



10-1973

## Federal Power Commission v. New England Power Co.

Lewis F. Powell Jr.

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Await discussion  
(Join Three?)

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(a CATV case relisted for this one), involves validity of annual fees assessed by FPC against electric & gas utilities. **DISCUSS**

CA DC held fees invalid, as unauthorized by statute.

May 11  
List 1, Sheet 1

No. 72-1162

F.P.C. v. New England Power Co., et al

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GRANT  
TWR 5-7-73



TR

PRELIMINARY MEMO

May 11, 1973  
List 1, Sheet 1

No. 72-1162

F. P. C.                                          Cert to CA DC (Tamm, Robb, Wilkey)  
v.                                                          Federal-Civil

NEW ENGLAND POWER CO.,  
ET AL.

Timely

1. The Commission promulgated new annual fees and charges on electric utilities and natural gas companies designed to recoup the cost of regulating there industries. CA DC set aside the Commission's orders, finding the statutory authority on which the Commission relied, Title V of the Independent Offices Appropriations Act, 1952 (31 U. S. C. 483a), did not authorize the challenged fees. Petr contends that Title V does provide authority and suggests that a conflict in the circuits exists over the proper interpretation



of Title V.

2. FACTS: Under the Commission's order, the challenged annual charges are assessed as follows: With respect to electric utilities, the Commission determines each year the costs of administering Parts II and III of the Federal Power Act other than those costs associated with the Commission's efforts to promote the coordination and reliability of electric systems. The Commission then deducts from the administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amounts received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities in proportion to their wholesale sales and interchanges of electric energy. The costs of administering the Commission's reliability and coordination programs, after deducting the portion of the costs attributable to non-jurisdictional utilities, are assessed against jurisdictional utilities in proportion to their gross revenues.

With respect to natural gas companies, the costs of administering the Commission's natural gas pipeline programs, after deducting amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of \$1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In addition, all natural gas companies required to file an annual report of their total gas supply are assessed one-tenth of a mill for each thousand cubic feet of new

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Title V states in part: "It is the sense of Congress that any work, . . . benefit, privilege, authority, . . . license, permit, certificate, registration or similar thing of value or utility performed . . . by any Federal agency . . . shall be self-sustaining to the full extent possible" and fees and charges may be made. Such charges are "to be fair and equitable taking into consideration direct and indirect costs to the Government, value to the recipient, public policy or interest served . . ." The statute is expressly made subject to then existing provisions for and prohibitions on charging fees. Budget Circular No. A-25 (1959), interpreting the statute, stated that a reasonable charge "should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit". These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . ." Examples listed in the Circular were receiving a patent, crop insurance, or a license to carry on a specific business; certificates of necessity and convenience for airline routes, or safety inspections of craft; receiving a passport, visa, airman's certificate, or an inspection after regular duty hours. The Circular stated that no charge should be made "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public".



In ordering the charges, the Commission found that the regulatory activities in question had "provided continuing benefits to consumers", but emphasized that they had also:

redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands.

The CA held that the creation of an "economic climate" is not a special service and that no particular pipeline or gas company is the "special beneficiary" of such a climate any more than any other pipeline, gas company or the consumer in general. Under the Commission's order the companies would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. The "economic climate" argument does not square with the Circular's requirement that charges be for a "measurable unit of service" rendered to an "identifiable recipient". The CA noted that in 1966 the Commission had explicitly refused to impose essentially similar charges because the activities for which such charges would be imposed "are primarily for the benefit of the general public rather than the regulated companies".

3. CONTENTIONS: The Commission argues that the test is whether the regulated companies benefit from regulation in a manner different from the public at large. If they do, as is here the case, then the statute does not prohibit charging for industry-wide benefits. "The Commission's establishment of a uniform



accounting system, for example, while ultimately benefiting the public, has made possible the rapid growth of the electric power and natural gas industries". The Commission suggests that Natl. Cable TV Assn., No. 72-948 (relisted for consideration with this case) represents a conflict in "approach". There CA 5 upheld a charges to radio and TV broadcasters and cable TV operators under an FCC Title V regulation. The Commission concedes that "detailed comparison" of the two agencies' new rules is "difficult" and that the decisions are therefore distinguishable on their facts. ("CATV operators, of course, use the broadcast signals protected and licensed by the FCC and the relative scarcity of television outlets creates much of the economic value of CATV systems . . .") It argues, however, that the two CA's used different legal standards: CA 5 properly recognized that charges could be imposed for industry-wide benefits under Title V so long as members of a regulated industry benefit from regulation in a manner different from the public at large.

Resps argue the primary beneficiaries of the Natural Gas Act are consumers. Since 1966 the companies have paid filing and processing fees on their own certificate applications, and these are not challenged. Resps generally rely on the language of Title V and the Circular cited above. They distinguish Natl. Cable TV Assn. on the different kind of direct and indirect benefits associated with permission to use government-owned radio and TV frequencies. The legal standard was the same in both CA's:

The essential question is whether the public or the regulated industries are the primary beneficiaries. The application of this standard happened to produce different results in the contexts of two different regulatory schemes and agencies.

4. DISCUSSION: Although I am persuaded by the opinion of the CA below, the issue is important and certworthy. This is especially true in view of CA 5's decision in National Cable. The basis for charging the cable TV companies were apparently that the FCC's general regulatory activities benefited the companies at least indirectly, and that this benefit was different in kind from that received by the general public. Applying the "different in kind" test, it would seem that all regulated industries would be chargeable for all expenses of the regulatory agencies. The CA in the present case emphasized that the charges were not for specific benefits rendered to specific beneficiaries, and therefore the benefits were not primarily accruing to the regulated industries as opposed to the general public.

It would seem that the appropriate allocation of agency costs ought to be clarified by Congress, but it may be that Congress will not act until Title V has been definitively construed.

There are responses.

Reavley Op CA in petn appx.

5/1/73

PW

Voted in Conference to  
grant cert before  
AT&T filed brief.

December 27, 1973

No. 72-948 National Cable TV v. United States  
No. 72-1162 FPC v. New England Power

Dear Bill:

Please note at the end of your opinions that I took no part in  
the decision of these cases.

Sincerely,

Mr. Justice Douglas

lfp/ss

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 28, 1973

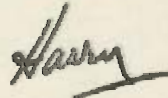
Re: No. 72-1162 - Federal Power Commission v.  
New England Power Co.

Dear Bill:

Will you please add the following at the end of your  
opinion for this case:

"Mr. Justice Blackmun took no part in  
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Sincerely,



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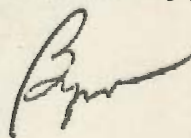
January 2, 1974

Re: No. 72-1162 - FPC v. New England Power Co.

Dear Bill:

Please join me.

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Copies to Conference

Supreme Court of the United States  
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Sincerely yours,

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CHAMBERS OF  
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January 17, 1974

MEMORANDUM TO THE CONFERENCE

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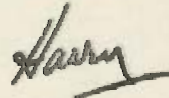
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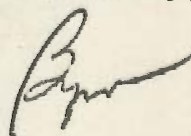
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