

# The Burger Court Opinion Writing Database

*Federal Power Commission v. Florida Power and Light Co.*

404 U.S. 453 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



①  
②  
Supreme Court of the United States  
Washington, D. C. 20543

December 28, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

MEMORANDUM TO THE CONFERENCE:

Re: No 70-38 -- Federal Power Commission v. Florida  
Power and Light Company

I find this case close and difficult. Traditional standards of appellate review if carried too far constitute a virtual negation of review. Byron has made a strong case for the traditional side. Bill Douglas makes what I felt at the close of argument, i. e., that this is just not the kind of activity that Congress intended to control and that there is no need for federal regulation.

As presently advised, I believe I will join Bill Douglas.

Regards,

W. B.

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun

Federal Power Commission,  
Petitioner,  
v.  
Florida Power & Light  
Company. } On Writ of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit. 1/22/71

[December —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

There can be no doubt that Congress has constitutional power to regulate under the Commerce Clause the interstate "commingling" of electric power involved in the instant case. See *Connecticut Co. v. Federal Power Commission*, 324 U. S. 515, 525-530. The question is whether it has done so.

The Examiner explains the "electromagnetic unity" theory and tells us in electrical engineering terms why that unasserted power of Congress exists:

"An electric utility system such as [respondent] is essentially an electro-mechanical system to which all operating generators on the interconnected network are interlocked electromagnetically. This means that electric generators, under ordinary operating conditions run either at exactly the same speed or at speeds which will result in a frequency of 60 cycles. No operating generator can change its speed by itself as long as it operates connected to the network. All generators connected to the same network must follow each other as to speed and frequency whenever there is a change in frequency, and the frequency of all interlocked generators is always exactly the same.

"The electric systems of [respondent] and all other inter-connected systems are essentially alike as to electrical, electromagnetic and electromechanical characteristics. Because they are alike, it is possible

To: The Chief Justice  
Mr. Justice ~~Black~~  
Mr. Justice ~~White~~  
Mr. Justice ~~Marshall~~  
Mr. Justice ~~Just.~~

p/

6th DRAFT

~~Justice~~ ~~glas.~~

SUPREME COURT OF THE UNITED STATES:

No. 70-38

Recirculated

1-2

Federal Power Commission,  
Petitioner.  
v.  
Florida Power & Light  
Company. } On Writ of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit.

[December —, 1971]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

There can be no doubt that Congress has constitutional power to regulate under the Commerce Clause the interstate "commingling" of electric power involved in the instant case. See *Connecticut Co. v. Federal Power Commission*, 324 U. S. 515, 525-530. The question is whether it has done so.

The Examiner explains the "electromagnetic unity" theory and tells us in electrical engineering terms why that unasserted power of Congress exists:

"An electric utility system such as [respondent] is essentially an electro-mechanical system to which all operating generators on the interconnected network are interlocked electromagnetically. This means that electric generators, under ordinary operating conditions run either at exactly the same speed or at speeds which will result in a frequency of 60 cycles. No operating generator can change its speed by itself as long as it operates connected to the network. All generators connected to the same network must follow each other as to speed and frequency whenever there is a change in frequency, and the frequency of all interlocked generators is always exactly the same.

"The electric systems of [respondent] and all other inter-connected systems are essentially alike as to

2/5/7  
7th DRAFT

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES  
From: Douglas, J.

No. 70-38

Circulated:

Federal Power Commission,  
Petitioner,  
v.  
Florida Power & Light  
Company.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit.

Recirculated: 1-6

[January —, 1972]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

There can be no doubt that Congress has constitutional power to regulate under the Commerce Clause the interstate "commingling" of electric power involved in the instant case. See *Connecticut Co. v. Federal Power Commission*, 324 U. S. 515, 525-530. The question is whether it has done so.

The Examiner explains the "electromagnetic unity" theory and tells us in electrical engineering terms why that unasserted power of Congress exists:

"An electric utility system such as [respondent] is essentially an electro-mechanical system to which all operating generators on the interconnected network are interlocked electromagnetically. This means that electric generators, under ordinary operating conditions run either at exactly the same speed or at speeds which will result in a frequency of 60 cycles. No operating generator can change its speed by itself as long as it operates connected to the network. All generators connected to the same network must follow each other as to speed and frequency whenever there is a change in frequency, and the frequency of all interlocked generators is always exactly the same.

7th DRAFT

**SUPREME COURT OF THE UNITED STATES**

**No. 70-38**

Federal Power Commission,  
Petitioner,  
v.  
Florida Power & Light  
Company. } On Writ of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit.

[January 12, 1972]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

There can be no doubt that Congress has constitutional power to regulate under the Commerce Clause the interstate "commingling" of electric power involved in the instant case. See *Connecticut Co. v. Federal Power Commission*, 324 U. S. 515, 525-530. The question is whether it has done so.

The Examiner explains the "electromagnetic unity" theory and tells us in electrical engineering terms why that unasserted power of Congress exists:

"An electric utility system such as [respondent] is essentially an electro-mechanical system to which all operating generators on the interconnected network are interlocked electromagnetically. This means that electric generators, under ordinary operating conditions run either at exactly the same speed or at speeds which will result in a frequency of 60 cycles. No operating generator can change its speed by itself as long as it operates connected to the network. All generators connected to the same network must follow each other as to speed and frequency whenever there is a change in frequency, and the frequency of all interlocked generators is always exactly the same.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. December 27, 1971

No. 70-38 - Federal Power Commission v.  
Florida Power & Light Co.

Dear Byron:

This is just a superb opinion and I am  
delighted to join it.

Sincerely,



Mr. Justice White

cc: The Conference

50  
2  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 21, 1971

70-38, FPC v. Florida Power & Light

Dear Byron,

I should appreciate your appending the following language at the foot of your opinion for the Court in this case:

"MR. JUSTICE STEWART took no part in the consideration or decision of this case."

Sincerely yours,

*C. J.*

Mr. Justice White

Copies to the Conference

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

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES<sup>Circ</sup>

Circulated: 12 = 3/12/74

Recirculated:

No. 70-38

Federal Power Commission,  
Petitioner,  
*v.*  
Florida Power & Light  
Company. } On Writ of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit.

[January —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

We are asked to determine whether the Federal Power Commission exceeded its statutory authorization when it asserted jurisdiction over the Florida Power and Light Company. Section 201 (b) of the Federal Power Act, 16 U. S. C. § 824, grants the Federal Power Commission jurisdiction over "that part of . . . business which consists of the transmission of electric energy in interstate commerce . . . such Federal regulation, however, to extend only to those matters which are not subject to regulation by the states." Section 201 (c) defines energy transmitted in interstate commerce as energy "transmitted from a State and consumed at any point outside thereof." In *Connecticut Light and Power Co. v. FPC*, 324 U. S. 515 (1945), we noted that by this definition the initial jurisdictional determination "was to follow the flow of electric energy, an engineering and scientific rather than legalistic or governmental test." *Id.*, at 529; *Federal Power Commission v. Southern California Edison Co.*, 376 U. S. 205, at 209 n. 5 (1964).

In the case now before us the FPC hearing examiner and the Commission itself, utilizing two scientific tests,

30 / 1, 2, 4, 5, 17 To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Lazarus

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-38

Circulated:

Federal Power Commission,  
Petitioner, v. Florida Power & Light  
Company. Recirculated: On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 12, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

We are asked to determine whether the Federal Power Commission exceeded its statutory authorization when it asserted jurisdiction over the Florida Power and Light Company. Section 201 (b) of the Federal Power Act, 16 U. S. C. § 824, grants the Federal Power Commission jurisdiction over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce, but . . . not [over] any other sale of electric energy . . . ." Section 201 (c) defines energy transmitted in interstate commerce as energy "transmitted from a State and consumed at any point outside thereof."<sup>1</sup> In *Connecticut Light and*

<sup>1</sup> The relevant sections of 16 U. S. C. § 824, stated in full, are as follows:

"(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 22, 1971

Re: No. 70-38 - FPC v. Florida Power & Light

Dear Byron:

Please join me.

Sincerely,



T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 22, 1971

Re: No. 70-38 - FPC v. Florida Power and Light Co.

Dear Byron:

Please join me in the very persuasive opinion  
you have written for this case.

Sincerely,

*H.A.B.*

Mr. Justice White

cc: The Conference