

# The Burger Court Opinion Writing Database

## *New England Power Co. v. New Hampshire*

455 U.S. 331 (1982)

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

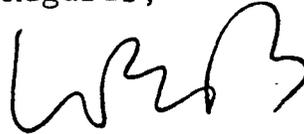
October 7, 1981

Re: 80-1208 New England Power v. New Hampshire  
80-1471 Commonwealth v. New Hampshire  
80-1610 Roberts v. New Hampshire

Dear Lewis:

I agree with your proposed order.

Regards,

A handwritten signature in black ink, appearing to be 'W.P.', written in a cursive style.

Justice Powell  
Copies to the Conference

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: The Chief Justice

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1208

NEW ENGLAND POWER COMPANY, APPELLANT  
80-1208  
*v.*  
NEW HAMPSHIRE ET AL.

MASSACHUSETTS, ET AL., APPELLANTS  
80-1471  
*v.*  
NEW HAMPSHIRE ET AL.

DENNIS J. ROBERTS, II, ATTORNEY GENERAL OF  
THE STATE OF RHODE ISLAND, ET AL., APPELLANT  
80-1610  
*v.*  
NEW HAMPSHIRE ET AL.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE  
[January —, 1982]

CHIEF JUSTICE BURGER delivered the opinion of the  
Court.

These three consolidated appeals present the question  
whether a State can constitutionally prohibit the exportation  
of hydroelectric energy produced within its borders by a fed-  
erally-licensed facility, or otherwise reserve for its own citi-  
zens the "economic benefit" of such hydroelectric power.

I

Appellant New England Power Company is a public utility  
which generates and transmits electricity at wholesale. It  
sells 75% of its power in Massachusetts and much of the re-

STYLISTIC CHANGES

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackman  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: The Chief Justice

Circulated: \_\_\_\_\_  
Recirculated: **FEB 22 1982**

*2nd*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1208

NEW ENGLAND POWER COMPANY, APPELLANT  
80-1208  
v.  
NEW HAMPSHIRE ET AL.

MASSACHUSETTS, ET AL., APPELLANTS  
80-1471  
v.  
NEW HAMPSHIRE ET AL.

DENNIS J. ROBERTS, II, ATTORNEY GENERAL OF  
THE STATE OF RHODE ISLAND, ET AL., APPELLANT  
80-1610  
v.  
NEW HAMPSHIRE ET AL.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

[February —, 1982]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These three consolidated appeals present the question whether a State can constitutionally prohibit the exportation of hydroelectric energy produced within its borders by a federally-licensed facility, or otherwise reserve for its own citizens the "economic benefit" of such hydroelectric power.

### I

Appellant New England Power Company is a public utility which generates and transmits electricity at wholesale. It sells 75% of its power in Massachusetts and much of the re-

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

CHAMBERS OF  
THE CHIEF JUSTICE

March 1, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for New England Power Co. v. New Hampshire, No. 80-1208 etc.

No. 81-731, Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n

The above case, on appeal from the Supreme Court of Arkansas, has been held for New England Power Co. v. New Hampshire, No. 80-1208 etc. The Arkansas Public Service Commission asserted ratemaking jurisdiction over sales of electricity at wholesale from appellant, an Arkansas corporation, to 17 Arkansas electric cooperatives which resell the electricity to Arkansas customers. Appellant generates some of the electricity itself, and purchases the remainder from Arkansas utilities. The purchased power is generated at facilities located in Oklahoma, Missouri, Texas, or Arkansas and is transmitted to appellant through an integrated multi-state transmission system. When appellant has a surplus of power, it sells electricity back to the utilities; the power thus reenters the multi-state grid, and some of it is sold outside Arkansas. The Arkansas Supreme Court held that despite these "incidental" interstate transactions, appellant's sales to the Arkansas cooperatives were essentially local in character, and therefore state regulation of the sales was not inconsistent with the Commerce Clause.

The principal issue in this case is whether appellant's sales of electricity at wholesale are "in interstate commerce." This was not a substantial issue in New England Power; it was clear that New England Power's sales to Massachusetts and Rhode Island utilities were interstate sales. Accordingly, I do not see it as necessary to remand this case in light of New England Power.

However, the decision below may conflict with Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1965), where, on similar facts, this Court held that a sale of electricity from a California utility to a California municipality was subject to the jurisdiction of the Federal Power Commission. Although the Court was there interpreting the Federal Power Act, Southern California Edison suggests that federal jurisdiction under the Act extends only to regulatory

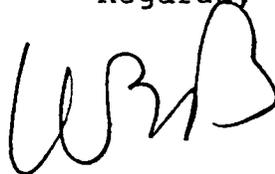
March 1, 1982

- 2 -

authority declared off-limits to the states in Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927). Thus, even though the federal government has made no effort to regulate the sales at issue here, Southern California Edison and Attleboro may nevertheless raise the issue whether such regulation is beyond legitimate state authority.

Since there is tension between this case and Southern California Edison, and given the fact that the federal government has not attempted to regulate the sales at issue, I would call for the views of the Solicitor General. Recommendation: CVSG.

Regards,

A handwritten signature in black ink, appearing to be the initials 'W. B. B.' with a stylized flourish at the end.

JUS

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



CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

October 7, 1981

RE: Nos. 80-1208 New England Power v. New Hampshire  
80-1471 Commonwealth v. New Hampshire  
80-1610 Roberts v. New Hampshire

Dear Lewis:

I agree with your proposed order.

Sincerely,

Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

February 3, 1982

RE: No. 80-1208, 1471 and 1610 New England Power,  
Massachusetts and Roberts v. New Hampshire, et al.

Dear Chief:

I agree.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

October 6, 1981

80-1208 - New England Power v. New Hampshire  
80-1471 - Commonwealth v. New Hampshire  
80-1610 - Roberts v. New Hampshire

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Dear Lewis,

I agree with your proposed order.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

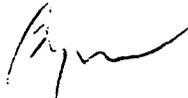
February 8, 1982

Re: 80-1208, 80-1471 & 80-1610 -  
New England Power Co. v. New Hampshire  
Massachusetts v. New Hampshire  
Roberts v. New Hampshire

Dear Chief,

I agree,

Sincerely yours,



The Chief Justice

Copies to the Conference

cpm

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

October 6, 1981

Re: No. 80-1208-New England Power v. New Hampshire  
No. 80-1471-Commonwealth v. New Hampshire  
No. 80-1610-Roberts v. New Hampshire

Dear Lewis:

Your proposed order in this case is OK with me.

Sincerely,

*T.M.*

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 8, 1982

Re: No. 80-1208) - N.E. Power v. New Hampshire  
No. 80-1471) - Massachusetts v. New Hampshire  
No. 80-1610) - Roberts v. New Hampshire

Dear Chief:

Please join me.

Sincerely,

*J.M.*  
T.M.

The Chief Justice

cc: The Conference

*please - give me a nice summary*

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



CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

*on Thurs afternoon  
of the vote.*

October 7, 1981

Re: 80-1208 - New England Power v. New Hampshire  
80-1471 - Commonwealth v. New Hampshire  
80-1610 - Roberts v. New Hampshire

Dear Lewis:

I go along with your proposed order.

Sincerely,

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 4, 1981

Re: No. 80-1208) - New England Power Co. v. New Hampshire  
No. 80-1471) - Massachusetts v. New Hampshire  
No. 80-1610) - Roberts v. New Hampshire

Dear Chief:

Please join me.

Sincerely,



The Chief Justice  
cc: The Conference

October 6, 1981

80-1208 New England Power v. New Hampshire  
80-1471 Commonwealth v. New Hampshire  
80-1610 Roberts v. New Hampshire

MEMORANDUM TO THE CONFERENCE:

As suggested at our last Conference, I have prepared - with assistance from Frank Lorson - the attached form of a proposed order disposing of the various motions.

I hardly need say that this is a confusing situation.

L.F.P., Jr.

SS

lfp/ss 10/6/81

The motion of the New Hampshire Legislative Utility Consumer's Council to withdraw as a party appellee in cases 80-1208, 80-1471, and 80-1610 is granted. The motion of the New Hampshire Public Utilities Commission and the State of New Hampshire to dismiss the New Hampshire Public Utilities Commission as a party appellee in cases 80-1208 and 80-1610 is granted. The motion of the Commonwealth of Massachusetts for substitution of the New Hampshire Public Utilities Commission as a party appellee in case 80-1471 is denied. It is ordered that the State of New Hampshire be added as a party appellee in case 80-1471.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 3, 1982

80-1208, 80-1471, 80-1610 New England Power v. New Hampshire

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

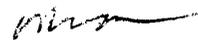
V  
October 7, 1981

Re: 80-1208 - New England Power v. New Hampshire  
80-1471 - Commonwealth v. New Hampshire  
80-1610 - Roberts v. New Hampshire

Dear Lewis,

I agree with your proposed order.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 17, 1982

Re: Nos. 80-1208, 80-1471 & 80-1610 New England  
Power Co. v. New Hampshire

Dear Chief:

Please join me in your opinion for the Court.

Sincerely,

*WHR*

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 8, 1981

Re: 80-1208 - New England Power v.  
New Hampshire; 80-1471 - Commonwealth  
v. New Hampshire; 80-1610 - Roberts  
v. New Hampshire

Dear Lewis:

I agree with your proposed order.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 8, 1982

Re: 80-1208 - New England Power v. New Hampshire  
80-1471 - Massachusetts v. New Hampshire  
80-1610 - Roberts v. New Hampshire

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

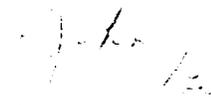
February 12, 1982

Re: 80-1208, 80-1471 & 80-1610  
New England Power Co. v. New Hampshire  
Massachusetts v. New Hampshire  
Roberts v. New Hampshire

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

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

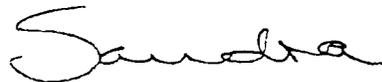
February 9, 1982

No. 80-1208 New England Power Company v.  
New Hampshire  
No. 80-1471 Massachusetts v. New Hampshire  
No. 80-1610 Roberts v. New Hampshire

Dear Chief,

Please join me in your opinion in the  
referenced matter.

Sincerely,



Sandra D. O'Connor

The Chief Justice

Copies to the Conference