

The Burger Court Opinion Writing Database

NAACP v. FPC

425 U.S. 662 (1976)

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



To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Marshall
Mr. Justice Burger

From: The Chief Justice

Circulated: MAY 18 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1608 AND 74-1619

National Association for the
Advancement of Colored
People et al., Petitioners,
74-1608 v.
Federal Power Commission,
Federal Power Commission,
Petitioner,
74-1619 v.
National Association for the
Advancement of Colored
People et al.

On Writs of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia Circuit.

[May —, 1976]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I join the judgment of the Court even though I find it difficult to understand why the result reached by the Commission was not a reasonable administrative determination. The Court of Appeals read the Commission's order in this case as "ambiguous":

"We do not know whether its order asserted a lack of jurisdiction to adopt (1) the specific proposed rule, or (2) *any* rule relating to employment discrimination by regulatees." 520 F. 2d 432, 434 (emphasis added).

In context, the FPC's order could fairly have been read simply as rejecting the rule proposed by the NAACP. This is particularly true in view of the Commission's auditing practice of disallowing duplicative costs, including those occasioned by backpay awards. *Ante*, at 6.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 15, 1976

RE: Nos. 74-1608 and 74-1619 - N.A.A.C. P. v. Federal
Power Commission

Dear Potter:

Please join me.

Sincerely,

Bul

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice

Mr. Justice Brennan

Mr. Justice White

Mr. Justice Marshall

Mr. Justice Black

Mr. Justice Douglas

Mr. Justice Stewart

Mr. Justice Thurgood Marshall

From: Mr. Justice Stewart

Circulated: APR 15 1976

Received:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

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On Writs of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia Circuit,

[May —, 1976]

MR. JUSTICE STEWART delivered the opinion of the
Court.

The issue in this case is to what extent, if any, the Federal Power Commission, in the performance of its functions under the Federal Power Act, 16 U. S. C. § 791a *et seq.* (Power Act), and the Natural Gas Act, 15 U. S. C. § 717 *et seq.* (Gas Act), has authority to prohibit discriminatory employment practices on the part of its regulatees.

I

In 1972 the National Association for the Advancement of Colored People (NAACP) and several other organizations petitioned the Commission to issue a rule "requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees." The

STYLISTIC CHANGES INTRODUCED

2, 3, 4, 8

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

From: Mr. Justice Stewart

Circulated: _____

Received: APR 16 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1608 AND 74-1619

National Association for the
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Federal Power Commission.

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 20, 1976

Re: No. 74-1608 and No. 74-1619, NAACP v. FPC

Dear Lewis,

As presently advised, I regretfully think it
wise not to add your suggested footnote to this opinion.

Sincerely yours,

P.S.
/

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice All
 Mr. Justice Aquist
 Mr. Justice Stevens

John Stewart

APR 21 1976

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

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Federal Power Commission.
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On Writs of Certiorari to
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[May —, 1976]

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 tion in the employment practices of its regulatees." The

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 22, 1976

Re: Nos. 74-1608 & 74-1619 - NAACP v. Federal
Power Commission

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 19, 1976

Re: Nos. 74-1608 and 74-1619, NAACP v. FPC

Dear Potter:

Please show me as not participating in this case.

Sincerely,

T.M.
T.M.

Mr. Justice Stewart

cc: The Conference

*There were all
in another file*

ST

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN


April 16, 1976

Re: No. 74-1608 - NAACP v. FPC
No. 74-1619 - FPC v. NAACP

Dear Potter:

I agree.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry", with a long horizontal stroke extending to the right.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 19, 1976

No. 74-1608 and No. 74-1619 NAACP v. FPC, etc.

MEMORANDUM TO THE CONFERENCE

Here are copies of a letter to Potter, and a suggested footnote, that I now send to each of you.

L.F.P.
L.F.P., Jr.

April 19, 1976

No. 74-1608 and No. 74-1619 NAACP v. FPC, etc.

Dear Potter:

I agree with your opinion for the Court, as I read it.

It is possible, however, that the inclusion of the long excerpt from the opinion of CADC (pp. 4 and 5 of your draft) may invite litigation and fruitless delay. CADC identified six types of "costs of employment discrimination" that might be taken into consideration in determining rates. Several of the categories (e.g., backpay), are clear and reasonable. But some of the other categories are almost absurdly unreal. They could never be quantified with any assurance of dependability and without protracted and probably futile litigation.

I recognize that your opinion does not necessarily endorse the particular costs, and on page 6 you have taken care to say that the cost should be quantified by judicial decree or the final action of an administrative agency. My concern derives from what may be viewed, nevertheless, as an invitation to obtain by litigation a judicial decree or an administrative decision that could delay rate making for years.

I enclose a paragraph which perhaps you will consider including, in substance, as a footnote. It could be keyed to the last full sentence on page 5 or to the first sentence in the first full paragraph on page 6.

Sincerely,

Mr. Justice Stewart

LFP/gg

LFP/gg 4-19-76

No. 74-1608 and No. 74-1619
Suggested Footnotefile
7

We note that the Court of Appeals recognized that some of the possible costs enumerated by it are "very questionable and virtually unquantifiable." Indeed, some of the categories mentioned could rarely, if ever, be quantified without resort to speculative assumptions that would be unacceptable for rate making purposes. This would be true, in all likelihood, with respect to costs identified above as categories (4), (5) and (6). Rates approved by the Commission must be adequate to allow a fair return and to enable continued access by utilities to capital markets. Rate making under the Act requires the careful ascertainment of costs in accord with accounting and engineering practices approved by the Commission. Consumers' interests would not be served if rates were determined on speculative assumptions or if rate-making procedures were delayed pending protracted litigation in an effort to establish costs that intrinsically are unquantifiable.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

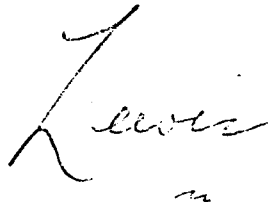
April 20, 1976

No. 74-1608 and No. 74-1619, NAACP v. FPC

Dear Potter:

I will include the substance of my proposed footnote
in a brief concurring opinion.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Powell

Circulated: APR 29 1976

Nos. 74-1608 AND 74-1619

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On Writs of Certiorari to
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 trict of Columbia Circuit,

[May —, 1976]

MR. JUSTICE POWELL, concurring.

Although I join in the opinion of the Court, I write briefly to emphasize a point that seems important.

The Court quotes a portion of the opinion of the Court of Appeals that identifies six categories of "costs" said to be "arguably within the Commission's range of concern." *Ante*, at 4, 5. The Court of Appeals correctly noted, however, that these costs "range from the very definite and easily ascertainable to the very questionable and virtually unquantifiable." *Ante*, at 5.

The Court's opinion explicitly does not endorse all of these categories of costs, and requires that consideration may be given only to costs that have been "demonstrably quantified by judicial decree or the final action of an administrative agency charged with consideration of such matters. . . ." *Ante*, at 6. Although implicit in what the Court says, I think it important to emphasize

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

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CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 16, 1976

Re: Nos. 74-1608 and 74-1619 - National Association
for the Advancement of Colored People v. FPC

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 19, 1976

Re: Nos. 74-1608, 74-1619 - National Association
for the Advancement of Colored People v. FPC

Dear Potter:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to be "JPS", written in a cursive style.

Mr. Justice Stewart

Copies to the Conference