

NOTE: HAS THE SUPREME COURT PULLED THE RUG FROM UNDER
THE FERC'S ELECTRIC AND NATURAL GAS REGULATION?

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With the close of the 1982-83 Term of the Supreme Court, the practitioner before the Federal Energy Regulatory Commission may well wonder if his or her fate is akin to that of the student who on the night of the Pearl Harbor attack burned page-by-page the draft of his thesis on why the Japanese would never attack the United States. Alternatively, the practitioner may now be facing a period when there will be a series of adjustments by way of court decisions and innovative business decisions such as followed the first *Phillips* case¹ and other major pronouncements by the Court.

The reason for this conjecture is the Supreme Court's treatment this term of its prior holding,² which provided the rationale for the "Attleboro Gap" and supplied the predicate for both the 1935 enactment of Parts II and III of the Federal Power Act³ and the 1938 enactment of the Natural Gas Act.⁴ *Attleboro* held that regulation by

the Rhode Island Commission is not . . . regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett [Rhode Island] Company for the interstate service to the Attleboro [Massachusetts] Company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose.⁵

By this language, *Attleboro* identified an area where state regulation would be a burden on interstate commerce and opened the way for federal regulation in that "gap".

Justice Brandeis' dissent suggested that the paramount interest in a sale would be national, rather than local, where the sale "is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities . . . in different states."⁶ This distinction is the apparent basis for the differentiation between wholesale sales, *i.e.*, "sales for resale", and retail, *i.e.*, direct sales, in both the Federal Power Act and the Natural Gas Act.

The Court's departure from the path hewn by *Attleboro* occurred in *Arkansas Electric Cooperative Corporation (AECC) v. Arkansas Public Service Commission*⁷, although its course was indicated by its prior decision in *Pacific Gas and Electric Company, (PG&E) v. State Energy Resources Conservation & Development Commission*.⁸ In *PG&E*, the Court upheld the power of the California legislature to enact legislation which provided a moratorium on the certification of new nuclear plants until there is a

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¹ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

² *Public Utils. Comm'n. of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

³ Federal Power Act, 49 Stat. 838, 16 U.S.C. §§ 791a-825r (1935). Statement of D.A. DeVane, Solicitor, Federal Power Comm'n., *Hearings on H.R. 11662 Before The Subcomm. of the House Comm. on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 13 (1936)*.

⁴ Natural Gas Act, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w (1976). *Hearings Before the House Comm. on Interstate and Foreign Commerce, on H.R. 4008, 75th Cong., 1st Sess. 142 (1937)*.

⁵ 273 U.S. at 89.

⁶ 273 U.S. at 93; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 309 (1924).

⁷ *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n.*, 51 U.S.L.W. 4539 (May 16, 1983).

⁸ *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n.*, 51 U.S.L.W. 4449 (9th Cir., Apr. 20, 1983).

demonstrated technology or a means to dispose of high-level nuclear wastes. Thus, the Atomic Energy Act contains a congressional authorization that allows states to regulate nuclear power plants for other than protection against radiation hazards, and the Court held that Congress intended that states only proceed consistent with other priorities and subject to controls traditionally exercised by states and expressly preserved by federal statute.⁹

On this basis, the Supreme Court adopted the reasoning of the Court of Appeals that the cost of disposing of high-level nuclear wastes would make the project uneconomic and determining the economics of new projects is a traditional function of utility regulatory bodies.¹⁰

In *AECC*, the Court also in effect overruled *Attleboro* by rejecting the notion that there is a "bright line" between the point where state regulation of wholesale rates will be a burden on interstate commerce and where it will be tolerable.¹¹ Thus, the Court rejected a *stare decisis* application of a mechanical test and stated that it has since shifted its focus from the constitutional issues of *Attleboro* to an analysis of the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.¹² The Supreme Court further held in *AECC* that the Arkansas Public Service Commission has jurisdiction to fix rates that a Generation and Transmission (G&T) cooperative charges its members for wholesale service, where the Rural Electrification Administration (REA) had not undertaken to do so. On that basis the Commission had ruled that relevant statutes gave the Rural Electrification Administration exclusive authority among federal agencies to regulate rural power cooperatives, *Dairyland Power Cooperative*¹³. In addition, the Court held that the PSC's regulation of wholesale rates that AECC charges to its members was well within the scope of "legitimate local public interests"¹⁴. The Court was convinced that the burden on interstate commerce was not excessive in relation to local benefits and that the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the states. Furthermore, notwithstanding the vigorous dissent of Justice White,¹⁵ the Court relied on an REA Bulletin which had noted that borrowers (from REA) must submit proposed rate changes to any regulatory commissions having jurisdiction and must seek approval in the manner prescribed by those commissions.¹⁶

With its departure from the approach of *Attleboro*, the Supreme Court tends to emphasize whether there is actually an interference with interstate commerce rather than whether, abstractly, there *could* be such an interference. This raises the question of who must make the determination of interference in the first instance and the effect of an interference determination on already extended administrative proceedings.

As to the question of who must make the determination, a state or federal agency might promulgate rules respecting the circumstances under which an interference determination would be appropriate, after providing notice to the corresponding agency. This could be in the nature of the procedure contemplated

⁹*Id.* at 4451.

¹⁰*Id.* at 4455.

¹¹*Id.* at 4544; *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Commission*, 659 F.2d 903, 918 (9th Cir. 1981).

¹²*Id.* at 4543.

¹³*Dairyland Power Coop.*, 37 F.P.C. 12, 26; 67 P.U.R. 3d 340, 353-354; *Id.* at 4541.

¹⁴Ark. Elec. Coop. Corp., 51 U.S.L.W. at 4544.

¹⁵*Id.* at 4546.

¹⁶*Id.* at 4543.

in “price squeeze” proceedings,¹⁷ where the party that claims to be adversely affected announces its intention to raise the issue, and the other party is put on notice that it should defend itself. Raising an interference issue would no doubt extend the proceeding to permit one party or the other to demonstrate (1) that the issue is or is not one that is traditionally a matter for consideration in utility proceedings of the state, and (2) the regulation would or would not interfere with national interests in favor of local interests.

From a substantive standpoint, interference issues that might be considered could be whether cost allocations or allocations of electricity by federal or state regulatory agencies should prevail where there are joint costs or whether the allocation of service could materially affect resale or direct sale customers. While the question of whether such allocations are supported by substantial evidence is inherent in any F.E.R.C. proceeding, it does not mean that the evidentiary issue takes precedence over the constitutionality of the Commission’s determination.

An issue of a direct burden on interstate commerce could arise in the licensing of dams where electricity that is generated is transmitted in interstate commerce pursuant to the *Taum Sauk decision*.¹⁸ In such a case, there may be a direct burden on interstate commerce if it could be shown that excess capacity was imprudently built. This would result in revenues that are inadequate to recover fixed costs, thus requiring progressively higher rates which tend to discourage sales and make it less likely that those costs will be recovered.¹⁹

Central to the extent to which there is a conflict between the federal and state commissions is the nature of possible legislation authorizing the state’s public service commission to expand its jurisdiction over the transportation of natural gas or electricity or their sale for resale in interstate commerce. In this regard, and based on the *AECC* holding, *supra*, state legislatures also might seek to give state commissions jurisdiction over wholesale rates and service.

In sum, the Supreme Court has overruled its prior decision in *Attleboro* which created both the *Attleboro* Gap, and the impetus for Congress to close that gap by enacting the Federal Power Act in 1935 and the Natural Gas Act in 1938. The underlying concept of *Attleboro* was that state legislation authorizing a state regulatory commission to regulate the transportation or sale of electricity or natural gas in interstate commerce for resale could result in a direct burden on interstate commerce. Therefore, a separate statutory scheme was devised to assure that the gap would be filled by the Federal Power Commission and now the Federal Energy Regulatory Commission. However, the Supreme Court has shifted its focus away from the bright constitutional lines between interstate or intrastate commerce and wholesale and retail sales to whether the regulation undertaken by the state is consistent with a state function and is in fact a burden on interstate commerce in relation to putative local benefits.

The impact of this changed approach is a matter for conjecture. States that consider themselves to be chafing under federal domination may well enact legislation to give their public service commissions jurisdiction over wholesale sales, and transmission or transportation in interstate commerce. This assumes that the State can conjure up a legitimate state regulatory purpose, avoid the accusation that they are burdening interstate commerce and not do major violence to the state’s budget by increasing regulatory costs. Assuming that a legislature can satisfy these objectives, the possible reduction of wholesale rates and as a consequence retail rates

¹⁷ 18 CFR § 2.17 (1982).

¹⁸ *F.P.C. v. Union Elec. Co.*, 381 U.S. 90 (1965).

¹⁹ *Cf. Market Street R. Co. v. R.R. Comm’n. of Cal.*, 324 U.S. 548, 565 (1945).

in the generating or producing states could provide a competitive edge in attracting industry and population, assuming that it could be achieved while also recovering the utility's full costs.

Depending on individual evaluations by state legislatures, regulatory commissions, those regulated, and consumers at large, it would seem that a major impact from "DeAttleboroing" would be questionable. Certainly it would be surprising if the impact reached the importance of the original *Attleboro* holding, which can claim the Federal Power Act and the Natural Gas Act as its progeny.