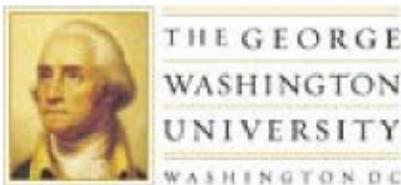


The Burger Court Opinion Writing Database

*Arkansas Electric Cooperative Corp. v.
Arkansas Public Service Commission*
461 U.S. 375 (1983)

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

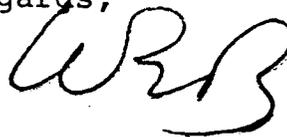
April 28, 1983

Re: No. 81-731, Arkansas Electric Coop. Corp. v.
Arkansas Public Service Comm'n

Dear Byron:

This is a close case but show me as joining
your dissenting opinion.

Regards,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 21, 1983

RE: No. 81-731 Arkansas Electric Cooperative Corporation
v. Arkansas Public Service Commission
No. 81-523 Container Corporation of America v. Franchise
Tax Board

Dear Chief:

I'll try my hand at opinions for the Court in the above.

Sincerely,

The Chief Justice

Copies to the Conference

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

From: **Justice Brennan**

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WJB
Plouffe
me
WJ

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-731

ARKANSAS ELECTRIC COOPERATIVE CORPORATION, APPELLANT *v.* ARKANSAS PUBLIC COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

[March —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This appeal requires us to decide whether the Arkansas Public Service Commission (PSC) acted contrary to the Commerce Clause or the Supremacy Clause of the Constitution when it asserted regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its member retail distributors, all of whom are located within the State. The Arkansas Supreme Court upheld the PSC's assertion of jurisdiction. We affirm.

I

Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. See *Munn v. Illinois*, 94 U. S. 113 (1877). On the other hand, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests. See *FERC v. Mississippi*, 456 U. S. 742, 755-757 (1982); *New England Power Co. v. New Hampshire*,

K

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 30, 1983

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

Dear Chief:

It appears that Byron and I have some changes to make in our respective opinions in this case. It will not be ready to be announced Monday.

Sincerely,

WJB, Jr.

WJB/jhs

The Chief Justice

Copies to the Conference

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 8-9, 11-13, 16

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

From: Justice Brennan

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-731

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,
APPELLANT *v.* ARKANSAS
PUBLIC COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

[May —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This appeal requires us to decide whether the Arkansas Public Service Commission (PSC) acted contrary to the Commerce Clause or the Supremacy Clause of the Constitution when it asserted regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its member retail distributors, all of whom are located within the State. The Arkansas Supreme Court upheld the PSC's assertion of jurisdiction. We affirm.

I

Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. See *Munn v. Illinois*, 94 U. S. 113 (1877). On the other hand, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests. See *FERC v. Mississippi*, 456 U. S. 742, 755-757 (1982); *New England Power Co. v. New Hampshire*,

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 31, 1983

Re: 81-731 - Arkansas Electric Cooperative
Corp. v. Arkansas Public Service Comm'n

Dear Bill,

I am considering writing a dissent in
this case.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

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

From: **Justice White**

APR 26 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-731

ARKANSAS ELECTRIC COOPERATIVE CORPORATION, APPELLANT v. ARKANSAS PUBLIC COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

[May —, 1983]

JUSTICE WHITE dissenting.

I respectfully dissent. I believe that state regulation of rural cooperative wholesale power rates is preempted because Congress has occupied the field of wholesale power rate regulation.

Several years before the expansion of the jurisdiction of the Federal Power Commission to regulate interstate wholesale power rates, this Court had invalidated as repugnant to the Commerce Clause state attempts to regulate interstate power wholesale rates. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). The Court drew a bright line demarking the permissible scope of state regulation. States could regulate retail sales of energy in interstate commerce, but could not regulate wholesale sales of energy in interstate commerce. "*Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce." *United States v. Public Utilities Commission*, 345 U. S. 295, 304 (1953). Had there been at the time of *Attleboro* a cooperative that generated electricity and sold it for resale across state lines, state regulation of such sales would have been foreclosed as an interference with commerce. I do not see how that conclusion could be questioned.

Nor is it sensible to argue that such a cooperative's rates

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

From: **Justice White**

pp. 2, 4, 5 and
stylistic changes throughout

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2d
~~1st~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-731

ARKANSAS ELECTRIC COOPERATIVE CORPORATION, APPELLANT *v.* ARKANSAS PUBLIC COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

[May —, 1983]

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

I respectfully dissent. I believe that state regulation of rural cooperative wholesale power rates is preempted because Congress has occupied the field of wholesale power rate regulation.

Several years before the expansion of the jurisdiction of the Federal Power Commission to regulate interstate wholesale power rates, this Court had invalidated as repugnant to the Commerce Clause state attempts to regulate interstate power wholesale rates. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). The Court drew a bright line demarking the permissible scope of state regulation. States could regulate retail sales of energy in interstate commerce, but could not regulate wholesale sales of energy in interstate commerce. "*Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce." *United States v. Public Utilities Commission*, 345 U. S. 295, 304 (1953). Had there been at the time of *Attleboro* a cooperative that generated electricity and sold it for resale across state lines, state regulation of such sales would have been foreclosed as an interference with commerce. I do not see how that conclusion could be questioned.

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

From: Justice White

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3, 6

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-731

ARKANSAS ELECTRIC COOPERATIVE CORPORATION, APPELLANT *v.* ARKANSAS PUBLIC COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

[May —, 1983]

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

I respectfully dissent. I believe that state regulation of rural cooperative wholesale power rates is preempted because Congress has occupied the field of wholesale power rate regulation.

Several years before the expansion of the jurisdiction of the Federal Power Commission to regulate interstate wholesale power rates, this Court had invalidated as repugnant to the Commerce Clause state attempts to regulate interstate power wholesale rates. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). The Court drew a bright line demarking the permissible scope of state regulation. States could regulate retail sales of energy in interstate commerce, but could not regulate wholesale sales of energy in interstate commerce. "*Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce." *United States v. Public Utilities Commission*, 345 U. S. 295, 304 (1953). Had there been at the time of *Attleboro* a cooperative that generated electricity and sold it for resale across state lines, state regulation of such sales would have been foreclosed as an interference with commerce. I do not see how that conclusion could be questioned.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 28, 1983

Re: No. 81-731-Arkansas Electric Cooperative Corp. v.
Arkansas Public Commission

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 31, 1983

Re: No. 81-731, Arkansas Electric Cooperative Corp.
Arkansas Public Service Commission

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 29, 1983

81-731 Arkansas Electric Cooperative v.
Arkansas Public Commission

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lewis".

Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

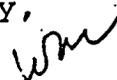
March 29, 1983

Re: No. 81-731 Arkansas Electric Cooperative
Corp. v. Arkansas Public Commission

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 29, 1983

Re: 81-731 - Arkansas Electric Cooperative
Corp. v. Arkansas Public Commission

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 29, 1983

No. 81-731 Arkansas Electric Cooperative Corp.
v. Arkansas Public Commission

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference