

The Burger Court Opinion Writing Database

FERC v. Mississippi

456 U.S. 742 (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

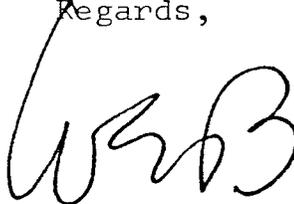
April 13, 1982

Re: 80-1749 - FERC v. Mississippi

MEMORANDUM TO THE CONFERENCE:

Sandra's opinion concurring in part and dissenting as to § IVB and IVC, persuades me the Court goes too far. I therefore join her dissent.

Regards,

A handwritten signature in black ink, appearing to be "WEB", written in a cursive style.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 17, 1982

RE: No. 80-1749 Federal Energy Regulatory Commission
v. Mississippi, et al.

Dear Harry:

I agree.

Sincerely,



Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 16, 1982

Re: 80-1749 - FERC v. Mississippi

Dear Harry,

Please join me.

Sincerely yours,



Justice Blackmun

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 18, 1982

Re: No. 80-1749 - Federal Energy Regulatory
Commission v. Mississippi

Dear Harry:

Please join me.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Burger
Justice Stewart
Justice Thurgood Marshall
Justice Lewis F. Powell, Jr.
Justice Sandra Day O'Connor

From: Justice Blackmun

Circulated: FEB 15 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION, ET AL., APPELLANTS v. MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[February —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, appellees successfully challenged the constitutionality of Titles I and III, and of § 210 of Title II, of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA or Act.) We conclude that appellees' challenge lacks merit and we reverse the judgment below.

I

On November 9, 1978, President Carter signed PURPA into law.¹ The Act was part of a package of legislation,² approved the same day, designed to combat the nationwide energy crisis.

At the time, it was said that the generation of electricity consumed more than 25% of all energy resources used in the United States. S. Rep. No. 95-442, p. 7 (1977). Approxi-

¹The Senate vote was taken on Oct. 9, 1978. The Mississippi Senators voted against the bill. See 124 Cong. Rec. S17818. The House vote was taken on Oct. 15, 1978. The five-member Mississippi delegation voted three "ayes" and two "nays." See 124 Cong. Rec. H38503.

²In addition to PURPA, the package included the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206; the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289; and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351.

pp. 12 + 20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION, ET AL., APPELLANTS *v.* MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[February —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, appellees successfully challenged the constitutionality of Titles I and III, and of § 210 of Title II, of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA or Act.) We conclude that appellees' challenge lacks merit and we reverse the judgment below.

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At the time, it was said that the generation of electricity consumed more than 25% of all energy resources used in the United States. S. Rep. No. 95-442, p. 7 (1977). Approxi-

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Pages: 2, 18, 19, 21, 23-24, 25-26
 Footnotes Renumbered

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION ET
 AL., APPELLANTS, *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF MISSISSIPPI

[April —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, appellees successfully challenged the constitutionality of Titles I and III, and of § 210 of Title II, of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA or Act.) We conclude that appellees' challenge lacks merit and we reverse the judgment below.

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PP 18, 19, 21, 22, 25, 26
STYLISTIC CHANGES

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: _____ **MAY 19 1982**

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

**FEDERAL ENERGY REGULATORY COMMISSION,
ET AL., APPELLANTS, v. MISSISSIPPI ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI**

[May —, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, appellees successfully challenged the constitutionality of Titles I and III, and of § 210 of Title II, of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA or Act.) We conclude that appellees' challenge lacks merit and we reverse the judgment below.

I

On November 9, 1978, President Carter signed PURPA into law.¹ The Act was part of a package of legislation,² approved the same day, designed to combat the nationwide energy crisis.

At the time, it was said that the generation of electricity consumed more than 25% of all energy resources used in the United States. S. Rep. No. 95-442, p. 7 (1977). Approxi-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1982

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 80-1749, FERC v. Mississippi

There are two holds for FERC, a pair of curve-lined cases, Texas v. FERC and Harvey v. FERC, Nos. 81-1232 and 81-1478. These involve Tenth Amendment challenges to the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §3301 et seq. The NGPA establishes pricing categories for sales of natural gas. Gas may be sold at prices set out in the statute only if there is a prior determination under §3413 that the gas involved "qualifies." Section 3413(c)(1) empowers federal or state agencies "having regulatory jurisdiction with respect to the production of natural gas" to make such determinations by applying statutory standards. But §3413(c)(2) allows any state agency "to waive its authority to make [such] determinations ... by entering into an agreement [with FERC] in accordance with subparagraph (B)." Section 3413(c)(2)(B) states that agreements may be made "only by written agreement between the ... State agency involved and [FERC]." If a state commission does waive its regulatory authority, pricing determinations are made by FERC.

Among many other challenges, the DC (WD Okla) rejected petitioners' Tenth Amendment attack on the NGPA. The court noted that the statute "authorizes" state agencies to make determinations under the statute, but "[t]here is no requirement of state cooperation and no sanctions are levied in the event a state agency refuses to act." The court also observed that, while the statute requires the agreement of FERC before a state waiver becomes effective, "there is no mandatory requirement of state agency action even absent FERC's agreement, and no sanction provided for a state whose agency does not act. Thus, there is no 'coercion' in the constitutional sense, and the Act ... must be upheld." The court pointed out that there was no evidence that any State had attempted to obtain FERC's agreement to a waiver, and the court therefore did not consider whether FERC could, consistent with the Tenth Amendment, decline a request that the Commission rather than the State make pricing determinations. The CA10 (Barrett, Doyle, McKay) affirmed, largely on the basis of the DC's opinion. The CA also noted that the DC's opinion was consistent with this Court's reasoning in Hodel v. Virginia Surface Min. & Recl. Assn., 452 U.S. 264 (1981).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 16, 1982

80-1749 Federal Energy Regulatory Comm. v. Mississippi

Dear Harry:

I will await Sandra's dissent

Sincerely,

L. F. P.

Justice Blackmun

lfp/ss

cc: The Conference

April 12, 1982

PERSONAL

80-1749 Federal Energy Regulatory Comm. v. Mississippi

Dear Sandra:

The clerk working with me on this case (John Wiley) began his memorandum as follows: "Justice O'Connor has written a dissent in which she can take real pride. It is persuasive and eloquent." I agree with John's assessment, and think your opinion will be cited often and - in view of your legislative experience - will have influence over the years.

I am inclined, nevertheless, to write separately. As you may recall from Conference, my principal concern was with the extent to which the statute mandates state procedure, including standing, judicial review, etc. I may not conclude that the entire statute is facially invalid. I want to take a closer look at the case.

Sincerely,

Justice O'Connor

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 12, 1982

80-1749 FERC v. Mississippi

Dear Harry:

Although I agree with much of what Sandra has written so well as to the intrusiveness of this statute, I am not entirely at rest and may write separately.

Sincerely,



Justice Blackmun

lfp/ss

cc: The Conference

— p 3

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: MAY 17 1982

Recirculated: _____

FIRST DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION,
 ET AL., APPELLANTS *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF MISSISSIPPI

[May —, 1982]

JUSTICE POWELL, dissenting.

The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*, (PURPA), imposes unprecedented burdens on the States. As JUSTICE O'CONNOR ably demonstrates, it intrusively requires them to make a place on their administrative agenda for consideration and potential adoption of federally proposed "standards." The statute does not simply ask States to consider quasi-legislative matters that Congress believes they would do well to adopt. It also prescribes administrative and judicial procedures that States must follow in deciding whether to adopt the proposed standards. At least to this extent, I think the PURPA violates the Tenth Amendment.

I

Most, if not all, of the States have administrative bodies—usually commissions—that regulate electric and gas public utility companies. As these utilities normally are given monopoly jurisdiction, they are extensively regulated both substantively and procedurally by state law. Until now, with limited exceptions, the federal government has not attempted to preempt this important state function, and certainly has not undertaken to prescribe the procedures by which state regulatory bodies make their decisions. The

— P 1

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 9 0 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION,
 ET AL., APPELLANTS *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF MISSISSIPPI

[May —, 1982]

JUSTICE POWELL, concurring and dissenting.

The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*, (PURPA), imposes unprecedented burdens on the States. As JUSTICE O'CONNOR ably demonstrates, it intrusively requires them to make a place on their administrative agenda for consideration and potential adoption of federally proposed "standards." The statute does not simply ask States to consider quasi-legislative matters that Congress believes they would do well to adopt. It also prescribes administrative and judicial procedures that States must follow in deciding whether to adopt the proposed standards. At least to this extent, I think the PURPA violates the Tenth Amendment.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 17, 1982

Re: No. 80-1749 Federal Energy Regulatory Comm. v.
Mississippi

Dear Harry:

I will await Sandra's dissent in this case.

Sincerely,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 13, 1982

Re: No. 80-1749 FERC v. Mississippi

Dear Sandra:

Please join me in your dissenting opinion.

Sincerely,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 16, 1982

Re: 80-1749 - FERC v. Mississippi

Dear Harry:

Please join me.

Respectfully,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

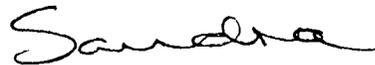
February 16, 1982

No. 80-1749 Federal Energy Regulatory Comm.
v. Mississippi

Dear Harry,

I will circulate a dissent in due course.

Sincerely,



Justice Blackmun

Copies to the Conference

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

From: **Justice O'Connor**

Circulated: APR 8 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION ET AL., APPELLANTS, *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[April —, 1982]

NO

JUSTICE O'CONNOR, concurring in part in the judgment and dissenting in part.

I agree with the majority that the Commerce Clause supported Congress' enactment of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA). I disagree, however, with much of the majority's Tenth Amendment analysis. Titles I and III of PURPA conscript state utility commissions into the national bureaucratic army. This result is contrary to the principles of *National League of Cities v. Usery*, 426 U. S. 833 (1976), antithetical to the values of federalism, and inconsistent with our constitutional history. Accordingly, I dissent from subsections IVB and C of the majority's opinion.¹

¹ I concur in the majority's decision to uphold Title II, § 210 of PURPA against appellees' facial attack. As the majority explains, part of that section permits the Federal Energy Regulatory Commission (FERC) to exempt cogeneration and small power production facilities from otherwise applicable state and federal laws. 16 U. S. C. § 824a-3 (e) (1976 ed., Supp. IV). This exemption authority does not violate the Tenth Amendment, for it merely preempts state control of private conduct, rather than regulating the "States as States." See *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 287-293 (1981).

Section 210's requirement that the States "implement" rules promulgated by the Secretary of Energy, 16 U. S. C. § 824a-3 (f) (1976 ed., Supp. IV), is more disturbing. Appellants, however, have interpreted this statu-

PP. 4, 3, 8, 10, 12, 16, 19, 26

Stylistic Changes Throughout

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

From: **Justice O'Connor**

Circulated: _____

Recirculated: **APR 22 1982**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION ET
AL., APPELLANTS, v. MISSISSIPPI ET AL.ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

[April —, 1982]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and
 JUSTICE REHNQUIST join, concurring in part in the judgment
 and dissenting in part.

I agree with the Court that the Commerce Clause sup-
 ported Congress' enactment of the Public Utility Regulatory
 Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117
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 Tenth Amendment analysis. Titles I and III of PURPA con-
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 League of Cities v. Usery*, 426 U. S. 833 (1976), antithetical
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 Reclamation Association, Inc.*, 452 U. S. 264, 287-293 (1981).

Section 210's requirement that the States "implement" rules promul-

PP. 8, 11, 12, 17, 18

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

From: **Justice O'Connor**

Circulated: _____

Recirculated: **MAY** 11 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION ET
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and
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 and dissenting in part.

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Section 210's requirement that the States "implement" rules promul-

pp. 4, 8, 9, 11, 14, 16, 17, 21, 23

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

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAY 24 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION ET
AL., APPELLANTS, *v.* MISSISSIPPI ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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[May —, 1982]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part in the judgment and dissenting in part.

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