTION: It misconstrued its statute.

9 MR. COHEN: It misconstrued its statute.

10 QUESTION: It didn't simply withdraw its hand.
11 It misconstrued the act.

12 MR. COHEN: Yes, yes. And we are -- we are
13 asking the Court to tell FERC that it did have
14 jurisdiction over that large portion of the
15 transmission --

16 QUESTION: In your view --

17 MR. COHEN: -- and that it should, therefore,
18 solve the problem that it found.

19 QUESTION: In your view, if FERC does have
20 jurisdiction of this -- this part of the problem, must it
21 exercise that jurisdiction or can it allow the States to
22 regulate?

23 MR. COHEN: What it must do under section 206,
24 which is section 824(e), is cure the undue discrimination
25 that it found. I think FERC does have, would have a good

1 deal of discretion to decide how to do that.

2 QUESTION: Well, then it's pretty much a Pyrrhic
3 victory for you if you persuade us that the CADC was wrong
4 in saying it was just a policy choice, it was a
5 jurisdictional decision. It goes back to them and they
6 say, well, so we have jurisdiction, we're choosing not to
7 exercise it.

8 MR. COHEN: I'm hoping that what I had was a
9 Pyrrhic defeat in the -- in the D.C. Circuit and that --
10 and that FERC, once told that it has jurisdiction, and
11 having recognized that it has the obligation to cure undue
12 discrimination, will exercise that jurisdiction properly.
13 Because this -- this is a problem that only FERC can
14 solve.

15 QUESTION: We usually have cases in which the
16 agency is alleged to go too far. What case do you cite
17 that we could look to for a model where the agency goes
18 not far enough and we have to push them?

19 MR. COHEN: Well, actually in the Louisiana
20 Power & Light case, which we cite and think is very much
21 in point here, which arises under the same parallel
22 provisions of the Natural Gas Act, FERC's initial position
23 was that it -- I believe FERC's initial position was that
24 it did not have jurisdiction to regulate bundled direct
25 retail sales of -- of gas and that that included a lack of

1 jurisdiction over the transportation of that gas. And --
2 and this Court said, yes, you do.

3 QUESTION: I guess what would -- suppose FERC
4 says or suppose I read it as saying, since you're
5 whipsawing them between you and New York, look, in 1935
6 yours is the case where Congress would have never dreamt
7 they had jurisdiction. Theirs is the case that's somewhat
8 ambiguous. I take it that's their reply. Theirs is the
9 new legal animal, the new factual animal. Yours is the
10 old one. Yours is the situation I described in the
11 hypothetical.

12 MR. COHEN: What happened in 1935 was that,
13 recognizing that interconnection was coming, Congress
14 granted FERC jurisdiction over transportation of electric
15 energy in interstate commerce without limitation. It is
16 only more recently -- really only in the 1990's -- that
17 competition for the use of the interstate grid, which is
18 what we're -- what we're about here, has arisen and has
19 become a problem.

20 QUESTION: It gave them, without limitation,
21 authority over transportation of energy, but not without
22 limitation authority over sale of energy. Your argument,
23 like I'm sure the Government's which will follow, assumes
24 that the -- the power to regulate the transmission
25 includes the power to regulate the sale.

1 MR. COHEN: No.

2 QUESTION: Isn't that an essential part of your
3 argument?

4 MR. COHEN: No. We --

5 QUESTION: Well, where does it -- where does
6 it --

7 MR. COHEN: We think that the States have
8 plenary power to regulate who may serve their retail
9 customers and at what rates and at what -- and on what
10 other terms and conditions. But they must take into
11 account FERC's -- and properly respect FERC's regulation
12 of the -- the item that is within FERC's jurisdiction,
13 namely transmission.

14 And this is a parallel to the Nantahala case
15 where this Court said --

16 QUESTION: What do you mean take into account?
17 I thought you're saying that -- that FERC has the power to
18 determine a -- a component of the retail sale.

19 MR. COHEN: It has the power to determine the --
20 the cost of -- of transmission of electricity insofar as
21 that -- and that may be one of the costs that the retail
22 utility incurs for which the retail utility has the right
23 under State law to recover. That's just like the
24 wholesaling cost. FERC is no more -- is no more
25 regulating the retail transaction when it regulates the --

1 QUESTION: That's right.

2 MR. COHEN: -- the transmission --

3 QUESTION: But it has authority to regulate the
4 -- the wholesale sale. It does not have authority to
5 regulate the retail sale.

6 MR. COHEN: But it has authority to regulate
7 transmission, and what I'm saying is --

8 QUESTION: But transmission by the statute, as I
9 read it, is separated from sale. It says, the provisions
10 shall apply to the transmission of --

11 QUESTION: Where are you reading from?

12 QUESTION: I'm reading from (b)(1). Shall apply
13 to the transmission of -- section 824(b)(1). I don't know
14 what -- at (2), whatever it is in the -- in the --

15 MR. COHEN: It's 824 --

16 QUESTION: 16 U.S.C. 824(b)(1).

17 MR. COHEN: Yes.

18 QUESTION: The provisions of this chapter shall
19 apply to the transmission of electric energy in interstate
20 commerce. And it does not then say, including the sale of
21 electric energy at wholesale. It doesn't say, including
22 the sale. It says, shall apply to the transmission in
23 interstate commerce and to the sale of electric energy at
24 wholesale -- at wholesale -- in interstate commerce,
25 drawing a dichotomy between transmission and sale. And

1 what the State is saying here is the only sale you're
2 given authority over is the wholesale and -- and not --
3 not the retail sale.

4 MR. COHEN: And we have stressed -- whereas the
5 -- the nine States have tried to blur this distinction, we
6 have stressed the distinction between FERC's jurisdiction
7 over transmission and FERC's jurisdiction over wholesale
8 sales.

9 Let me put it this way. The State regulates
10 retail sales. A retail seller has two costs. It may have
11 more, but two of its costs are the cost of power, which it
12 may buy at wholesale, and the cost of transmission of
13 power, which it incurs in order to make a retail sale.
14 Both of those two things are regulated by the -- by the
15 Federal Government, by -- by FERC.

16 And just as this Court has squarely held that
17 the -- that FERC's jurisdiction over the cost of wholesale
18 sales is -- is -- does not encroach upon the States'
19 retail sale authority, but it is something that the States
20 must respect in setting retail rates, so FERC's regulation
21 of the cost of transmission.

22 QUESTION: But FERC's regulation of the cost of
23 -- of interstate transmission at wholesale comes about not
24 because of its authority over the transmission of -- of
25 electric energy, but because of its authority over the

1 sale of electric energy at wholesale. It can fix those
2 wholesale prices, and once it does, the States have to
3 take that --

4 QUESTION: That's the point of your
5 disagreement.

6 MR. COHEN: Yes. I don't -- I don't agree with
7 that.

8 QUESTION: That's the issue, isn't it?

9 MR. COHEN: Yes. That -- that is the
10 statutory --

11 QUESTION: Yes. The statute says, shall apply
12 to transmission of electric energy in interstate commerce.
13 And you take that as a separate grant.

14 QUESTION: And it says and.

15 QUESTION: And -- and, two, the sale of electric
16 energy at wholesale in interstate commerce, which you take
17 to be a second grant of authority.

18 MR. COHEN: Yes, and the basic --

19 QUESTION: Not linked together.

20 MR. COHEN: The basic structure of our argument
21 is that just as your opinion for the Court, Justice
22 O'Connor, explained in Nantahala, that the States must
23 take into account the wholesale cost of energy, so the
24 States can be required to -- to take into account FERC's
25 regulation of transmission --

1 QUESTION: What difference does it make whether
2 the transmission component is bundled or unbundled at
3 retail sale?

4 MR. COHEN: We don't think it should make any
5 because transmissions, whether for wholesale or retail,
6 whether bundled or unbundled, compete for use of the
7 interstate grid. And what we are really about here isn't
8 even rates in any important way. It is competition for
9 the use of the grid.

10 QUESTION: Can you sell at retail in States
11 which are -- which are bundled?

12 MR. COHEN: Absolutely not. What we want --

13 QUESTION: Well, then why -- then why is there
14 -- then why is there a problem?

15 MR. COHEN: Because what we want the right to do
16 is to use the transmission system through those States
17 without the retail -- the traditional monopoly utility
18 that owns the facilities in those States being able to hog
19 those facilities for its own use and keep us off the road.

20 Let me -- let me try an example.

21 QUESTION: In other words, even though you're
22 not trying to reach retail --

23 MR. COHEN: Even though we're not trying to
24 reach retail customers, we may be trying to sell energy to
25 the utility in -- in Wisconsin. I'm taking this example

1 partly from the Eighth Circuit's decision in the NSP case,
2 which is in our briefs. We're trying to sell energy to
3 the utility at wholesale in Wisconsin. To do that, we
4 have to transmit through Minnesota. The traditional --

5 QUESTION: Well, then that -- then that
6 wholesale sale can be regulated.

7 MR. COHEN: The wholesale sale can be regulated,
8 but the traditional utility in Minnesota, which owns the
9 facilities and mostly makes bundled retail sales to its
10 customers in Minnesota, can say, our bundled retail sales
11 are not subject to FERC's OATT. We can schedule
12 transmissions an hour before we want to send them, but
13 your transmissions through to Wisconsin need 2 days.

14 QUESTION: I'm very surprised that FERC is
15 saying that they have no jurisdiction over that. You
16 would have thought that if you are in State A and you are
17 selling to a different, say, retailer in State C, the
18 transmission from A to C is certainly a transmission that
19 falls within the classical notion of this statute, isn't
20 it? And if B puts something up on those lines that
21 blocks the transmission, I'm very surprised that FERC
22 would say they don't have jurisdiction to stop that.

23 MR. COHEN: Well, we were a little surprised
24 too.

25 QUESTION: But that's what this case is about in

1 your view.

2 MR. COHEN: From our -- from our standpoint,
3 that's what our side of this case is about. And it's
4 exactly what the Eighth Circuit said in the NSP case.
5 They said --

6 QUESTION: That -- that would be an interference
7 with the transmission, not with the sale. I mean, sure,
8 they'd have authority over that because they have
9 authority over transmission, both interstate and
10 intrastate.

11 MR. COHEN: All that I'm asking the Court to say
12 is that FERC has the ability to -- the jurisdiction to
13 apply its general open access transmission tariff not only
14 to our sales at wholesale and to -- but -- but also to the
15 bundled retail sales that compete with us for use of -- of
16 the transmission grid.

17 QUESTION: Well, if the -- FERC can regulate
18 your transmissions and you go to FERC and say, you know,
19 our transmissions are being blocked, why can't they say,
20 we will exercise jurisdiction over your transmission and
21 we will unblock you?

22 MR. COHEN: Justice Kennedy, the answer to that
23 is, first of all, that it's -- it's not just blockage. It
24 can be more complicated than that.

25 But -- but second of all, FERC actually said in

1 Order 888 we need to impose the OATT because doing this on
2 a case-by-case basis doesn't work. If you're going to
3 have an interstate highway system in which the traffic is
4 present simultaneously, instantaneously in all parts of
5 the system, you need a set of rules of the road that apply
6 to everybody. You can't just say, weeks or months later,
7 we found that somebody -- that somebody improperly blocked
8 somebody else's through transmission.

9 QUESTION: But I -- I thought you wanted the
10 particular reg -- there's a particular reg that New York
11 has been talking about, and I thought you wanted that
12 applied to the bundled sales as well.

13 MR. COHEN: Particular regulation.

14 QUESTION: Yes.

15 MR. COHEN: Yes.

16 QUESTION: And -- and that seems to me a
17 different issue than somebody climbing up a pole, for
18 example, and cutting the wire so that you can't get your
19 electricity between State A and State C.

20 MR. COHEN: Well, the ideal example is the
21 curtailment example. What happens when there is a
22 constraint such that the system can't carry all the would-
23 be transmission? The OATT says there shall be a
24 complicated formula pro rata curtailment of different
25 uses.

1 The Eighth Circuit said in the NSP case, because
2 FERC had no -- had said it had no jurisdiction over
3 bundled retail sales, they don't get prorated. Our
4 transmissions through Minnesota to Wisconsin get cut back
5 so that our service to the -- to the homeowners and -- or
6 through the utility that serves the homeowners and
7 hospitals in Wisconsin gets cut back so that the utility
8 in Minnesota can provide full service to its retail
9 customers.

10 QUESTION: You want the Federal Government to
11 determine which -- which will be the emergency users and
12 the preferred users in each State and locality. You want
13 that decided in Washington.

14 MR. COHEN: We want the Federal Government to
15 regulate the transmission of electric energy in interstate
16 commerce, and that has become a more complicated problem
17 than it was in 1935. There is new competition for those
18 facilities. Transmission has itself become a product, but
19 we think both the jurisdiction to regulate and the
20 obligation to cure a discrimination have been in the
21 statute since -- since that time.

22 QUESTION: There's always been a product. It's
23 now a separately sold product, but it's always been part
24 -- in fact, it used to be even a greater percentage, I
25 think, of the cost of the electricity.

1 MR. COHEN: Yes. I -- I'm told --

2 QUESTION: It's a lesser percentage now than it
3 used to be.

4 MR. COHEN: -- on average it's now about -- it's
5 now about 10 percent. But there has not been --

6 QUESTION: I don't know about you, but when I
7 look at my utility rate, it's a very small amount for
8 transmission and a substantially larger amount for the
9 energy.

10 MR. COHEN: It is. It's a small fraction of the
11 cost, which is one of the reasons why this case isn't
12 primarily about rates. The OATT, which is in the joint
13 appendix, starts -- it runs about 110 pages. And two-
14 and-a-half of those pages talk about rates and say that
15 you must publish a transmission rate and that it shall be
16 essentially proportional to usage.

17 But what we're concerned about here is getting
18 on the system, being able to schedule your transmissions.

19 QUESTION: I don't even see how this works. I
20 mean, it isn't like water. I mean, you get on the system,
21 you get on the system, and they have these people
22 underground who pull levers and so forth. The electricity
23 flows according to some scientific way. It's not like
24 putting water through a dam. So, I don't even know how
25 this works, this blocking scheduling business.

1 MR. COHEN: Well, in order to have the -- the
2 electricity flows -- the power flows generally over the
3 system, but -- but in order to have the right to turn on
4 -- to ramp up your generator to produce some additional
5 electricity which your customer -- at a time when your
6 customer is going to take electricity off the system at
7 some other point, you need to have a contractual
8 arrangement or other right to do that.

9 Thank you, Mr. Chief Justice.

10 QUESTION: Thank you, Mr. Cohen.

11 Mr. Kneedler, we'll hear from you.

12 ORAL ARGUMENT OF EDWIN S. KNEEDLER

13 ON BEHALF OF THE RESPONDENT

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

16 Order 888 fully respects and, indeed,
17 complements State regulatory jurisdiction over the
18 transmission -- excuse me -- over the sale of electric
19 energy. Some States have chosen to maintain the
20 traditional monopoly system for the delivery of power to
21 retail customers. In that situation, there is no separate
22 transmission service, and the customer pays a single rate
23 that includes all of the utility's costs, basically
24 calculated by that utility and regulated by the State, for
25 the generation, the transmission, and the distribution of

1 power to the local customer. Order 888 does not affect
2 those traditional monopoly arrangements.

3 Other States, however -- now about half the
4 States -- have decided to take a different path, which is
5 to separate out the transmission service and -- and
6 introduce competition in the purchase of electric power at
7 retail. In that system, the retail customer has the right
8 to purchase the power not simply from the utility that
9 previously had the monopoly control, but from a broad
10 variety of utilities. In that situation, that power might
11 have to be generated, purchased and transmitted from out
12 of State or in State by another utility. In that
13 situation, it is necessary for there to be access to the
14 transmission facilities to move the power from the
15 generation place to the place of -- of retail delivery.
16 In that situation, there is now a new transmission service
17 that did not exist in 1935 when the Federal Power Act was
18 passed.

19 QUESTION: Mr. Kneedler, if -- if I understand
20 it correctly, it is -- the position of the agency hinges
21 on the proposition that the power conferred by -- by
22 section 824 to regulate the transmission of electrical
23 energy includes -- includes the power to regulate the sale
24 of the transmission of electrical energy. Isn't that
25 what --

1 MR. KNEEDLER: The sale -- the sale of the
2 transmission, yes.

3 QUESTION: The sale of the transmission.

4 MR. KNEEDLER: But what it does not -- what it
5 does not include is the retail sale.

6 QUESTION: Now, if that were true, it seems to
7 me that 824(b)(1), instead of reading the way it does,
8 should read this way: The provisions of this subchapter
9 shall apply to the transmission of electric energy in
10 interstate commerce -- which would include the sale of
11 that transmission, right? -- and to the sale of the
12 commodity portion of electrical energy at wholesale in
13 interstate commerce. Because you wouldn't need the second
14 half to cover the sale of the transmission component.
15 You're saying the sale of the transmission component is
16 covered by the first half of the -- of the sentence, shall
17 apply to the transmission of electrical energy.

18 MR. KNEEDLER: Well --

19 QUESTION: And -- but -- so, it should have gone
20 on to say, and to the sale of the -- of the commodity at
21 wholesale in interstate commerce.

22 MR. KNEEDLER: But -- but that is what it says I
23 believe because electric energy is the commodity. And the
24 transmission -- it's the transmission of the commodity, to
25 use your words, or the wholesale interstate commerce of

1 the commodity. In both cases, the electric energy is the
2 commodity.

3 And what FERC can regulate is two different
4 things. As Justice O'Connor pointed out, these are two
5 separate and independent grants of jurisdiction to FERC.
6 One is wholesale sales of -- of the commodity, and the
7 other is the transmission of the commodity.

8 Now, it's true in this case, this case turns
9 primarily on rights of access, physical access, to the
10 transmission capacity. But a necessary part of regulating
11 access is also regulating the rates because different
12 qualities of -- of access, rights of access -- you could
13 have firm or non-firm power. Those different rights of
14 access necessarily would -- would cost more or less. A
15 utility would charge more for -- for a firm power than --
16 than non-firm power. And that -- so, in that situation,
17 the rates being charged for the access are essentially
18 inseparable from setting the rules of the road.

19 So, it seems to us not -- not feasible as a
20 practical matter and not textually the natural reading of
21 the act to say that somehow FERC does not have authority
22 to regulate the costs -- or excuse me -- the price on
23 which interstate transmission will be sold.

24 And I think it was Justice Ginsburg also pointed
25 out that the clause of the statute that saves power to the

1 -- authority to the State says that the provisions of this
2 subchapter affirmatively grant the power to FERC --

3 QUESTION: Where are you reading from?

4 MR. KNEEDLER: I'm sorry. This is (b)(1) on
5 page 2 of New York's brief.

6 QUESTION: (B)(1)?

7 MR. KNEEDLER: (B)(1), yes.

8 It says, but except as provided in paragraph
9 (2), shall not apply to any other sale of electric energy.
10 It does not say, does not apply to the transmission or the
11 sale of transmission or matters having to do with
12 transmission.

13 And it's also important in --

14 QUESTION: And you think that -- that sale of
15 electric energy at wholesale in -- in the first portion of
16 it, in -- in (1), only referred to the sale of --
17 regulating the sale of the commodity at wholesale.

18 MR. KNEEDLER: Well, yes, but -- but for
19 example, in setting a wholesale cost -- or excuse me -- a
20 wholesale rate, FERC could take into account the costs of
21 transmission --

22 QUESTION: Because --

23 MR. KNEEDLER: -- in setting a wholesale rate,
24 just as the State could.

25 QUESTION: Because of its authority over the

1 transmission of energy.

2 MR. KNEEDLER: Either one. It has authority
3 over the transmission. But that's -- what I just said is
4 parallel to the way it would work for the State. The
5 State, in setting a retail rate -- as Mr. Cohen explained,
6 the State in setting a retail rate, would have to take
7 into account all of the costs that are components of that
8 retail rate. That could be the cost of the electric
9 energy, the commodity, and it would also include,
10 importantly, the cost of the transmission service.

11 QUESTION: I think that's a very unrealistic
12 reading of what Congress thought it was doing when it
13 wrote this thing, that when it -- when it spoke of the
14 sale of electric energy at wholesale in interstate
15 commerce, it had in mind only -- only the sale of the --
16 the commodity and not the sale of, you know, the
17 transmission and the entire cost. I think they were
18 saying FERC can regulate wholesale rates.

19 MR. KNEEDLER: Yes, absolutely. And I didn't
20 mean to say anything else. All I'm -- all I'm saying is
21 that as part of -- one component of the wholesale rates
22 includes the cost of transmitting the electric energy at
23 wholesale. So, if it is setting a -- a wholesale rate, it
24 has to include that as part of it.

25 QUESTION: But you can't say that because if you

1 say that that -- that the reason you have that authority
2 is because of the phrase, the sale of electric energy at
3 wholesale, you would also have to say in the very next
4 phrase, the sale of electric energy -- any other sale of
5 electric energy, sale at retail, would also include the
6 transmission component. You'd have to exclude the
7 transmission component from both of them.

8 MR. KNEEDLER: No. If I could -- if I could
9 answer that. First of all, quite aside from whether it --
10 it -- FERC would have the power under the wholesale sales
11 clause, it would unquestionably, we think, have the power
12 under the transmission clause, which I said is a -- is
13 a --

14 QUESTION: I don't think that's unquestionable
15 at all.

16 MR. KNEEDLER: But -- well, it's -- it's an
17 independent grant of authority. And -- and for FERC's
18 authority in this area to be complete, especially in these
19 days of interconnected grids, it's -- it's necessary that
20 -- that FERC have the ability to regulate all aspects of
21 access to the grid, which as I said, is not just technical
22 problems of scheduling but also what the costs of
23 different -- different quality of access to the grid will
24 be.

25 But the other point I wanted to make -- and this

1 -- this ties in, I think, to a -- a misconception of
2 Attleboro and Pennsylvania Gas, which is the background
3 against which Congress acted, that I -- that I would like
4 to address here.

5 States, in setting retail rates, have the
6 authority -- and I was saying this before -- have the
7 authority to take into account all of the costs that the
8 utilities serving retail customers may incur. And in the
9 monopoly situation, the -- the State will regulate the --
10 will take into account the generation costs, the
11 transmission costs, and the -- and the retail delivery
12 costs and come up with a rate.

13 And in -- in the Pennsylvania Gas case, this
14 Court held that a State, consistent with the Interstate
15 Commerce Clause, could regulate the retail rates of
16 natural gas that were -- that were paid by retail
17 customers at the end line of the distribution system for
18 the cost of natural gas. And the Court rejected the
19 argument that because that gas had moved interstate, that
20 the State had no power to regulate the delivery to the
21 retail customer.

22 But in so holding, the Court didn't say that the
23 States could regulate interstate commerce. What they said
24 was that the States could regulate the local distribution,
25 even though it had an incidental effect on interstate

1 commerce. So, the rates that were left to the States,
2 under Attleboro and under Pennsylvania Gas, were the
3 ability to actually regulate the rates that the local
4 utility is going to charge to the local customer, but it
5 -- the Court did not say that the States had affirmative
6 authority to directly regulate the interstate transmission
7 itself.

8 QUESTION: Well, suppose you have -- have a
9 condition, as described by counsel for Enron, and they
10 say, we just can't transmit our gas through this State.
11 Do you have jurisdiction to exercise -- does the
12 commission have jurisdiction to exercise if it chooses to
13 do so?

14 MR. KNEEDLER: Absolutely. We think that
15 FERC's --

16 QUESTION: So, this is just discretionary -- a
17 discretionary choice.

18 MR. KNEEDLER: Well, there are two different
19 things, and I think it was maybe you who put the question.
20 There's -- or maybe Justice Breyer. What Enron is seeking
21 here is to have an existing regulation on open access, all
22 comers, anytime, anywhere to -- for retail -- excuse me --
23 to have a -- a pricing provision under an open access
24 regime applied to the -- the transmission component even
25 in the monopoly State. That -- that is -- that would be a

1 significant change in the way that retail rates for
2 bundled sales have been handled.

3 QUESTION: Well, it might. He's seeking a
4 number of different things. But the first thing he's
5 seeking is an acknowledgement that you do have
6 jurisdiction to exercise if you choose to do it.

7 MR. KNEEDLER: Right. And -- and as --

8 QUESTION: Do you concede that you have that?

9 MR. KNEEDLER: We don't just concede, we
10 affirmatively assert that we do have authority. And --
11 and, for example, in the Northern States --

12 QUESTION: So, then this isn't a jurisdiction
13 case.

14 MR. KNEEDLER: Not in that respect, no, because
15 I think that all -- with respect to this order --

16 QUESTION: And so you would have no objection to
17 our saying -- and I don't know quite how we'd say it, but
18 the FCC has jurisdiction over transmissions of bundled
19 sales at retail.

20 MR. KNEEDLER: Well, let me -- let me just
21 modify that in one respect. What Enron was seeking here
22 was essentially to have FERC regulate the transmission
23 component of a retail sale while it remained bundled.
24 FERC did not disclaim the authority in an appropriate case
25 to order the unbundling of -- of that service --

1 QUESTION: Well, that's just a two-step -- you
2 say, first, unbundle, and now that you've unbundled, we're
3 going to regulate it.

4 MR. KNEEDLER: And the court of -- and what the
5 -- the court of appeals analysis in this case essentially
6 looked at the -- at the transaction --

7 QUESTION: If we can get back to my question.
8 That means that you do have jurisdiction to reach this
9 problem and to regulate transmissions.

10 MR. KNEEDLER: Yes. And in the -- in the
11 Northern States Power case, that is discussed in the -- in
12 the briefs, it -- it addresses the question of
13 curtailment. Under the open access tariffs, a -- a
14 utility is required to curtail all service in a
15 nondiscriminatory manner. And in -- in FERC's view that
16 meant that a -- a utility having control over transmission
17 capacity had -- would have had to curtail all service --
18 all transmission for retail on a nondiscriminatory basis.
19 And that --

20 QUESTION: Well, if jurisdiction is thought of
21 in constitutional terms, the answer is pretty clear. You
22 have jurisdiction. If it's thought of in statutory terms,
23 do you have statutory jurisdiction to order the
24 unbundling?

25 MR. KNEEDLER: I believe FERC does.

1 QUESTION: To order unbundling.

2 MR. KNEEDLER: I believe FERC does. I mean,
3 that's essentially what FERC ultimately did in the natural
4 gas area.

5 QUESTION: But aren't -- aren't you --

6 MR. KNEEDLER: But -- but let me be clear. That
7 would be a -- that would be a -- a major change in the way
8 that utility regulation has happened. And what -- what
9 FERC has done is leave to the States the decision as to
10 whether to maintain the traditional --

11 QUESTION: What FERC has --

12 QUESTION: Mr. Kneedler, I'm really puzzled
13 because I -- I must have misread the papers. I thought
14 that the position of the FERC, at the agency level and the
15 court of appeals, was that it did not have jurisdiction to
16 take the action that Enron wants it to take.

17 MR. KNEEDLER: To order -- to order unbundling.

18 QUESTION: Yes.

19 MR. KNEEDLER: That -- that may well have been
20 an implicit understanding of FERC, but if you look at the
21 order, it actually never says that.

22 And the court of appeals opinion, in affirming
23 the -- the FERC order, simply says that it -- that FERC's
24 characterization of a bundled transaction is within the --
25 the realm of its discretion. What the court of appeals

1 said is you could look at the bundled transaction as being
2 primarily a -- a retail sale, and that has traditionally
3 been subject to State regulation. Or you could look at it
4 as including that -- the transmission component, and that
5 would be subject to FERC regulation. But FERC made a --
6 FERC made a permissible --

7 QUESTION: So, the position of the Government
8 is, in respect to Enron's case, not New York's, Enron is
9 right. FERC does have jurisdiction, but FERC, in
10 exercising that jurisdiction, could say, we do not wish to
11 exercise it. And that's what happened here.

12 MR. KNEEDLER: The commission in this --

13 QUESTION: Is that -- is that your position or
14 not?

15 MR. KNEEDLER: I cannot speak for FERC on that
16 question because FERC did not address that in this order.
17 All FERC said was it was not going to order the
18 unbundling, and -- and all it was doing was -- was
19 regulating the transmission component where there is
20 unbundling.

21 QUESTION: But I want to know what -- I have an
22 argument in some briefs made by Enron, and perhaps I
23 misread them and I'll go back to them. But I thought
24 Enron was saying the error that FERC made and the
25 Government in this case is that FERC denied it had

1 jurisdiction to give us the order we'd like them to give.
2 Now, I read that, I think, in their briefs.

3 Therefore, I want to know what does the
4 Government say about that. And what I hear you saying is
5 they are right in claiming that FERC had jurisdiction, but
6 they are wrong if they say that FERC had to exercise it.
7 Now, that's what I would like to know, just what the
8 position is.

9 MR. KNEEDLER: Well, there are really two points
10 about FERC's power here -- authority here that I would --
11 would like to separate. One is the -- the power -- the
12 authority of the sort Justice Kennedy was asking, where --
13 where a utility is -- is reserving its load for bundled
14 retail in a way that frustrates the ability of someone
15 like Enron to pass through its power to another State.
16 That would -- that would be, in effect, imposing an
17 obstacle, like cutting the line, that is frustrating the
18 ability of FERC to regulate the -- the aspects of
19 transmission that New York, I think, concedes that FERC
20 has. I think in that situation -- and that's like the
21 Louisiana Power & Gas case. I think in that situation,
22 FERC unquestionably has the authority to prevent any --

23 QUESTION: Whether they have the authority --
24 how do I answer this question from your question
25 presented? Number 2, in 00-809, the question presented is

1 whether the court of appeals properly deferred to the
2 commission's determination that it lacks jurisdiction over
3 retail transmission service that is sold together with
4 electric energy in a single bundled transaction, et
5 cetera.

6 Now, I have to answer that question. Do I
7 answer that question yes or no, that it did properly defer
8 or that it did not properly defer?

9 MR. KNEEDLER: It did properly defer because the
10 predicate is that there is a single transaction. The --
11 the transmission service has not been separated out of the
12 one bundled transaction.

13 QUESTION: Okay. Are you -- are you saying that
14 -- are you drawing this line? You're saying that FERC has
15 the authority to order unbundling. No question.
16 Jurisdiction, constitutional and statutory, to do that.

17 Are you also saying that if FERC chooses not to
18 order unbundling, it has no jurisdiction to regulate the
19 transmission that is a component of the ultimate unbundled
20 cost? Is that where you're drawing the line?

21 MR. KNEEDLER: Yes. That -- and that -- that is
22 I think all that FERC said.

23 I would like to modify the first point, which is
24 I am not -- I'm not affirmatively asserting at this point
25 that FERC has the jurisdiction to order unbundling. I

1 don't see anything in the act that prevents it, and under
2 the --

3 QUESTION: So, you're saying that you see
4 nothing in the act that would prevent FERC from doing just
5 what Mr. Cohen wants it to do so long as it takes two
6 steps, so long as it orders unbundling first. That's the
7 difference, I think, between you and Enron. Is that
8 correct?

9 MR. KNEEDLER: Assuming that FERC has this
10 authority. As I stated, it didn't disclaim it, but FERC
11 in this order did not -- did not stress that.

12 QUESTION: Right. But you're assuming they have
13 authority. You see no reason --

14 MR. KNEEDLER: I'm -- I see nothing in the act,
15 in the parallel provisions of the Natural Gas Act --

16 QUESTION: Well, again, referring to the
17 question presented that you drafted, question 2, the
18 question presented is whether the court of appeals
19 properly deferred to the commission's determination that
20 it lacks jurisdiction over retail transmission. And you
21 want us to say yes.

22 MR. KNEEDLER: But the rest of the question is:
23 when it is sold together with electric energy in a single
24 bundled transaction. And that is -- and that is the
25 transaction. That is the transaction that --

1 QUESTION: And you want us to say yes, it lacks
2 jurisdiction.

3 MR. KNEEDLER: Yes.

4 QUESTION: In that circumstance.

5 MR. KNEEDLER: In that circumstance.

6 QUESTION: Therefore, when Mr. Cohen put the
7 example that he did of a grid, and the grid covers several
8 States, and there are many sales for wholesale between --
9 sales for resale between A and C and D and F, but there's
10 one in the middle, C, where it in fact is all bundled.
11 And they all -- you know, it's a big grid. It goes
12 everywhere. And if in fact they are scheduling
13 deliveries, the State commission, in that C so that the
14 wrong people are getting the energy and so that the
15 wholesale -- the sales for resale in A, E, and F are all
16 mucked up, the answer is, of course, the commission has
17 jurisdiction to deal with that situation.

18 MR. KNEEDLER: Yes.

19 QUESTION: Of course.

20 MR. KNEEDLER: Even -- even under Order 888 --
21 what Order 888 does is decline to extend the plenary rate
22 -- the plenary jurisdiction of Order 888 itself over the
23 transmission component of bundled sales.

24 QUESTION: So, the sole thing it doesn't have
25 jurisdiction over, in your opinion, is to make this kind

1 of nondiscriminatory order applicable in our middle State
2 C where the transactions are all run from generating to
3 distribution to transmission, everything is run by one
4 company, PG&E.

5 MR. KNEEDLER: Right.

6 QUESTION: It doesn't have jurisdiction over
7 that.

8 MR. KNEEDLER: As long as they -- as long as
9 they are -- as long as the State hasn't unbundled it, the
10 utility has not unbundled it, and FERC has not exercised
11 whatever authority it would have to unbundle it --

12 QUESTION: Even though they're in the grid.

13 MR. KNEEDLER: Even though they are in the grid.

14 QUESTION: See, I didn't --

15 MR. KNEEDLER: But -- but let me -- let me make
16 clear. This does not mean -- this does not mean, with
17 respect to Justice Breyer's question, that even -- even
18 though FERC did not impose that requirement across the
19 board by imposing the -- the separate rate component
20 requirement on bundled retail transmission, if a utility
21 exercises its authority in a way that disadvantages, that
22 discriminates the matters that are within FERC's
23 jurisdiction, FERC can -- can act to eliminate that
24 discrimination, which is what FERC -- the position FERC
25 took in the NSP --

1 QUESTION: And your reason, as I interpret it,
2 in a sentence is if we go back to 1935, even if the New
3 York situation was something they never would have dreamt
4 of, the Enron situation is something that they certainly
5 did dream of. It was absolutely common, and they rejected
6 it, the statute covering that.

7 MR. KNEEDLER: Right. The -- the statute leaves
8 the retail rates.

9 But again --

10 QUESTION: Am I right? Don't say I'm right if
11 I'm not.

12 MR. KNEEDLER: Yes. No, you're correct.

13 But -- but again, what -- what --

14 QUESTION: Where? Where does the statute -- you
15 say the statute leaves the retail rates. What are you
16 referring to?

17 MR. KNEEDLER: In the -- in the clause in 201(b)
18 that you were referring to, shall not apply to any other
19 sale of electric energy. That is leaving to the States
20 the authority to set the rates for the retail sale of
21 electric energy, which is essentially what was left to
22 them under the Pennsylvania Gas case as -- as a matter of
23 the Interstate Commerce Clause.

24 QUESTION: Mr. Kneedler, would you please
25 clarify what FERC has no jurisdiction -- that is, no

1 authority -- Congress gave them no authority to do what
2 versus what they can do or decline to do as a matter of
3 policy? As I read Judge Sentelle's portion of the per
4 curiam opinion, those two were put together, and they're
5 two quite different things. One is a question of power.
6 Does FERC have the power to do it? One is a question of
7 should it exercise that power, the policy question. Which
8 is no power and which is a matter of policy?

9 MR. KNEEDLER: I think what is no power is where
10 the transaction remains bundled, FERC may characterize
11 that in the same way that it has always been treated, as
12 -- as a single retail rate, and that FERC cannot require,
13 as long as the transaction remains bundled, that be --
14 that a separate cost component for retail transmission be
15 stated.

16 QUESTION: What do you mean? You say, may
17 characterize it. You mean must characterize it.

18 QUESTION: Yes. That's a crucial point.

19 QUESTION: If -- if you're going to say it has
20 no power, you have to say must characterize it, not may
21 characterize it.

22 MR. KNEEDLER: Yes, but -- but I don't have to
23 say -- it depends by what you mean by must because --

24 (Laughter.)

25 MR. KNEEDLER: -- the court of appeals did not

1 say that was the only way to read the statute. The court
2 of appeals said the agency could have --

3 QUESTION: Well, but we want to know your --
4 your position, and it's a very odd answer to the question
5 to say that we may say we may have no jurisdiction -- we
6 have no jurisdiction. I've never heard of such a thing.
7 We may say we have no jurisdiction.

8 MR. KNEEDLER: This is a Chevron point. Where
9 you -- where you have a -- where you have a bundled
10 transaction, what the court of appeals said is that FERC
11 could have looked at the bundled transaction as being
12 primarily a retail sale over which the States are -- are
13 -- their jurisdiction is preserved under the clause I just
14 mentioned. Or FERC has plenary jurisdiction over the
15 transmission and it would be possible to look at that and
16 say that the -- that the transmission component of the
17 bundled sale does come under FERC's jurisdiction.

18 What the court of appeals said is that it was --
19 and this is on page 35a of the -- of the petition
20 appendix, Enron's petition appendix -- FERC's decision to
21 characterize bundled transmissions as part of retail
22 sales, subject to State jurisdiction, therefore,
23 represents a statutorily permissible policy choice. In
24 other words, it's the characterization of the bundled
25 sale.

1 QUESTION: If you have the power to characterize
2 it one way or the other, it seems to me you have the power
3 to assert jurisdiction. So, you're saying FERC has the
4 power to assert jurisdiction.

5 MR. KNEEDLER: As a Chevron matter, FERC has --
6 has concluded -- has construed the statute not to
7 authorize it to -- under Chevron, the -- the agency could
8 go either way.

9 QUESTION: It could have done differently, and
10 if it had done differently, it could move in to regulate
11 it all. Right?

12 MR. KNEEDLER: But -- but FERC has now construed
13 the statute, in a statutorily permissible way, that does
14 not give it jurisdiction over the transmission component
15 of bundled retail sales.

16 QUESTION: May I ask this question?

17 QUESTION: So, FERC couldn't -- couldn't
18 exercise the power on that reading unless Congress gave it
19 to them.

20 MR. KNEEDLER: Right, as long as the transaction
21 remains bundled.

22 But what we -- what we fundamentally have in 25
23 States is that 25 States have provided for the unbundling
24 and created a separate transmission service, transmission
25 of power in interstate commerce, which the States could

1 not have regulated in 1935. They couldn't have regulated
2 a separate transmission service. All they were allowed to
3 do was regulate the local retail rate, which --

4 QUESTION: Mr. Kneedler, may I ask you this
5 question? If we assume -- we assume the commission has
6 said that they do not have jurisdiction when the
7 transaction remains bundled, because it wasn't voluntarily
8 unbundled or compelled to be unbundled by State or Federal
9 authority. If we disagreed with that and said, no, you do
10 have jurisdiction there, is there anything in the statute
11 that would compel them to exercise the jurisdiction?

12 MR. KNEEDLER: No. I think -- I think FERC
13 would have great authority in deciding how to identify
14 discrimination and how to deal with it.

15 I wanted to mention one last point with respect
16 to New York's claim -- desire to protect its -- its retail
17 customers, and particularly those in dire needs. Nothing
18 -- this tariff -- and I'd point the Court to pages 772 to
19 775 of the joint appendix. Utilities are allowed to set
20 curtailment priorities under their tariffs, and therefore,
21 they could protect retail customers, they could protect
22 hospitals, that sort of thing. It's just that when you
23 have curtailment, the utility has to curtail in a
24 nondiscriminatory way. It can't favor its own
25 transmission at retail to hospitals and discriminate

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1 against another supplier of electric power to hospitals.
2 In other words, it has -- it can have -- it can have
3 priorities based on the -- the need for the power, but it
4 can't discriminate against suppliers of the power. And
5 that is the whole point --

6 QUESTION: It's all at the sufferance of FERC,
7 however. I mean, in FERC's graciousness, it -- it allows
8 the -- the State of New York to decide who should be
9 served first, and if FERC wanted to change that and say,
10 we say these should be your priority -- right?

11 MR. KNEEDLER: Well, there may well be
12 limitations on that because, among other things, the act
13 preserves to the States the authority over local
14 distribution systems and over retail rates. The sense of
15 that, I think, is to preserve the general State police
16 power over the way power is being delivered to the
17 ultimate customer. That's what this act was really
18 leaving to the States.

19 But in any -- any event, FERC did not seek to
20 upset the priorities for power --

21 QUESTION: Now, if FERC has -- has determined,
22 after a hearing, that there is discrimination going on in
23 the allocation of transmission services, must it then
24 order a remedy?

25 MR. KNEEDLER: I think if it finds

1 discrimination, it has to order appropriate relief. It
2 wouldn't necessarily be relief under Order -- Order 888.
3 There may well be other -- other measures that could be
4 taken.

5 QUESTION: And are there still some intrastate
6 electric producers that also transmit their energy totally
7 within the State and FERC has no jurisdiction over that at
8 all?

9 MR. KNEEDLER: The -- if they -- if a utility --
10 such utility is connected to the grid, it cannot
11 transmit --

12 QUESTION: But probably there are some that are
13 not connected to the grid.

14 MR. KNEEDLER: I'm informed by FERC that there
15 are virtually none anymore, and that -- that while the act
16 does preserve intrastate transmission to the -- to the
17 States, there's virtually none that isn't connected to the
18 grid. And if it is connected to the grid, as the
19 commission said in the Florida Power case, because of the
20 electromagnetic connection of all generators and all users
21 to the grid, it is -- anything put onto the grid is
22 necessarily in interstate commerce.

23 So, Congress -- the limitations Congress placed
24 on FERC's power come elsewhere in preserving the power
25 over the ultimate retail rates and the local distribution

1 to the -- to the local utilities, and -- and the State
2 regulation. But the transmission, the control over that
3 critical interstate grid, is left to the Federal Energy
4 Regulatory Commission.

5 Now, there's also in Texas, the Texas -- a
6 portion of Texas is not connected to the interstate grid,
7 and that would -- that would remain --

8 QUESTION: Would you say that if a State
9 regulates a bundled retail sale, it is, for all practical
10 purposes, in part regulating transmission?

11 MR. KNEEDLER: I would say it is not regulating
12 transmission, and I -- and I think that that is what the
13 Court said in -- in Pennsylvania -- in Pennsylvania Gas.
14 It's regulating the retail sale that may have an
15 incidental effect on interstate transmission, but it is
16 not directly regulating the transmission itself. And we
17 think the Commerce Clause then and the Federal Power Act
18 now wouldn't allow it.

19 QUESTION: Thank you, Mr. Kneedler.

20 Mr. Malone, you have 1 minute remaining.

21 REBUTTAL ARGUMENT OF LAWRENCE G. MALONE
22 ON BEHALF OF THE PETITIONER IN NO. 00-568

23 MR. MALONE: Your Honor, Justice Scalia, in
24 response to your question as to whether FERC has given the
25 authority to the States to decide prioritization of

1 curtailment, the answer is no. The utility has sole
2 discretion to decide that, not the State of New York.

3 It's joint appendix 350 where FERC says, in
4 asserting jurisdiction over unbundled retail transmission
5 in interstate commerce, the commission in no way is
6 asserting jurisdiction to order retail transmission
7 directly to an ultimate consumer. 888 directly says that
8 they cannot order retail wheeling to a consumer, and they
9 are correct in that respect.

10 Transmission is not a new service. It is the
11 same service that we have always seen. It is a monopoly
12 service to retail customers. Justice Kennedy, when we
13 have a bundled sale, there's no question that the State is
14 regulating the transmission within that bundled sale, and
15 that's why the Northern States case held that FERC could
16 not govern curtailments in the bundled case, as it is
17 attempting to do in this case in the unbundled case.

18 The FERC order is at war with itself in several
19 respects. It says that it has exclusive jurisdiction over
20 transmission and it can't delegate an iota of it. And
21 yet, it turns around and says, but, States, you regulate
22 customer complaints. That's the sort of thing that
23 happens when a Federal agency is over-reaching, rewriting
24 the law, and trying to regulate, in this case, retail
25 transactions which Congress expressly left to the States

1 in 1935.

2 There's no question Congress in '35 did not
3 intend FERC to do what it is doing today, which is taking
4 over the relationship between 127,000 retail customers and
5 the people who deliver electricity to them.

6 Thank you very much.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Malone.

8 The case is submitted.

9 (Whereupon, at 11:12 a.m., the case in the
10 above-entitled matter was submitted.)

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