

# The Burger Court Opinion Writing Database

*FPC v. Moss*

424 U.S. 494 (1976)

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



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

CHAMBERS OF  
THE CHIEF JUSTICE

December 2, 1975

Re: 74-883 - FPC v. Moss

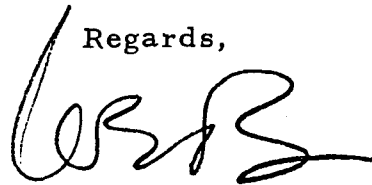
MEMORANDUM TO THE CONFERENCE:

Lest it be too late after today to consider the matter, I call attention to the fact that only six Justices will sit on this case. At best with an early "accretion" there will be only a seven member Court.

Should this result in an equally divided vote and the case be set for reargument, a new colleague will be very readily identifiable as the dispositive vote. That, of course, is an occupational hazard.

Any thought of deferring this case should be acted on today.

Regards,



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

CHAMBERS OF  
THE CHIEF JUSTICE

February 27, 1976

Re: 74-883 - FPC v. Moss

Dear Bill:

Enclosed is a concurrence in the above.

Absent objection we will keep it scheduled for Wednesday, but anyone can ask it to go over.

Regards,

*W.E.B.*

Mr. Justice Brennan

Copies to the Conference

To: Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall ✓  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Burger  
 Mr. Justice Stevens

From: The Chief Justice

Circulated: FEB 27 1976

Recirculated: \_\_\_\_\_

I concur in the judgment of the Court, but with respect I cannot agree that the Sunray II holding is as categorical as Mr. Justice Brennan suggests. I therefore do not agree that the Court of Appeals' reading of Sunray II is "patently erroneous." Ante, at 9.

The optional procedure established by Order No. 455 does not appear to be precisely the same as a limited term certificate. Under the new procedure, the Commission issues a permanent certificate to the producer. The producer is therefore authorized to supply the interstate market indefinitely. The additional and novel feature is that the producer is apparently given a free choice at the end of the contract term; he can continue to supply the interstate market pursuant to his permanent certificate

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

From: The Chief Justice

Circulated: \_\_\_\_\_

Recirculated: MAR 2 1976

*printed*  
 1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-883

Federal Power Commission,	}	On Writ of Certiorari to
Petitioner,		the United States Court
v.		of Appeals for the Dis-
John E. Moss et al.		trict of Columbia Circuit.

[March 3, 1976]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment of the Court, but with respect I cannot agree that the *Sunray II* holding is as categorical as MR. JUSTICE BRENNAN suggests. I therefore do not agree that the Court of Appeals' reading of *Sunray II* is "patently erroneous." *Ante*, at 9.

The optional procedure established by Order No. 455 does not appear to be precisely the same as a limited-term certificate. Under the new procedure, the Commission issues a *permanent* certificate to the producer. The producer is therefore authorized to supply the interstate market indefinitely. The additional and novel feature is that the producer is apparently given a free choice at the end of the contract term; he can continue to supply the interstate market pursuant to his permanent certificate, or he can abandon any further sales at the end of the particular contract term. This decision is left entirely in the hands of the producer. The Commission has no voice whatever in this critical decision; and it does not know in advance what the producer will do. This seems to me far different from granting a limited-term certificate; in that instance, the FPC knows that the particular supplies of gas will end at a date certain, unless both the producer *and* the Commission decide that the supply should continue.

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

2nd DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Recirculated: 1/30/76

No. 74-883

Recirculated: \_\_\_\_\_

Federal Power Commission,	}	On Writ of Certiorari to
Petitioner,		the United States Court
v.		of Appeals for the Dis-
John E. Moss et al.		trict of Columbia Circuit.

[February —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 7 (b) of the Natural Gas Act, 15 U. S. C. § 717f (b), provides that "[n]o natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the [Federal Power] Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment."<sup>1</sup> The question presented in this case is whether FPC may, upon a proper finding of public convenience or necessity, simultaneously authorize both the sale of natural gas in interstate commerce by a producer and the abandonment of

<sup>1</sup> Section 7 (b) of the Act provides in full text:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 30, 1976

Re: No. 74-883 - FPC v. Moss

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 THURGOOD MARSHALL

February 3, 1976

Re: No. 74-883, Federal Power Commission v. Moss

Dear Bill:

Please join me.

Sincerely,

*T.M.*  
T.M.

Mr. Justice Brennan

cc: The Conference



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 12, 1976

Re: No. 74-883 - FPC v. Moss

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 30, 1976

Re: No. 74-883 - FPC v. Moss

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to the Conference