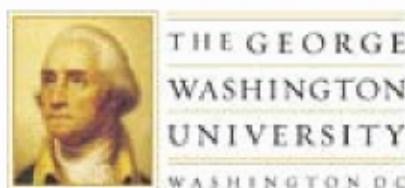


The Burger Court Opinion Writing Database

Otter Tail Power Co. v. United States
410 U.S. 366 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20542

B
You joined CSD
CHAMBERS OF
THE CHIEF JUSTICE

January 30, 1973

Re: No. 71-991 - Otter Tail Power Co. v. U. S.

Dear Bill:

I do not believe I can join your January 12
circulation and will wait on Potter's dissent.

Regards,

W. B.

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 16, 1973

Re: No. 71-991 - Otter Tail Power Co. v. U. S.

Dear Potter:

Please join me.

Regards,

WSB

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 12, 1972

MEMORANDUM TO THE CONFERENCE:

My views on the merits of No. 71-991 -

Otter Tail Power Co. v. United States, are
substantially those of Byron as set forth in
his Memorandum of December 11.

W. O. D.

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-991

Circulated: 1-2-73

Recirculated: _____

Otter Tail Power Company, } On Appeal from the
Appellant, } United States District
v. } Court for District of
United States. } Minnesota.

[January —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by respondent against Otter Tail Power Company (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-991

Circulated:

Otter Tail Power Company, Appellant, v. United States. } On Appeal from the United States District Court for District of Minnesota.

Recirculated: 1-5-73

[January —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by respondent against Otter Tail Power Company (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

Rec'd
Draft #5

WOD
Rec'd
1/6/73

4th
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-991

Otter Tail Power Company, Appellant,
v.
United States. } On Appeal from the
United States District
Court for District of
Minnesota.

[January —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by respondent against Otter Tail Power Company (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

WD

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 8, 1973

Please forward

MEMORANDUM TO THE CONFERENCE:

RE: No. 71-991 - Otter Tail

This draft of Otter Tail incorporates a suggestion of Justice Marshall concerning Part IV of the opinion. He thought - and perhaps rightly - that the decree on that phase of the case is too broad. It was indeed drafted prior to our decision in California Transport. Hence the change on page 12 and on the last page of the opinion.

W. O. D.

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

5th DRAFT

From: Douglas.

No. 71-991

Circulated:

SUPREME COURT OF THE UNITED STATES

Otter Tail Power Company, On Appeal from the *Recircled*
Appellant, United States District
v. Court for District of
United States. Minnesota.

[January —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by respondent against Otter Tail Power Company (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

13
JAN

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

6th DRAFT

SUPREME COURT OF THE UNITED STATES

For Justice Douglas, J.

No. 71-991

Circulated:

Recirculated: JAN 12 1973

Otter Tail Power Company, } On Appeal from the
Appellant, } United States District
v. } Court for District of
United States. } Minnesota.

[January —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by respondent against Otter Tail Power Company (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 4, 1973

W.C.D.
I am still
with you

Dear Bill, Byron, and Thurgood:

Otter Tail Power -- No. 71-991 --

has a bob-tailed Court of 7. We four are
the majority. I have read Potter's dissent
and propose to make no changes -- unless you
have suggestions.

William O. Douglas

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall

cc: Law Clerks

7—
10/13/74

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

7th DRAFT

From: [unclear], J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-991

FEB 7 1973

Recirculated:

Otter Tail Power Company, | On Appeal from the
Appellant, | United States District
v. | Court for the District of
United States. | Minnesota.

[January —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by respondent against Otter Tail Power Company (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

(b) 1,14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Fehnquist

8th DRAFT

From: Douglas.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-991

Recirculated 2/10/73

Otter Tail Power Company, } On Appeal from the
Appellant, } United States District
v. } Court for the District of
United States. } Minnesota.

[January —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by appellee against Otter Tail Power Company (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 3, 1973

RE: No. 71-991 - Otter Tail Power Co. v.
United States

Dear Bill:

I agree.

Sincerely,



Mr. Justice Douglas

cc: The Conference

3
You joined 1/21/73

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-991

From: Stewart, J.

Circulated: FEB 1 1973

Recirculated: _____

Otter Tail Power Company, } On Appeal from the
Appellant, } United States District
v. } Court for the District of
United States. } Minnesota.

[February —, 1973]

MR. JUSTICE STEWART, concurring in part and dissenting in part.

I join Part IV of the Court's opinion, which sets aside the judgment and remands the case to the District Court for consideration of the appellant's litigation activities in light of our decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508. As to the rest of the Court's opinion, however, I respectfully dissent.

The Court in this case has followed the District Court into a misapplication of the Sherman Act to a highly regulated, natural monopoly industry wholly different from those that have given rise to ordinary antitrust principles. In my view, Otter Tail's refusal to wholesale power through interconnection or to perform wheeling services was conduct entailing no antitrust violation.

It is undisputed that Otter Tail refused either to wheel power or to sell it at wholesale to the towns of Elbow Lake, Minnesota, and Hankinson, North Dakota, both of which had formerly been its customers and had elected to establish municipally owned electric utility systems. The District Court concluded that Otter Tail had substantial monopoly power at retail and "strategic dominance" in the subtransmission of power in most of its

B
You are still with Pg. 1, 7
W

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

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-991

Recirculated: FEB 8 1973

Otter Tail Power Company, | On Appeal from the
Appellant, | United States District
v. | Court for the District of
United States. | Minnesota.

[February —, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

I join Part IV of the Court's opinion, which sets aside the judgment and remands the case to the District Court for consideration of the appellant's litigation activities in light of our decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508. As to the rest of the Court's opinion, however, I respectfully dissent.

The Court in this case has followed the District Court into a misapplication of the Sherman Act to a highly regulated, natural monopoly industry wholly different from those that have given rise to ordinary antitrust principles. In my view, Otter Tail's refusal to wholesale power through interconnection or to perform wheeling services was conduct entailing no antitrust violation.

It is undisputed that Otter Tail refused either to wheel power or to sell it at wholesale to the towns of Elbow Lake, Minnesota, and Hankinson, North Dakota, both of which had formerly been its customers and had elected to establish municipally owned electric utility systems. The District Court concluded that Otter Tail had substantial monopoly power at retail and "strategic dominance" in the subtransmission of power in most of its

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 71-991 - Otter Tail Power Co. v. U.S.

My vote in this case was and is to affirm; but I should make clearer than I did that an antitrust court may not wholly ignore the authority of the Federal Power Commission to order interconnection over the objection of the power company.

The Government charged that Otter Tail had monopoly power and had monopolized by refusing interconnection, among other things. The District Court agreed and ordered interconnection, subject to conditions, a remedy that Otter Tail claims invades the authority of the FPC.

Section 202 of the Act does not require FPC consent for interconnections that a power company is willing to make. It is undisputed that Otter Tail, had it so desired, could have established connections with any other system without FPC consent and without violating the Act. The section does, of course, empower the FPC to order interconnection otherwise unacceptable to the power company;

- 2 -

and it is this provision that Otter Tail insists bars the interconnection relief in this case, not because the FPC could order it, but because it might refuse to order interconnection on grounds within the peculiar competence of the FPC to ascertain and adjudicate.

Although an interconnection that the FPC would order or has ordered could not be said to be incompetent evidence of an antitrust violation or beyond the power of an antitrust court to include as part of its remedy, what is the situation, for example, if the FPC were to refuse a municipality's demand for interconnection with Otter Tail on grounds that such interconnection would impair Otter Tail's ability to serve its existing customers? Could the antitrust court nevertheless order the interconnection? Whether it could or not, it is clear to me that at the very least the antitrust court should have the agency judgment before entering its decree, --- if, that is, the power company defendant, which is free voluntarily to interconnect, asserts that its refusal is or was based upon grounds within the special cognizance of the FPC.

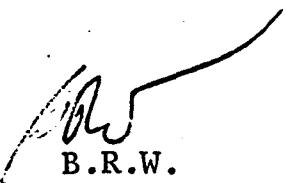
In the case before us, the FPC has ordered Otter Tail to connect with Elbow Lake. To this extent, FPC authority offers no barrier to the judgment and decree of

- 3 -

the District Court. The decree is, of course, much broader with respect to interconnection but it seems to me that ¶ V takes due note of the authority of the FPC. If it does not, the decree should be modified but only so as not to compel those interconnections that the FPC refuses to order on the petition of the company or municipality seeking interconnection.

The question of wheeling is another matter. This is something the FPC has no authority to compel. And, in my view, the fact that Congress did not desire the FPC to have this power in administering the Power Act hardly bars a court from ordering wheeling as a remedy for violating the antitrust laws. Surely, Congress at the time was not addressing itself to the antitrust laws, the Power Act contains no express exemptions from the antitrust laws, and this Court has normally been reluctant to imply partial repeal of the antitrust statutes.

As for the Noerr issue, I would accept the findings of the District Court.



B.R.W.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 4, 1973

Re: No. 71-991 - Otter Tail Power Co. v. U.S.

Dear Bill:

I wonder if you would consider inserting the following sentence before the final two sentences of the full paragraph on page nine:

It also contemplates that future disputes over interconnections and the terms and conditions governing those interconnections will be subject to Federal Power Commission perusal.

If you would rather not make the change, I shall join with a brief concurring statement.

Sincerely,



Mr. Justice Douglas

WD

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 9, 1973

Re: No. 71-991 - Otter Tail Power Co. v.
United States

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 9, 1973

Re: No. 71-991 - Otter Tail v. U. S.

Dear Bill:

Please join me.

Sincerely,


T.M.

Mr. Justice Douglas

cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 7, 1973

Re: No. 71-991 - Otter Tail Power v. U. S.

Dear Bill:

I am still with you.

Sincerely,



T.M.

Mr. Justice Douglas

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 5, 1973

Re: No. 71-991 - Otter Tail Power Co. v. United States

Dear Bill:

Will you please note at the end of your opinion that I
took no part in the consideration or decision of this case.

Sincerely,



Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

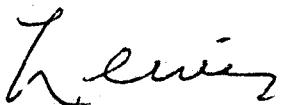
January 5, 1973

Re: No. 71-991 - Otter Tail Power Co. v.
United States

Dear Bill:

Please note at the end of your opinion that I took no part
in the consideration or decision of this case.

Sincerely,



Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 2, 1973

Re: No. 71-991 - Otter Tail v. United States

Dear Potter:

Please join me in your dissenting opinion in this case.

Sincerely,

W.H.R.

It is first rate

Mr. Justice Stewart

Copies to the Conference

WD