Washington and Lee University School of Law
Washington and Lee University School of Law Scholarly Commons

Supreme Court Case Files

Lewis F. Powell Jr. Papers

10-1973

Mobil Oil Corp. v. Federal Power Commission

Lewis F. Powell Jr.

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/casefiles

Part of the Law Commons

Recommended Citation
Mobile Oil Corp. v. Fed. Power. Supreme Court Case Files Collection. Box 18. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

LFP only

done 1-3-74 gg

OUT

437
457
464

Preliminary Memo

January 11, 1974 Conference
List 1, Sheet 1

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP (Distributors)

v.

FPC

Timely

Cert to CA 5 (Brown, Bell and Morgan)
Federal/Civil

Please see memo for No. 73-437

1/2/74

Scott

ME

Exxon Corp. is listed as a respondent in No. 73-437, No. 73-457, and No. 73-464

Preliminary Memo

January 11, 1974 Conference
List 1, Sheet 1

No. 73-457

PUBLIC SERVICE COMM'N. of N.Y. (Consumer)

v.

FPC

Cert to CA 5 (Brown, Bell & Morgan)
Federal/Civil

Timely

Please see memo for No. 73-437.

1/2/74

Scott

ME

Preliminary Memo

January 11, 1974 Conference
List 1, Sheet 1

No. 73-437

MOBIL OIL CORP. (Producer) v. FPC	Cert to CA 5 (Brown, Bell and Morgan) Federal/Civil	Timely

No. 73-457

PUBLIC SERVICE COMM'N. of N.Y. (Consumer) v. FPC	Cert to CA 5 (Brown, Bell and Morgan) Federal/Civil	Timely

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP (Distributors) v. FPC	Cert to CA 5 (Brown, Bell and Morgan) Federal/Civil	Timely

I. <u>SUMMARY:</u> These cases all involve the CA 5 affirmance of FPC Orders No. 598 and 598-A setting rates for the Southern Louisiana Area (SLA). Various provisions of the area-rates, and the methods by which they were formulated are challenged by petitioners in No. 73-437, 73-457 and 73-464. As a general matter, the certworthiness of the case must focus particularly on the asserted conflict between the CA 5 result in the instant case, and that of CADC in the Texas Gulf Coast Area Natural Gas Rate Case, decided August 24, 1973, affirming in part and remanding in part another area-rate order with similar features. The SG is seeking cert from that opinion in No. 73-968, a petn not yet circulated on a conference list.

II. <u>FACTS</u>: A. <u>BASIC PROVISIONS OF RATE ORDER:</u> FPC Order No. 598 set area-rates, the "just and reasonable rates" at which natural gas producers may sell gas in the Southern Louisiana Area (SLA). This Order followed in the footsteps of <u>Austral Oil Co.</u> v. <u>FPC</u>, 428 F. 2d 407 (CA 5), <u>cert. denied,</u> 400 U. S. 950 (1970), where CA 5 approved the first Comm'n attempt to set rates for the SLA, but made a number of suggestions for further modifications -- particularly to take into account the increased need for supply -- in its opinion. In reviewing the Order here at issue, CA 5 evaluated it in the context of its prior suggestions.

The basic provisions of the rate order are as follows: (1) Ceiling prices (base rates) -- the FPC used a two-tiered system of pricing. For contracts dated prior to Oct. 1, 1968, so-called flowing or "old" gas,

a maximum price of 22.375¢ per mcf was set for onshore gas, and 21.375¢ for offshore gas. For contracts dated on or after October 1, 1968, so-called new gas, the onshore and offshore maximum price was 26¢. The base rates were modified by certain built-in periodic escalations. The ceiling prices applicable to pre-Oct. 1968 contracts were to escalate by one-half cent per mcf on October 1, 1974.

(2) On top, and addition to, these base rates the FPC adopted certain "incentive" provisions to increase the supply of natural gas. Thus, for gas under contracts dated prior to October 1, 1968, the flowing gas, when new reserves dedicated to the interstate market total 7 and one-half trillion cubic feet, as of any time before October 1977, the ceiling prices then in effect are to increase by one-half cent. Further increases of one-half cent are to be made when new commitments reach 11 and one-quarter tcf, and again at 15 trillion, again prior to 1977. These are the contingent escalation incentives.

The second incentive is tied into refunds. The FPC first determined what the total refund obligation outstanding was, in terms of past prices which exceeded the newly determined "just and reasonable" rates. First, the total refund obligation was reduced from $375,000,000 to $150,000,000. Secondly, producers were given a way to "work-off" this refund obligation. Any company having a remaining refund obligation could reduce it by one cent for each Mcf of newly committed gas reserves. Any new gas reserves used for the purpose of working-off refunds would not count against the escalations in new reserves needed to trigger the contingent escalations, discussed supra.

(3) Moratoria--The FPC also imposed a moratorium on increased rate filings under § 4 of the Act, in excess of the newly determined rates, effective until approximately 1977.

The backdrop for the entire CA opinion was its stress on the supply shortage.

B. METHOD OF ARRIVING AT RATES: This rate structure order originated as a proposed settlement agreement. It was offered as such by United Distribution Companies (UDC), a consumer oriented group of distributors. All of the petrs in the instant case opposed the settlement. The FPC based its Order on the proposed settlement, which was supported by most of the parties.*/ The FPC reviewed and approved of the proposal on its merits.

III. ISSUES IN DISPUTE AND CONTENTIONS OF THE PARTIES:**/ Since the various parties to this litigation attack many features of the rate order, it is best to consider the provisions, issues, contentions and the opinion of CA 5 as a whole.

A. CHALLENGED FEATURES OF BASE RATES:

(1) General adequacy: Mobil, petr in No. 73-437, contends that the rate of return for producers not owing refunds -- who cannot benefit by the incentive there offered -- is insufficient, and that the base rates do not allow adequately for their costs of exploration and development (E&D) and

---

*/ Supporters included UDC coalition of 32 major distribution companies representing approximately 25% of the gas distribution in the United States and serving about 10.3 million customers at retail. The proposal was also supported by Associated Gas Distributors (AGD), all interstate pipelines purchasing gas from SLA, and 46 natural gas producers comprising 80% of the total gas production in the area. Obviously, this broad base of support was an important consideration for FPC.

**/ See next page.

do not adequately cover their revenue requirements. The base rates employ a 15% rate of return (RR) for "new gas" and a 13% rate of return for "old gas." Petrs contend that these RR's do not satisfy the requirements of Permian Basin Area Rate Cases, 390 U.S. 747 (1968), and FPC v. Hope Natural Gas Company, 320 U.S. 591 (1944), that RR's be commensurate with risks and sufficient to attract capital. The same claim is made as to E&D costs. They contrast their situation to that of producers benefiting from the refund work-off.

The general approach of CA 5 was to say that there was a supply shortage, the Comm'n had attempted to set high enough flowing and new gas prices to eliminate this shortage, and although the relationship between price and increased supply could not be quantified, the prices set appeared to be within a "zone of reasonableness," Permian, based on cost data and the range of prices which the Comm'n determined this cost data would support. As to the point that the effective RR's would be lower for producers without refund obligations, the CA 5 stated that area rates necessarily affect different producers differently, and the FPC acted within its area of discretion.

Although Mobil does not press the fact that the affirmance of the base rates is at odds with CADC in the Texas Gulf Coast Area Rate Case (TGC), it should be noted that in TGC, CADC (Bazelon, Richey; Leventhal, dissenting)[1/] refused to affirm the base rates because the Comm'n had not adequately demonstrated the relationship between the price set and the

---

**/ The SG has filed a response. His position on granting the petn, as limited to certain questions, will be dealt with separately at the end of this section.

1/ The CADC was unanimous on all other issues, with Leventhal, J., writing for the ct.

expected increase in supply, and remanded to the agency for fuller explanation. The dissent thought that the price was adequately cost-justified and that further quantification was a meaningless quest for the Platonic ideal.

The discrimination aspect, as it may relate to the adequacy of the rate of return for those not benefiting from refund work-off, is further developed below in the context of the incentive provisions.

Briefs in Opposition to the Petn for cert have been filed by Exxon Corp., et al., producers supporting the rate order, and UDC, the distribution companies whose proposed settlement formed the basis of the Comm'n's Order. They generally rely on the opinion below on this point.

(2) Mandatory Minimum Charges for Transportation of Liquids and Liquefiable Hydrocarbons: As part of its decision, the Comm'n required as to producers that mandatory minimum rates be charged by pipelines for transportation of liquids and liquefiable hydrocarbons. Mobil, in No. 73-437, contends that it was improper for the Comm'n to set such minimal charges and contends that the result here is in conflict with the result reached by the CADC in Mobil Oil Corp. v. FPC (Leventhal, Wilkey; Jameson, d.j.), decided July 11, 1973. In that case, which involved national rates which pipelines must charge producers for transporting liquids and liquefiables, the CADC determined that the Comm'n had no jurisdiction over liquids, and that the rates set on liquefiables could not stand without further proceedings.

The focus of the CA 5 decision on this matter was, of course, in the context of area rates on natural gas. It arose here because what are "just and reasonable rates" for natural gas are related to what are the actual costs and proper charges by pipelines for transporting other by-products. To the extent that pipelines were not charging transportation costs for these liquids, and instead allocating the costs to transportation of natural gas, this would mean higher prices for the ultimate consumer of natural gas. Looking at it another way, to the extent the pipelines were not charging, also would mean that the price of natural gas chargeable by producers to pipelines was unduly high, since it arguably should be reduced by the extra value received by the producers from the relatively low priced cost of transportation of by-products.

Mobil contends in its petition that it had raised questions of the propriety of imposition of the charges in view of the pendency of the national rate proceeding, but it is far from clear it ever squarely raised the jurisdictional claim, which formed the basis of the CADC opinion on liquids. As to the liquefiables the basis of the CADC ruling was inadequate procedures, and that is not Mobil's argument here.

All CA 5 said on the matter was that the minimum chargeable rates were supported by substantial evidence. Resp Exxon contends that the jurisdictional issue "was not considered by the court below," is not a significant factor in this rate case and should only be reviewed by this Court on cert to the CADC opinion in Mobil. Resp UDC also seeks to distinguish Mobil on the grounds that the CADC stated that "We are not

confronted with a case where the Commission has demonstrated that rate jurisdiction over natural gas", and that here there was substantial evidence. This seems fairly unconvincing, since the CADC decision largely depended on statutory analysis and since there does not seem to be any stronger reasons advanced by the Comm'n for the need to take jurisdiction of liquids in SLA than nationally. Also of interest is the fact that the SG has not sought cert to CADC and time has now expired for seeking a petition.

(3) Royalties: The problem here is created by still another CADC opinion. In Mobil Oil Corp. v. FPC, 463 F.2d 256 (1971), cert denied, 406 U.S. 976 (1972), the ct held that the Comm'n lacked jurisdiction to impose ceilings on the amount of royalties lessors could charge lessee producers since the royalties were not a matter of interstate jurisdiction. In the rate order here under review the Comm'n allowed as a cost to producers a 15% rate for royalties, based on producers' revenues from natural gas. Mobil argued that the rate schedule failed to take account of the possibility that royalty obligations might require a greater portion of the new rate than the FPC thought. CA 5 held that this might be a problem in the future but that if market values did exceed 15% a petition for modification could be filed, and observed that individualized relief along these lines had already occurred. Mobil makes no new arguments here. CADC in its area rate opinion in TGC rejected the royalty argument on the same grounds as employed by CA 5. Resps agree with the reasoning below.

(4) Issues reserved by New York Public Service Comm'n in its petition, No. 73-457: There are three issues which New York says it is

preserving the right to argue if the Court grants cert, but are not listed in its questions presented: (1) whether casinghead gas should be priced at the same rate level as gas well gas, as did the Comm'n; (2) whether October 1, 1968 should be the dividing date for the price differential between "old" and "new" gas, and (3) whether producers were validly excused from paying certain refunds originally ordered by the Comm'n in a 1964 in-line proceeding totally unrelated to the present area rate case.

a. Casinghead and gas well gas: The CA 5 noted that casinghead gas often is discovered in the search for oil and the N. Y. argument is that the usual E&D costs are not incurred. CA 5 approved the same rates on the basis of exigencies of administration, the problems in allocating E&D expenses between oil and gas, and the fact that a lower price on casinghead might divert that gas to the unregulated intrastate market or lead producers to flare it. Resps. nor petr develop arguments here on the matter. There are no conflicts on this matter.

b. Division Date: CA 5 merely said that the division date had been employed in other proceedings and SLA producers were on notice that this would be the date between the higher price on new gas, and the lower old gas price. Again no arguments are made in the petitions here. The same division date was examined carefully in the TGC opinion of CADC and approved, with some reluctance. Nothing is added by the parties.

c. In-Line Refunds: No information is available on this contention, and it was not commented upon in the CA 5 opinion.

B. CONTINGENT ESCALATIONS: This is one of the key provisions of the rate order, and is attacked by the New York Public Service Comm'n in No. 73-457 (Question #1). Mobil, in No. 73-437, only attacks the provision as it works in concert with the refund "work-off" and its claims will be remitted to that section of the memorandum.

As indicated, the basic idea of the contingent escalation is to allow for increases on the price of "old" gas as a fixed amount of new reserves are committed to the interstate market. This provision was meant to increase the supply of natural gas by working as an incentive.

(1) CA 5 Opinion: The CA 5's entire opinion is prefaced by a lengthy discussion of the supply shortage, particularly as reflected in declining reserves to production and findings to production ratios in the SLA. It also recalled that in Austral, supra, where it first reviewed the area rates for SLA, supply shortage had not been adequately taken into account. The CA observed that the contingent escalations were keyed to industry-wide dedication of additional reserves. The ct characterized the principal argument advanced by the producers against the escalations as one of discrimination, i. e., that producers without the possibility of refund-work-off would have less incentive to dedicate new reserves, but the CA thought half a loaf better than no loaf. New York argued that the provisions would discriminate against new entrants. On this point the CA stated:

> Certain of the producers urge that §§ 4 and 5 must in combination be understood to preclude moratoria upon filings under § 4(d). They assert that the period of effectiveness of a rate determination under § 5(a) is limited by § 4(e); they reason that § 4(d) creates an unrestricted right to file rate changes, and

> that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that "the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away."

(2) Contentions of NY: The contentions are principally an adoption of the reasoning of the CADC in the TGC case, where similar contingent escalations were not approved, and that feature of the rate order was remanded to the Comm'n. (Bazelon, Leventhal; Richey, d. j.). That decision will be reviewed below in terms of whether there is a conflict, and the reasons offered by CADC for remanding on that issue.

The CADC decision first excluded from consideration any evidence in the record supporting the escalations which had been incorporated from the SLA Comm'n Order under review in the instant case (the Comm'n sought to justify its TGC rate order on the basis of its SLA order). The ct noted that throughout the lengthy hearings for TGC, the working assumption was that rates would be cost-based and that supply needs would be satisfied through uniform pricing -- the base rates. Thus no evidence was introduced as to issues such as (1) the size of such escalations needed to produce a given supply, (2) the relationship between such provisions and the incentives contained within the uniform price system, or (3) the actual returns different producers with different quantities of "flowing gas" might realize from these contingent provisions. The

provisions were adopted ab initio, without evidence, in the Comm'n Order, and when the matter was raised on a Petition for Rehearing, the Comm'n indicated it was relying on its SLA Order to support the escalations. The CADC stated that whatever the scope for rulemaking procedures to set area rates in light of United States v. Florida East Coast Ry, 410 U.S. 224 (1973), the decision of the Comm'n must still be supported by substantial evidence as provided in § 19 of the NGA, and that the Comm'n decision in the SLA Rate Case could not be used to provide such evidence. First the TGC Comm'n opinion issued before the Comm'n opinion in SLA, even though the Order on a petition for rehearing in TGC issued afterwards. Secondly, the parties in TGC could not have been on notice of proceedings, or the content of the record in another area rate proceeding. Third, the SLA rate order was based on a settlement proposal, and the trade-offs of that settlement may have forced various parties to forego development of evidence, incentives which were missing in the TGC proceeding. Fourth, the reference to the SLA Order as justifying incentives was almost casual and not explicit as to citing that proceeding as justification. See Supp. Appex to petn at 53 n. 66. Having thrown out the SLA Order as justification, the ct focused on the justification of the actual record from its own proceeding.

Looking to the record, the TGC Order rested on a justification of the supply shortage per se. The ct noted that the Commission and producers had defended the incentives in briefs and oral argument with other arguments, principally that: (1) the degree of arbitrariness in

the incentive provisions, in terms of eliciting supply, is no greater or different than that which attaches to flowing gas prices, which have been calculated, in part, to produce increased supply; (2) the incentives will generate capital funds, and an extremely high percentage of outlays for discovery of new gas comes from this source of capital; and, (3) the incentives are only given on an "if . . . come" basis, so the price to the consumer will only be increased if the desired amount of gas if forthcoming. The ct thought however that this was not the reasoning of the Commission which had relied on the supply shortage per se. Thus, the ct remanded for further reasons. The ct said it was strengthened in its resolve by the problems it saw with using increased contingent escalations on flowing gas to deal with the supply shortage, and expressed disagreement with CA 5 in the instant case to the extent its opinion reflected approval of a sole justification of the supply shortage simpliciter.

As to the merits, the ct made the following observations: (1) a contingent escalation was more difficult to justify than a uniform price, because it could not be anchored in costs, it was a non-cost incentive. When supply needs were taken into account in the base rates, the degree of error was likely to be less; (2) it wondered why supply incentives should be given in the form of increased returns on "old gas," as opposed to new gas. It recognized the argument that a return on flowing gas was a more immediate source of capital, and that E&D could be generated from that source of capital, but felt that investment decisions as to new exploration were usually made in terms of the profitability of the contemplated

investment, and that if the profit picture was bright, funds would be available -- either from retained funds, if available, or debt and equity financing. (3) Tying incentives to "old" gas prices had a number of potential discriminatory and anticompetitive effects. Section 5(a) of the Act provides that rates should not be "unjust, unreasonable, unduly discriminatory, or preferential." Permian provided that:

> Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry.

The discriminations were of the following kind: (1) against producers with less or no flowing gas, since the RR's on new investments would be reflected on existing gas contracts. This imbalance could impinge on competition. Such problems should be taken into account by regulatory agencies. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973). The Comm'n argued that area rates were inherently discriminatory, but the ct thought these effects should be kept to an irreducible minimum and this might be accomplished through uniform pricing. (2) against customers of flowing-gas producers. Consumers of "old" gas would pay for new development, and this could not be justified by mere administrative convenience as other provisions of the rate order, i.e., vintage pricing.

MDG, petr in No. 73-464, also relies on the reasoning of CADC.

(3) Contentions of Resps Exxon and UDC: Exxon argues there is no conflict with CADC because that ct based its decision on lack of substantial

evidence and lack of reasons. Thus CADC noted that it was excluding from consideration the record and Order of the FPC in the instant case. UDC makes similar contentions.

C. REFUNDS: There are really two separate issues as to refunds: the total amount owing and the "work-off" incentive, which will be examined separately.

(1) Amount of Refund: The problem here is created by the amount of refund liability outstanding after the instant CA opinion as compared with that outstanding after its previous Austral decision approving the first attempt at setting area rates for the SLA. Before Austral producers had incurred various amounts of refunds as a result of charging prices that were higher than "in-line" prices, guideline prices pending determination of "just and reasonable" rates under Section 5. These guidelines were in effect from 1960 until 1968, when the CA approved in Austral the new area rates as "just and reasonable." During this period the Comm'n encouraged producers to settle their refund liability and a number of them did so. In Austral, however, when prices for "old" gas were finally(?) settled, the refund obligation became fixed in terms of the amount by which prices charged in the past exceeded what the Comm'n had determined were the actual "just and reasonable" prices. The total amount of this obligation was $375,000,000. In the instant case since area rates were increased, the amount of "retroactive" refund liability was decreased -- there were new "just and reasonable" rates -- to $150,000,000, although the decrease allowed was less than the literal application of the new rates would have demanded.

a. CA Opinion: The CA responded to the arguments of N. Y., among others, that refund liability could not be decreased because that liability had been finally fixed by its prior decision. The ct observed that its opinion expressly gave the Comm'n freedom to modify any part of its order and the ct had suggested that such modifications be made in light of the supply shortage. N. Y. also argued that the $150,000,000 figure was not supported by substantial evidence, but the Ct noted that the amount owed was higher than that which would be produced by literal application of the new just and reasonable rates. Moreover, the ct held that the Comm'n did not have to order refunds, this was discretionary with the Comm'n. As for the argument that the refund reduction benefited some producers more than others, some cake was better than none, the measure was intended to increase supply, and the FPC had latitude to take the approach it did.

b. Contentions of Petrs: New York, petr in No. 73-457, and Municipal Distributors Groups (MDG), petr in No. 73-464, contend there is not a shred of evidence justifying the amount of refund reduction, from $375 to $150 million. This number was picked out of the air. New York argues that the Comm'n could not change the amount of refunds after the CA 5 action in Austral, and contends that Comm'n discretion is not absolute on the matter of refunds. This was a huge gift to a few producers who had large outstanding refund obligations.

MDG contends that the re-opening of the refund issue after the CA affirmance of the first area-rate order was to engage in retroactive rate-making which is beyond the power of the Comm'n, citing, inter alia,

FPC v. Hope Natural Gas Co., 320 U.S. 591, 618 (1944), nor to make reparations in their rate-order. Montana-Dakota Util. Co. v. Northwestern Public Service Co., 341 U.S. 246, 254, 258 (1951). There were, of course, here no reparations to consumers, of concern in Montana-Dakota, and I would assume that the retroactivity of which MDG complains is inherent in a system in which the justness and reasonableness of past prices depends on future determinations of rates. MDG also contends that the Comm'n does not have discretion to waive refunds of excessive rates, but cites no case on point.

Mobil, petr in No. 73-437, argues that it was penalized since it had made substantial refunds in the past as part of settlements, and that refunds should be settled on a producer-by-producer basis to avoid giving incentives to postponing settlements and waiting for higher prices in the future, or lower refund obligations. Only a favored few received the benefit of the reduction. This was discriminatory treatment, and was in conflict with the approach taken on such matters by CADC in TGC. (No direct conflict with the CADC decision is asserted, since the amount of refund reduction from a prior area rate order was not in dispute therein).

c. Contentions of Resps Exxon and UDC: As to Mobil, resps both argue that Mobil put itself into the position complaint of by making the settlement of its refund liability in the past. The fact that it made a bad choice was no basis for claiming present discrimination. The Comm'n had responded to Mobil's argument by stating:

> "Parties who enter into settlements or those who refuse to do so, always run the risk that the ultimate Commission determination may be higher or lower than the settlement levels."

and the CA had made the same point.

As to N. Y. and MDG's claim of lack of evidence resp Exxon adopts the reasoning of the CA the refund obligation was higher than required in view of the new rates, and the Comm'n has the discretion not to order refunds. In fact, the supply shortage might justify no refunds at all.

(2) "Work-off" of Refunds: The work-off provision provided that whatever outstanding refund liability remained, per producer, could be worked off by dedicating additional reserves to the interstate market, which dedications could not be counted toward amounts needed to trigger contingent escalations.

a. CA Opinion: Mobil argued below that the "work-off" discriminated against it because it can only benefit by new dedications from contingent escalations, whereas other producers can benefit by refund work-off. The idea is that those with refunds will dedicate reserves to erase that liability, while Mobil dedicates to earn contingent escalations which will be shared by all producers. The CA seems to rely on the general proposition that an area rate structure cannot benefit all producers equally, and that the problem is again traceable to Mobil's decision to make voluntary refund settlements.

b. Contentions of Petrs: New York relies on the CA DC opinion in TGC as to its reasons for finding fault with the "work-off." CA DC remanded this provision of the rate order on similar grounds as for the contingent escalation -- additional findings and reasons. CA DC stated that the refund work-off seemed to discriminate against producers who had made refund restitution in the past, and against new entrants who, of course, had no refund liability. As with contingent escalations, the justifications of supply shortage and that area rates were inherently discriminatory had not been made by the Comm'n, and were offered for the first time by the agency's counsel on appeal. Since the producers who charged the highest prices in the past, and who had not made refunds were the real winners, the need for explanation by the agency was all the greater. MDG, petr in No. 73-464, also adopts this line of reasoning. Mobil stresses the discrimination against producers who had made refunds in the past.

c. Resps' Contentions: Both resps argue there is no conflict since CA DC remanded for reasons and findings, and that there was ample

support for the approach taken by the Comm'n in the SLA area. Additionally, they support the reasoning of CA 5.

C. MORATORIUM: The Comm'n Order imposed a moratorium on rate filings under Sec. 4, for increases in prices over the just and reasonable rates. The CA relied on Permian to uphold this provision, where the Court stated:

> Certain of the producers urge that §§ 4 and 5 must in combination be understood to preclude moratoria upon filings under § 4(d). They assert that the period of effectiveness of a rate determination under § 5(a) is limited by § 4(e); they reason that § 4(d) creates an unrestricted right to file rate changes, and that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that "the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away."

Appropriate adjustments could always be made in the future. The FPC could life the moratorium if changes in circumstances dictated. (The same reasoning was used by CA DC in rejecting challenges to the moratorium imposed in the TGC rate area.)

Mobil generally contends that costs may increase and that the rate order does not protect them from that possibility. Resp Exxon relies on the CA 9 opinion.

D. SETTLEMENT PACKAGE: New York, No. 73-457, argues that the Comm'n did not give enough independent consideration to the

support for the approach taken by the Comm'n in the SLA area. Additionally, they support the reasoning of CA 5.

C. MORATORIUM: The Comm'n Order imposed a moratorium on rate filings under Sec. 4, for increases in prices over the just and reasonable rates. The CA relied on Permian to uphold this provision, where the Court stated:

> Certain of the producers urge that §§ 4 and 5 must in combination be understood to preclude moratoria upon filings under § 4(d). They assert that the period of effectiveness of a rate determination under § 5(a) is limited by § 4(e); they reason that § 4(d) creates an unrestricted right to file rate changes, and that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that "the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away."

Appropriate adjustments could always be made in the future. The FPC could life the moratorium if changes in circumstances dictated. (The same reasoning was used by CA DC in rejecting challenges to the moratorium imposed in the TGC rate area.)

Mobil generally contends that costs may increase and that the rate order does not protect them from that possibility. Resp Exxon relies on the CA 9 opinion.

D. SETTLEMENT PACKAGE: New York, No. 73-457, argues that the Comm'n did not give enough independent consideration to the

settlement proposal of UDC, and relied in part on adopting some of the provisions, particularly the contingent escalations and refund credits, because they were part of the settlement proposal and agreed to by the majority of the producers. The CA, of course, said that the Comm'n independently reviewed the order and that its approval was supported by substantial evidence. Resps generally rely on the opinion below.

E. POSITION OF SG: The SG, who has finally filed a response after considerable delay, does not oppose cert on the issues of contingent escalations and refund credits, but opposes cert on all other issues. As to the contingent escalations and refund credits, he claims that there is conflict with CA DC because the underlying rationale of the CA DC remand seems to be the possible anticompetitive effects of these provisions, which were upheld by CA 5.

The SG is a bit artful though in arguing that there is a conflict. He states:

> Since the Commission had referred to its decision in the present case, however, it is evident that the D.C. Circuit in effect, rejected the same explanation that the court below considered sufficient. It accordingly recognized that its approach was inconsistent with that of the court of appeals in the present case.

As the memo indicates, however, the CA DC refused to look at the justification for the rates insofar as the Comm'n had relied on its SLA opinion. The SG also thinks it relevant that in the TGC case no better reasons could, in fact, be offered. That may be a reason for taking TGC, but I am not sure it is sufficient for taking this case.

On all other issues, the SG argues there is no conflict and the CA 5 was correct.

It seems to me the real reason the SG wants cert here comes out in his "Conclusion" where he points out that the issues involved can only be resolved this Term by taking cert in this case.

IV. DISCUSSION: It seems to me that a number of considerations are relevant as to whether to grant any or all of the questions presented in these three petitions. The SG opposes cert on all issues other than refun credits and contingent escalation.

A. Base Rates & Moratorium: At the outset, I do not think that most of the issues pertaining to the base rates, raised by Mobil in No. 73-437 or New York in No. 73-457 are certworthy. This applies to (1) royalties (Q. 5, No. 73-437), (2) issues reserved by New York, but not presented -- price of casinghead gas, division date, and certain in-line refunds, at 3 (see n. 2, No. 73-457). The same can be said about the moratorium (Q. 3, No. 73-437). With the exception of the in-line refunds where no information is provided, the issues have been decided the same way by both CA 5, in the instant case, and CA DC in TGC.

As to the general adequacy of the base rates, raised in Mobil's petition, No. 73-437 (part of Question #1), the adequacy of RR's seems to be an evidentiary issue, and not worthy of review. Even though CA DC remanded on the base rates (Bazelon, Richey; Leventhal, dissenting), Mobil does not press the conflict, and if need be the conflict can be

distinguished -- even though CA DC may be wrong -- on an evidentiary basis, and as a matter of judicial review under the substantial evidence test. The SG is seeking cert from the CA DC opinion on this point in No. 73-968, a case not yet listed for Conference action, and if need be that issue can await treatment there. On the other hand, if one waits to examine the standard of judicial review and the reasons the agency must advance when setting base rates to take account of the supply shortage, the issue would not come up until next Term, and there is a certain need for expediency in resolving these questions of rate regulation. Enough might be said in this Area Rate Case which might be heard this Term to dispose of CA DC, and the petition in 73-968 could simply be a hold.

B. Liquids and Liquefiable Hydrocarbons: (Q. 4 in No. 73-437). The certworthiness of this issue depends in large part, it seems to me, whether Mobil preserved its argument by representation to the Commission and to the court below, that the Commission had no jurisdiction over liquids, since CA DC in Mobil ruled that there was no jurisdiction and attempts of resps to say that ruling was not absolute do seem unconvincing. Interestingly, the SG has not sought cert in the Mobil case, and time has run. My feeling, based on the CA treatment of the issue, is that the issue was presented below as one of whether the charges were too high, and that jurisdiction was assume at least as part of the settlement discussions, and not later challenged in the petition for rehearing to the Commission. If so, there is no need to review the question, and it is at any rate unclear whether that part of the area rate order is still viable, given the CA DC ruling on the national rates.

C. Settlement Package (No. 73-457, Q. 3). The settlement review issue does not appear certworthy, and there is no conflict in the Circuits on it

D. Contingent Escalations and Refunds: (Qs. # 1 and 2 in No. 73-437; Qs. # 1, 2, 3 in 73-464; Qs. 1 and 2 in 73-457). The issues involved here are the center of potential conflict between CA DC and CA 5. It is possible, of course, to distinguish the cases, as resps suggest, insofar as the CA DC primarily hinged its ruling on the lack of evidence and the absence of reasons, which does not necessarily apply to CA 5. The real problem the C DC had with the refund work-off and contingent escalations related to their discriminatory and anticompetitive effects, and it certainly did not accept the proposition that supply shortage per se was enough to justify these provisions. However, seemingly there was a more thorough review of justifications in the Commission's opinion in the instant case. The most perhaps one can say is that the CA DC was more demanding in asking the Comm'n for justification.

If the Court believes that the Comm'n Order in CA DC should be upheld in No. 73-968, cert. pending, and decides to grant cert on that petn, that action would be delayed until next Term. Consideration might be given to taking this CA 5 case with the view of deciding it in a way so that the CA DC judgment could later be vacated and remanded. Alternatively, if the Court felt that the anticompetitive and discriminatory effects of the CA 5 opinion we incurable, even on a full record, these issues would require cert.

If cert is taken, it is probably not useful to limit the grant to certain refund issues, i. e. amount of refund vs. effect of the "work-off." The issues

and questions presented, indicated above, seem sufficiently interrelated to require a grant covering all.

As indicated, the SG does not oppose cert on these issues.

E. General Importance of Area Rates: The Court should be aware that area rates -- setting regulated prices -- will play only a limited role if the Comm'n is successful in de-regulating the price of natural gas. While the Court will have an opportunity to review this issue in the context of the small producers in No. 72-1490, FPC v. Texaco, to be argued this Term, a much more significant Order No. 455 of the Commission looms in the background. That Order de-regulates large producers to the extent of offering them the opportunity to opt into a type of de-regulated system and out of the regulated area rate system, and is currently pending review in CA DC, Moss v. FPC, Docket No. 72-1837. The case was argued on Sept. 25. If this Order survives, area rates will be a secondary matter. However, the deregulation is only optional and some producers may continue under the area rate systems because of the large returns achievable on outstanding flowing gas from contingent escalations and the refund "work-off" -- the RR's possibly may exceed those one might make charging the market price on a new gas contract. In the large, ~~area~~ Regulated rates are likely to have a lasting vitality. On the other hand, there is also a national rulemaking pending with the Commission to establish national regulated rates, moving away from area rates, and to some extent the rates arrived at -- and it should be expeditiousl since they are to be set by informal rulemaking, if such rulemaking is

permissible (see Preliminary Memo No. 73-91) -- will make these rates a thing of the past. But this is an endemic condition of this field of regulation.

\- - - - - -

My suggestion, for what it is worth, is to grant all questions pertaining to contingent escalations and refunds, as suggested by the SG, because of the important question of discrimination, and perhaps more important question of anticompetitive effect.*

There are responses.

Scott* Op of CA 5 & CA DC in petn appxs

1/3/74

JA/DK

* As a clerk on the D.C. Circuit to Judge Leventhal last term I was involved in working on his opinion in TGC. Due to the complexity of the issues here involved, I have undertaken to write the pool memo.

MOTION FILED

FEB 11 1974

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-437

MOBIL OIL CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-457

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP, *Petitioner*

v.

FEDERAL POWER COMMISSION

MOTION OF SHELL OIL COMPANY TO MR. JUSTICE WILLIAM O. DOUGLAS REQUESTING THAT HE RECUSE HIMSELF FROM PARTICIPATION IN THE CAPTIONED CASE; OR, IN THE ALTERNATIVE, TO THE COURT URGING THAT IT DISQUALIFY MR. JUSTICE DOUGLAS FROM PARTICIPATING IN THE CAPTIONED CASE

OLIVER L. STONE
THOMAS G. JOHNSON
One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

WILLIAM SIMON
Howrey, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for Shell Oil Company

February 8, 1974
Houston, Texas

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
I. Public Statements Attributed To Mr. Justice William O. Douglas	2
II. The Basic Issue In The Captioned Case	4
III. The Right Of A Hearing Before An Impartial Tribunal Is Basic To Due Process	6
IV. Conclusion	11

TABLE OF AUTHORITIES

CASES	Page
Amos Treat & Co., Inc. v. Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir., 1962)	6
Austral Oil Company v. Federal Power Commission, 428 F.2d 407 (5th Cir., 1970), cert. den. *sub nom. Municipal Distributors Group v. Federal Power Commission,* 400 U.S. 950 (1970)	5
Berger v. United States, 255 U.S. 22, 65 L.Ed. 481, 41 S.Ct. 230 (1921)	6
Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (D.C. Cir., 1970)	8
Evans v. Gore, 253 U.S. 245, 64 L.Ed. 887, 40 S.Ct. 550 (1920)	8
Federal Trade Commission v. Cement Institute, 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1947)	8
Gilligan, Will & Co. v. Securities Commission, 267 F.2d 461 (2nd Cir., 1959), cert. den. 361 U.S. 896, 4 L.Ed.2d 152, 80 S.Ct. 200 (1959)	2, 10
Jewel Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, 325 U.S. 897, 89 L.Ed. 2007, 65 S.Ct. 1550 (1945)	11
In Re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955)	6
Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954)	6, 7
Peckham v. United States, 210 F.2d 693 (D.C. Cir., 1953)	7
Pillsbury Company v. Federal Trade Commission, 354 F.2d 952 (5th Cir., 1966)	10
Rapp v. Van Dusen, 350 F.2d 806 (3rd Cir., 1965)	11
Safeway Stores, Inc. v. Federal Trade Commission, 366 F.2d 795 (9th Cir., 1966)	2

CASES Page

Texaco Inc. v. Chandler, 354 F.2d 665 (10th Cir., 1965); cert. den. 383 U.S. 936, 15 L.Ed.2d 853, 86 S.Ct. 1066 (1966) 11
Texaco Inc. v. Federal Trade Commission, 336 F.2d 754 (D.C. Cir., 1964), vacated and remanded on other grounds, 381 U.S. 739, 14 L.Ed.2d 714, 85 S.Ct. 1798 (1965).... 9
Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1926) 7
United States v. Grinnell Corp., 384 U.S. 563, 16 L.Ed.2d 778, 86 S.Ct. 1698 (1966) 7
United States v. Morgan, 313 U.S. 409, 85 L.Ed. 1429, 61 S.Ct. 999 (1940) 8
United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1953) 7

STATUTES

Administrative Procedure Act, § 7(a), 5 U.S.C.A. 556...... 11
Judicial Code, 62 Stat. 908, 28 U.S.C.A. 455 11
Judicial Code, 63 Stat. 99, 28 U.S.C.A. 144 11

MISCELLANEOUS

Davis, Administrative Law, § 12.04, Vol. 2, p. 162 8

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-437

MOBIL OIL CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-457

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP, *Petitioner*

v.

FEDERAL POWER COMMISSION

MOTION OF SHELL OIL COMPANY TO MR. JUSTICE WILLIAM O. DOUGLAS REQUESTING THAT HE RECUSE HIMSELF FROM PARTICIPATION IN THE CAPTIONED CASE; OR, IN THE ALTERNATIVE, TO THE COURT URGING THAT IT DISQUALIFY MR. JUSTICE DOUGLAS FROM PARTICIPATING IN THE CAPTIONED CASE

Comes now Shell Oil Company ("Shell") pursuant to Rule 35 of this Court, and most respectfully requests

Mr. Justice William O. Douglas to recuse himself from the captioned case and withdraw from participation therein. Should Mr. Justice Douglas decline so to recuse and withdraw, Shell most respectfully moves the Court to disqualify Mr. Justice Douglas from participation in this case.

The grounds for this Motion are that, according to press and news releases, Mr. Justice Douglas, in a public address delivered at Oxford, Mississippi, on January 28, 1974, expressed an opinion on questions of law and fact pending before this Court in the captioned case, prior to the submission of briefs and argument on the merits. Shell, a party respondent in support of the decision of the Federal Power Commission and the United States Court of Appeals for the Fifth Circuit, makes this Motion with the utmost reluctance, and in the light of the rule that questions of disqualification are deemed to be waived unless timely raised, see *Gilligan, Will & Co. v. S.E.C.*, 267 F.2d 461 (2nd Cir., 1959), cert. denied, 361 U.S. 896, 4 L.Ed.2d 152, 80 S.Ct. 200 (1959); *Safeway Stores, Inc. v. Federal Trade Commission,* 366 F.2d 795 (9th Cir., 1966).

I. Public Statements Attributed To Mr. Justice William O. Douglas

On January 28, 1974, Mr. Justice William O. Douglas made an address to law students and other undergraduates at the University of Mississippi at Oxford, Mississippi.

Mr. Justice Douglas' address was attended by a local newspaper reporter, Charles Daniel Goodgame, who is also a "stringer" for the Associated Press. This reporter drafted a wire, which was sent out over the Associated Press and United Press wire services to approximately 2,700 daily newspapers and radio and television stations, which reads in part as follows:

> "(OXFORD, MISSISSIPPI) — U-S SUPREME COURT JUSTICE WILLIAM O. DOUGLAS HAS CHARGED THE OIL COMPANIES WITH CREATING THE ENERGY CRISIS FOR THEIR OWN PROFIT. AND DOUGLAS SAYS THEY HAD THE COOPERATION OF GOVERNMENTAL BUREAUCRACY. DOUGLAS EXPRESSED HIS VIEWS IN AN ADDRESS TO LAW STUDENTS AND OTHER UNDERGRADUATES AT THE UNIVERSITY OF MISSISSIPPI IN OXFORD.
>
> THE 75-YEAR-OLD JURIST SAID 'THE OIL INDUSTRY KEEPS THE SUPPLY OF OIL AND GAS LOW ENOUGH TO BOOST PRICES . . .' HE ADDED THAT THE GOVERNMENT COOPERATES WITH THE BIG CORPORATIONS INSTEAD OF PROTECTING THE PEOPLE. THE REASON, DOUGLAS DECLARED, IS THAT IT HAS BECOME A 'GOVERNMENT OF CORPORATIONS, BY CORPORATIONS AND FOR CORPORATIONS.' "

An Affidavit of the reporter is attached hereto as Appendix A. In Appendix B appear two "follow-up" wires of the Associated Press by the same reporter in which Mr. Justice Douglas is quoted as saying "the problem is one of a fuel monopoly" and articles appearing in the Washington Post and The New York Times on January 29, 1974 based on the Associated Press wire.

It is Shell's position that, if the foregoing statements attributed to Mr. Justice Douglas were in fact made by him, he has evidenced a prejudgment of the crucial issue in this case, and a disinterested person, upon hearing or reading about the statements made by Mr. Justice Douglas would conclude that he has prejudged such issue. As is developed more fully *infra,* the basic and crucial issue is whether a gas shortage exists, the reasons for the shortage, and the appropriate action to be taken by the Federal Power Commission in response to the shortage. In stating that the oil companies had the "cooperation of governmental bureaucracy", and that "the government has become a government of corporations, by corporations, and for corporations", it is apparent that Mr. Justice Douglas has concluded that the Federal Power Commission acted in cooperation with the corporations involved in this case rather than on the basis of the record before it. The statements attributed to Mr. Justice Douglas, if in fact made by him, reflect such a hostility toward corporations engaged in the oil and gas business, and imputes such wrongdoing to them that, we submit, it would be highly improper for Mr. Justice Douglas to participate in this case.

II. The Basic Issue In The Captioned Case

In its first decision in the *Southern Louisiana Area Rate Proceeding,* 40 FPC 530, the Federal Power *Commission* established area rates for gas producers in the Southern Louisiana Area based almost entirely on a cost-of-service calculation following utility principles, with only minimal consideration of "non-cost" factors. On appeal, the United States Court of Appeals for the Fifth Circuit gave qualified affirmance to the Commission's action but criticized

the Commission's failure to take into consideration the impact of its price structure on gas supply, and authorized the Commission to reconsider its decision if it found a gas shortage to exist and further found that its rate structure was having an adverse impact on that shortage, *Austral Oil Co. v. Federal Power Commission,* 428 F.2d 407 (5th Cir., 1970), cert. den. *sub nom. Municipal Distributors Group v. Federal Power Commission,* 400 U.S. 950 (1970).

The Commission then reopened the record, heard additional evidence on the increasing gas shortage which in the Commission's words then amounted to a "crisis", obtained additional cost evidence, and considered a settlement agreement proposed by the substantial preponderance of the parties to the case. After a full hearing and briefs from all parties, the Commission withdrew its previous rate structure and established new area rates for producer sales in the Southern Louisiana Area, 46 FPC 86. The case was again appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the Commission in all respects, *Placid Oil Company v. Federal Power Commission,* 483 F.2d 880.

The Court of Appeals decision in the *Placid* case, *supra,* is the subject of Petitions for Certiorari filed by the Public Service Commission for the State of New York in Case No. 73-457, and by the Municipal Distributors Group in Case No. 73-464, which challenged the power of the Commission to base its decision in part on a finding that a gas shortage exists, and to take this factor into consideration in the determination of producer rates. By Order issued January 14, 1974, this Court granted certiorari and consolidated the captioned cases.

III. The Right Of A Hearing Before An Impartial Tribunal Is Basic To Due Process

The right of a party litigant to a fair hearing before an unbiased and impartial tribunal is basic in Anglo-Saxon jurisprudence. This Court laid down a strict standard in *In Re Murchison,* 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955), stating:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749, 758, 47 S.Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11." (349 U.S. at 136)[1]

This Court held in *Berger v. United States,* 255 U.S. 22, 65 L.Ed. 481, 41 S.Ct. 230 (1921), that a public

1. Discussed and followed in *Amos Treat & Co., Inc. v. S.E.C.,* 306 F.2d 260 (D.C. Cir., 1962).

statement by the trial judge reflecting prejudice against a class of which the defendant was a member, required reversal of the defendant's conviction in the trial over which the judge presided. Similarly, *Tumey v. Ohio,* 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1926) was a case where this Court found that a mayor, who was authorized under the laws of Ohio to preside over cases involving violations of the Prohibition Law, could not be impartial where he receives fees or costs only if the defendant were convicted. Even the conduct of a judge and statements about one of the attorneys in the course of the trial may be sufficient to constitute bias and lack of impartiality, *Offutt v. United States,* 348 U.S. 11, 99 L.Ed. 11, 75 S. Ct. 11 (1954); *Peckham v. United States,* 210 F.2d 693, 702 (D.C. Cir., 1953).

In *United States v. Grinnell Corp.,* 384 U.S. 563, 16 L.Ed.2d 778, 86 S.Ct. 1698 (1966), this Court noted:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." (384 U.S. at 583)

This test is met here, as no briefs have yet been filed or argument heard on these issues.

In *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1953), this Court remanded a case to the Board of Immigration because the Attorney General had, prior to a hearing announced at a press conference that he had prepared a list of "unsavory characters" and that the issuance of the list amounted to a prejudgment of petitioner's case.

It is true that this Court held in *United States v. Morgan,* 313 U.S. 409, 85 L.Ed. 1429, 61 S.Ct. 999 (1940) that the Secretary of Agriculture was not disqualified from determining rates where he had criticized the previous Supreme Court remand on the same issues, where he stated he had made no prejudgment of the rates to be fixed, and where no other person had the legal authority to make the rate order. The Court in *Morgan* was influenced by the "rule of necessity"[2] where judges, although otherwise disqualified, may be required to serve where there is no other tribunal authorized by law to resolve the issue. Thus, in *Evans v. Gore,* 253 U.S. 245, 64 L.Ed. 887, 40 S.Ct. 550 (1920), this Court ruled on the issue whether the income tax should be applied to judges' salaries, even though the judges necessarily had a financial interest in the outcome, because no other court could decide the question.[3]

The danger of making public statements indicating a predisposition on the issues before a tribunal was discussed by the District of Columbia Circuit in *Cinderella Career and Finishing Schools v. Federal Trade Commission,* 425 F.2d 583 (1970) in the following terms:

> "Conduct such as this may have the effect of entrenching a Commissioner in a position which he

2. Davis, Administrative Law, § 12.04, Vol. 2, p. 162, *et seq.*

3. In *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1947), this Court sustained the decision of the Federal Trade Commission against alleged bias and prejudgment disclosed by prior reports of the FTC to Congress on the grounds that the FTC had a duty to report to Congress and a duty to decide the issue, and if it were disqualified no other legal authority could carry out that duty, 330 U.S. at 701.

> has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." (425 F.2d at 590)

In that case the D. C. Circuit held that statements by a Federal Trade Commissioner in a speech before the Government Relations Workshop of the National Newspaper Association evidencing prejudgment of the issues in a case, were grounds for reversal of an FTC decision in which this Commissioner participated. The Court of Appeals reaffirmed the test for disqualification it had earlier laid down in *Texaco Inc. v. Federal Trade Commission,*[4] as follows:

> "The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' " (425 F.2d at 591)

The *Texaco* case, *supra,* involved statements made by the Chairman of the Federal Trade Commission in a speech before the National Congress of Petroleum Retailers, Inc. while the case was pending before the trial examiner. The Court found that:

> "[A] disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act." (336 F.2d at 760)

4. 336 F.2d 754 (D.C. Cir., 1964), vacated and remanded on other grounds, 381 U.S. 739, 14 L.Ed.2d 714, 85 S.Ct. 1798 (1965).

The court concluded that the participation of the Chairman in the hearing amounted under the circumstances to a denial of due process, invalidating the Commission's order.

In *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5th Cir., 1966), the Court of Appeals analyzed the foregoing cases in holding that questioning of members of the Federal Trade Commission by members of the United States Senate in a Senate Committee hearing about the merits of the case prejudiced the rights of the parties litigant.

The Court of Appeals further held that, in addition to its adverse effect on the rights of the litigants, the examination by the Senate Subcommittee had an adverse effect on the Commission itself, by sacrificing "the appearance of impartiality—the *sine qua non* of American *judicial* justice" (354 F.2d at 964). The court then stated:

> "What we do is to preserve the integrity of the judicial aspect of the administrative process." (354 F.2d at 964)

Similarly, in *Gilligan, Will & Co. v. S.E.C., supra*, the Court of Appeals voiced its concern for the Commission's reputation, which the court felt to be compromised by a press release indicating the issues had been prejudged. The Court said:

> "[T]he Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." (267 F.2d 461, 468-69)

It is true, that unlike United States District Judges[5] and Administrative Judges or Commissioners[6] there is no statute or rule dealing with disqualification of a United States Supreme Court Justice on the grounds that he has prejudged the issues of the case.[7] Nevertheless, the need to preserve this Court's long and distinguished reputation for objectivity, free from any possibility of a suggestion of prejudgment or bias, is much stronger than would be the case for any trial court or administrative agency. The higher the tribunal, the greater the need for high and unimpeachable standards of impartiality. Therefore, for this Court, none but the highest standard will suffice.

IV. Conclusion

WHEREFORE, Shell Oil Company most respectfully requests that Mr. Justice William O. Douglas recuse himself from the captioned case and withdraw from participation therein. Should Mr. Justice Douglas refuse to so recuse and withdraw, Shell Oil Company most respect-

5. 63 Stat. 99, 28 U.S.C.A. 144; 62 Stat. 908, 28 U.S.C.A. 455; *Rapp v. Van Dusen*, 350 F.2d 806 (3rd Cir., 1965); *Texaco Inc. v. Chandler*, 354 F.2d 665 (10th Cir., 1965); cert. den. 383 U.S. 936, 15 L.Ed.2d 853, 86 S.Ct. 1066 (1966).

6. Administrative Procedure Act, § 7(a), 5 U.S.C.A. 556.

7. See Comment by Justice Jackson in *Jewel Ridge Coal Corporation v. Local No. 6167, United Mine Workers*, 325 U.S. 897, 89 L. Ed. 2007, 65 S.Ct. 1550 (1945).

fully moves this Court to disqualify him from such participation.

Respectfully submitted,

OLIVER L. STONE
THOMAS G. JOHNSON
One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

WILLIAM SIMON
HOWREY, SIMON, BAKER
& MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Shell Oil Company

By /s/ THOMAS G. JOHNSON

February 8, 1974
Houston, Texas

APPENDIX A

State of Mississippi
County of Lafayette

AFFIDAVIT OF CHARLES DANIEL GOODGAME

Personally appeared before me this day within named Charles Daniel Goodgame who on oath did make the following affidavit:

My name is Charles Daniel Goodgame; I am a student at the University of Mississippi in Oxford, Lafayette County, Mississippi. On Monday, January 28, 1974, at Fulton Chapel on the University of Mississippi campus, at 2:00 P.M., Mr. Justice William O. Douglass, under the sponsorship of the University of Mississippi School of Law Speakers Bureau addressed an open forum of some 1,300 students and faculty of the University and invited guests. Among the re marks made by Justice Douglass were the following:

"The oil industry keeps the supply of oil and gas low enough to boost prices and make sure that all other energy sources are on the bottom."

"The energy crisis isn't a temporary thing to be resolved by the cleverness of the Secretary of State; we need long-range solutions and the oil industry is blocking progress toward those."

He said the energy crisis is "largely self-created". He said the problem is a "fuel monopoly".

"Ours has become a government of the corporations, by the corporations, for the corporations." "It used to be my country right or wrong, now it's my corporation right or wrong."

"Oil companies insure that solar energy and hydrogen fusion research are poorly funded."

I am the Executive Assistant to the DG Editor of the DAILY MISSISSIPPIAN, the campus daily newspaper and heard Mr. Justice Douglass' speech and reported it to the press.

And further affiant sayeth not.

/s/ CHARLES DANIEL GOODGAME
Charles Daniel Goodgame

SWORN TO AND SUBSCRIBED before me this the 5th day of February, 1974.

/s/ BETTY H. GALLOWAY
Notary Public

My commission expires Mar. 26, 1974.

(Seal)

APPENDIX B

(OXFORD, MISSISSIPPI)—SUPREME COURT JUSTICE WILLIAM O. DOUGLAS HAS SOME SHARP WORDS FOR THE GOVERNMENT AND ABOUT THE ENERGY CRISIS. DOUGLAS TOLD LAW STUDENTS AT OXFORD, MISSISSIPPI THAT THE OIL COMPANIES CREATED THE ENERGY CRISIS FOR THEIR OWN PROFIT. AND DOUGLAS SAYS THEY DID THIS WITH THE COOPERATION OF THE GOVERNMENT.

CHARGING THE CRISIS IS LARGELY SELF-CREATED, HE SAYS THE GOVERNMENT COOPERATES WITH THE BIG CORPORATIONS RATHER THAN PROTECTING THE PEOPLE. DOUGLAS SAYS THAT'S BECAUSE THE GOVERNMENT HAS BECOME ONE THAT IS OF . . . BY . . . AND FOR BIG CORPORATIONS.

10:01 PCD 01-28-74

APB363

264

18TH SUMMARY-TAKE 2

(OXFORD, MISSISSIPPI)—U-S SUPREME COURT JUSTICE WILLIAM O. DOUGLAS HAS ACCUSED THE OIL COMPANIES OF CREATING THE ENERGY CRISIS FOR THEIR OWN PROFIT WITH THE COOPERATION OF GOVERNMENT BUREAUCRACY. IN A SPEECH AT THE UNIVERSITY OF MISSISSIPPI TODAY, DOUGLAS CHARGED THE ENERGY CRISIS IS LARGELY SELF-CREATED.

THE JUSTICE SAID THE PROBLEM IS ONE OF A FUEL MONOPOLY. HE SAID THE OIL INDUSTRY KEEPS THE SUPPLY OF OIL AND GAS LOW ENOUGH TO BOOST PRICES AND MAKE SURE ALL OTHER ENERGY SOURCES ARE ON THE BOTTOM.

Washington Post—1/29/74

OIL INDUSTRY PROFITEERING, DOUGLAS SAYS

OXFORD, Miss. Jan. 29 (UPI)—Supreme Court Justice William O. Douglas today accused the petroleum industry of profiteering on the fuel shortage.

Douglas, addressing 1,300 University of Mississippi students, also criticized what he said was government spying.

He said the energy crisis is "largely self-created." Our problem is a fuel monopoly.

"The oil industry keeps the supply of oil and gas low enough to boost prices and makes sure all other energy sources are on the bottom." He said the oil interests are blocking progress toward long-term solutions.

Douglas said wiretapping and bugging have become almost commonplace in Washington and that the late Robert F. Kennedy "talked for about 20 minutes to a supposedly hidden mike once."

Mrs. Douglas and I do that a lot at home, too," he said. "We like to give them something to listen to."

New York Times—1/29/74

DOUGLAS SCORES COMPANIES ON CRISIS

OXFORD, Miss., Jan. 28 (AP)—Supreme Court Justice William O. Douglas accused the oil companies today of creating the energy crisis for their own profit, with the cooperation of governmental bureaucracy. The 75-year-old jurist told 1,300 law students and other undergraduates at the University of Mississippi that the "energy crisis is largely self-created." "Our problem is a fuel monopoly. The oil industry keeps the supply of oil and gas low enough to boost prices and make sure all other energy sources are on the bottom," he said.

Conf 1/11/74

Court ....CA - 5...... Argued ...., 19... Submitted ...., 19...

Voted on................., 19... Assigned ...., 19... Announced ...., 19...

No. 73-437
457
464

MOBIL OIL CORPORATION, Petitioner

vs.

FEDERAL POWER COMMISSION

9/6/73 Cert. filed.

out

178

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Conf 1/11/74

Court ......CA - 5......	*Voted on*................., *19*...		No. 73-457
Argued ...., *19*...	*Assigned*................., *19*...		(Vide 73-437 &
Submitted ...., *19*...	*Announced* ...., *19*...		73-464)

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, Petitioner

vs.

FEDERAL POWER COMMISSION

9/10/73 Cert. filed.

Out

L 78

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Court ......CA - 5..... Voted on.................., 19...
Argued ...., 19... Assigned.................., 19... No. 73-464
Submitted ...., 19... Announced ...., 19... (Vide 73-437 & 73-457)

cert 1/11/74

MUNICIPAL DISTRIBUTORS GROUP, Petitioner

vs.

FEDERAL POWER COMMISSION

9/10/73 Cert. filed.

out

LFP

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

DISCUSS

Leave to J. Douglas
(all of these)

LFP- out!

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP

v.

F. P. C.

Motion of Shell Oil to Recuse Mr. Justice Douglas

See memo for No. 73-437.

Ginty

2/21/74

DK

No. 73-457

PUBLIC SERV. COMM'N OF N. Y.

v.

F. P. C.

Motion of Shell Oil to Recuse Mr. Justice Douglas

See memo for No. 73-437.

Ginty

2/21/74

DK

February 22, 1974 Conference
List 3, Sheet 2

No. 73-437 MOBIL OIL CORP. v. F.P.C.	Motion of Shell Oil to Recuse Mr. Justice Douglas
No. 73-457 PUBLIC SERV. COMM'N OF N.Y. v. F.P.C.	Motion of Shell Oil to Recuse Mr. Justice Douglas
No. 73-464 MUNICIPAL DISTRIBUTORS GROUP v. F.P.C.	Motion of Shell Oil to Recuse Mr. Justice Douglas

The Court granted cert in these cases January 14.

Shell Oil Company, a petr in No. 73-437, moves that Mr. Justice Douglas recuse himself from these cases. Should he decline to do so, petr moves that the Court disqualify Mr. Justice Douglas. The motion is based on alleged statements of Mr. Justice Douglas respecting oil companies and the energy crisis made during an address to students at the University of Mississippi at Oxford on January 28.

Ginty

2/21/74

DK

Conference 2-22-74

Court ....
Argued ...., 19...
Submitted ...., 19...

Voted on.................., 19...
Assigned ...., 19...
Announced ...., 19...

No. 73-347
73-457
73-464

MOBILE OIL CORP. V. FED. POWER COMM'N.
PUB. SER. COMM'N. OF N.Y. v. FED. POWER COMM'N.
MUNICIPAL DISTRIBUTORS GROUP v. FED. " "

vs.

OUT

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

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

CHAMBERS OF
THE CHIEF JUSTICE

April 9, 1974

Re: (73-437 - Mobil Oil Corp. v. FPC
(73-457 - PSC of New York v. FPC
(73-464 - Municipal Distributors Group v. FPC

SUPPLEMENTAL MEMORANDUM TO THE CONFERENCE:

Mike Rodak has called to my attention the fact that my earlier memo today was in error. There will be two 15-minute arguments for the petitioners; the respondents are dividing their time 25 and 5 minutes.

This does not change the fact that I think we have enough difficulty with the case to warrant enlarging the time. However, I will await your reactions, having in mind that we should not wait until Friday to resolve this issue as the Clerk must advise the parties tomorrow afternoon.

Regards,

WEB

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1974

Re: Nos. 73-437, 73-457 & 73-464 - Mobil Oil Corp. v. FPC

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1974

Re: No. 73-437, No. 73-457, No. 73-464 - Mobil Oil v. FPC, et al.

Dear Bill:

Please join me in the opinion for the Court you have prepared in these cases.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

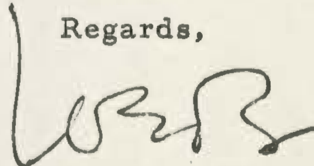
June 6, 1974

Re: Nos. 73-437) - Mobil Oil Corp. v. FPC
73-457) - Public Service Comm'n of N.Y. v. FPC
73-464) - Municipal Distributors Group v. FPC

Dear Bill:

Please join me.

Regards,



Mr. Justice Brennan

Copies to the Conference

9 [handwritten] in Out

MEMORANDUM TO THE CONFERENCE

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: JUN 11 1974

Recirculated:

CASES HELD FOR NO. 73-437, 73-457 & 73-464, Mobil Oil Corporation, et al. v. Federal Power Commission

No. 73-438, Mobil Oil Corp. v. Federal Power Commission

The Fifth Circuit affirmed an FPC order that established an area structure for the "Other Southwest Area." Many provisions are counterparts of the Southern Louisiana order involved in No. 73-437, including: (1) separate maximum rate ceilings for three "vintages" of gas, (2) automatic, periodic escalations for each vintage, (3) a formula for the "forgiveness" of refunds owed by area producers, (4) "moratoria" on rate increases, and (5) no allowances for royalty agreements that exceed those contemplated by the area rates. The order does not have provisions for contingent escallations.

The Court of Appeals, although affirming, held (as in Southern Louisiana) that the Commission would have "authority" to "alter or modify" the flowing gas rate, refund liability, and moratoria either prospectively or retroactively. The Court of Appeals held that its Southern Louisiana decision controlled this one. Similarly, I think our decision in Southern Louisiana controls our disposition of this one. I would therefore Deny. Incidentally, this opinion was written after the Commission announced its intention to set uniform rates for the nation as a whole via rulemaking. This prompted the Court of Appeals to make a comment which is equally pertinent to our role. It is:

"And before the last slug falls in the St. Paul linotype on this opinion area rate regulation may too be forgotten if not abandoned. For FPC has very recently announced its hopeful purpose to set uniform rates for the nation as a whole under its rule-making powers. So though we srite with the realization that the regulatory approach may soon change, we are nevertheless mindful that we must play our role."

Nos. 73-966, 967, 968, & 969 -- Shell Oil Corp. v. Public Service Commission of the State of New York

These four petitions seek review of the judgment of the District of Columbia Circuit reversing in substantial part the FPC's area rate order for the Texas Gulf Coast area. The Court of Appeals held that FPC is required, in fixing base area rates, to quantify the rate/supply relationship if its rate purports to take account of supply considerations, and that the Commission had failed in this case adequately to justify its refund credit and contingent escalation incentives. Although the FPC order was affirmed in certain other respects, all parties concede that the reversal and remand as to those questions conflicts with the decision of the Fifth Circuit in Southern Louisiana.

It appears inappropriate to attempt finally to dispose of the case because the D.C. Circuit has still to consider the substantiality of the evidence under the guidelines of our opinion in Mobil. In view of the pervasive differences between the Fifth Circuit and the D.C. Circuit, I think that it would be of doubtful value to parse the D.C. Circuit's judgment

to deny cert. in the respects to which the judgment affirms the Commission and to vacate and remand for reconsideration in light of Mobil as to the major issues. My recommendation is that we vacate and remand the entire Court of Appeals' judgment for further consideration in light of our decision. My thought is that much time would be saved if the Court of Appeals enters a new judgment consistent with our decision. My guess is that we will not again hear of the case -- or that if we do that we might be able to dispose of it by a denial of cert.

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
join WJB 6/6/74	join WJB 5-31-74	1st draft		join WJB 6-5-74	join WJB 6-3-74	join WJB 6-3-74	out	Join WJB 6/6/74

73-437 Mobil v. FPC