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Pushing State Regulatory Commissions behind the Bright Line: FERC Jurisdiction Pervails in Mississippi Power & (and) Light Co. v. Mississippi Ex Rel. Moore

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NOTE
PUSHING STATE REGULATORY COMMISSIONS
BEHIND THE BRIGHT LINE: FERC JURISDICTION
PREVAILS IN MISSISSIPPI POWER & LIGHT CO. V.
MISSISSIPPI EX REL. MOORE, 487 U.S. ___, 108

STATEMENT OF THE CASE

Once the Federal Energy Regulatory Commission (FERC) orders a
utility to buy electricity from a nuclear power plant, can a state review
the prudence of that utility’s decision to help build the plant in the first
place? The United States Supreme Court said “no” in Mississippi Power
& Light Co. v. Mississippi ex rel. Moore.1 Briefly, FERC ordered a
Mississippi utility to buy a certain amount of nuclear power that cost
much more than had been expected. Consequently, the state public utility
commission allowed the company to pass on the cost to its retail con-
sumers. The pass-through was challenged, and the Mississippi Supreme
Court ruled that the state commission should review whether the utility
and its parent company acted reasonably when they decided to complete
the nuclear power plant despite rapidly rising costs.2 The U.S. Supreme
Court reversed, holding that the Mississippi commission could not “in-
vade the province of federal authority” exercised by FERC.3 This Note
will discuss the nationwide trend of state commissions reviewing prudence
decisions of utilities and the Court’s response—to strengthen FERC’s
jurisdiction.

Mississippi Power & Light Co. (MP&L) is wholly owned by Middle
South Utilities (MSU), a public utility holding company.4 MSU also owns
three other operating companies.5 All four sell electricity wholesale to
each other. Each also sells electricity retail in separate service areas in
Louisiana, Arkansas, Missouri, and Mississippi.6 The four companies
operate as an integrated power pool, and “System Agreements” filed with

4. Id. at 2431.
5. Id. at 2431 n.1.
6. Id. at 2431.
FERC govern wholesale transactions among them.\textsuperscript{7} The Federal Power Act authorizes FERC to regulate \textit{wholesale} sales.\textsuperscript{8}

By contrast, state utility commissions regulate the \textit{retail} sales of each operating company.\textsuperscript{9} The Mississippi Public Service Commission (MPSC) regulates MP&L's retail rate.\textsuperscript{10} In 1974, MPSC granted a certificate to build two nuclear power plants to MP&L and a new MSU subsidiary, Middle South Energy, Inc. (MSE).\textsuperscript{11} MSE was created to finance, own, and operate the Grand Gulf nuclear plants, and MSE "hired MP&L to design, construct, and operate the facilities."\textsuperscript{12} Thus, the two wholly owned MSU subsidiaries applied to MPSC for a certificate of public convenience and necessity authorizing the construction of the plants.\textsuperscript{13} In granting the certificate, MPSC noted that MP&L was part of "an integrated electric system" and that "the Grand Gulf Project [would] serve as a major source of baseload capacity for the company and the entire Middle South System pooling arrangement."\textsuperscript{14}

By the late 1970s, however, the projected need for the plants had fizzled, making Grand Gulf's power-generating capacity unnecessary.\textsuperscript{15} As costs mounted from regulatory delays, construction requirements, and high inflation, management decided to stop building Grand Gulf 2 and concentrate on finishing Grand Gulf 1.\textsuperscript{16} Unfortunately, the completion of Grand Gulf 1 cost about $3 billion, or about six times its projected cost.\textsuperscript{17} The wholesale cost of Grand Gulf's power, therefore, greatly exceeded the cost of power produced by other MSU facilities.\textsuperscript{18}

After extensive hearings to review MSU's wholesale rates, FERC or-
dered that 33 percent of Grand Gulf's capacity costs should be allocated to MP&L to "achieve just and reasonable results." FERC reasoned that the four operating companies should share the cost of the system's investment in Grand Gulf I in proportion to their relative demand for energy generated by the system as a whole. The United States Court of Appeals for the District of Columbia affirmed FERC's decision. The appeals court also rejected challenges to FERC's authority. The court held that the Federal Power Act gave FERC the authority to set the allocation of Grand Gulf's capacity and costs and affirmed the order as both rational and within FERC's discretion to remedy discriminatory rates.

Before FERC proceedings were over, however, MP&L filed an application with the MPSC for a substantial increase in its retail rates. The Mississippi commission eventually approved a rate increase to allow MP&L to cover its FERC-ordered obligation, about $27 million each month. Also, in its order the MPSC said it intended to continue to challenge "the validity and fairness of the FERC allocation to MP&L." The Attorney General of Mississippi and consumer groups appealed to the Mississippi Supreme Court, charging that the MPSC had exceeded its authority by adopting "retail rates to pay Grand Gulf expenses without first determining that the expenses were prudently incurred." The court agreed. The Mississippi court also concluded that MSU and its subsidiaries "used the jurisdictional relationship between state and federal reg-

19. The "capacity costs" included the cost of building and operating the nuclear power plant. State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n, 506 So. 2d 978, 987 (Miss. 1987), rev'd sub nom. Mississippi Power & Light, 108 S. Ct. 2428. The FERC-approved rates for the electricity, coupled with the amount to be sold (the allocation), implicitly allowed MSE to recoup 100 percent of its costs in building Grand Gulf 1 since no costs were judged imprudent. See Mississippi Power & Light, 108 S. Ct. at 2434, 2441. Any decrease in the rates or the allocation probably would have meant that shareholders of MSU and its subsidiaries would pay for Grand Gulf 1, not its retail customers. See id. at 2446 (Brennan, J., dissenting). Justice Brennan implies in his dissent that if a cost is determined to be imprudent, the company's shareholders will pay, not its retail customers. See id.

20. Mississippi Power & Light, 108 S. Ct. at 2434 (quoting Middle South Energy, Inc., 31 F.E.R.C. ¶¶ 61,305, 61,655, aff'd sub nom. Mississippi Indus., 808 F.2d 1525). FERC had governed MSU wholesale rates and wholesale transactions among its subsidiaries through "System Agreements" in 1951, 1973, and 1982. Id. at 2431. The supplemental agreement FERC reviewed, the Unit Power Sales Agreement (UPSA), provided wholesale rates for MSE's sale of Grand Gulf I capacity and energy. Id. at 2433. The proposed UPSA obligated MP&L to purchase 31.63 percent of Grand Gulf's capacity. Id.

21. Id.
22. Mississippi Indus., 808 F.2d 1525.
23. Id. at 1539.
24. Id. at 1566.
26. Id. at 2436.
27. Id.
ulatory agencies to completely evade a prudence review of Grand Gulf costs" by either state or federal agencies. The court remanded the case to the MPSC for further review.

In justifying the remand, the Mississippi Supreme Court held that Mississippi could conduct a prudence review before passing on the cost to consumers despite FERC’s order that MP&L should pay 33 percent of the Grand Gulf costs. In other words, FERC’s action did not preempt a Mississippi prudence review. The state court said the test to determine whether FERC had pre-empted a particular aspect of state regulation required the court to “examine whose [sic] matters actually determined, whether expressly or impliedly, by the FERC.” The Mississippi court said that FERC was never confronted with the question of whether the completion or operation of Grand Gulf was prudent. The Mississippi Supreme Court remanded the case to the MPSC “for a review of the prudence of the Grand Gulf investment.” It said the review “must determine whether MP&L, [MSE] and MSU acted reasonably when they constructed Grand Gulf 1, in light of the change in demand for electric power in this state and the sudden escalation of costs.”

The U.S. Supreme Court rejected the Mississippi court’s analysis of the pre-emption issue. It held that the state was pre-empted from reviewing the prudence of MSU management decisions under the Federal Power Act and the United States Constitution’s Supremacy Clause. The Court said FERC had exclusive authority to determine the reasonableness of wholesale rates and power allocations and that states may not bar

29. Id. The court noted that neither FERC nor the MSPC had reviewed MP&L’s decision to continue to build Grand Gulf 1 and put it on line. Id. at 986. FERC at first said it did not have jurisdiction over MP&L’s purchase decision, and Mississippi officials did not press the issue. Mississippi Power & Light, 108 S. Ct. at 2448 (Brennan, J., dissenting). Then MP&L argued that only FERC could review that decision, and by this time, FERC agreed. Id.

30. Pittman, 506 So. 2d at 987.
31. Id. at 984.
32. Id. at 986 (quoting Appeal of Sinclair Mach. Prods., Inc., 126 N.H. 822, 833, 498 A.2d 696, 704 (1985)).
33. Id. at 986-87. The United States Supreme Court later contended that while FERC did not expressly discuss the “prudence” of constructing Grand Gulf, it “implicitly accepted the uncontroversial testimony of the MSU executives who explained why they believed the decisions to construct and to complete Grand Gulf 1 were sound.” Mississippi Power & Light, 108 S. Ct. at 2434. The Supreme Court also argued that Mississippi challengers “failed to raise the matter of the prudence of the investment in Grand Gulf before FERC though it was a matter FERC easily could have considered.” Id. at 2441. Dissenting Justice Brennan pointed out that FERC refused to consider this prudence issue. Id. at 2448. He added that FERC has since changed its policy to declare that its determination regarding the prudence of a wholesaler’s costs inevitably determines the prudence of a retail utility’s wholesale purchase and its decision to enter the agreement. Id. The majority failed to mention the FERC policy shift.
34. Pittman, 506 So. 2d at 987.
35. Id.
37. Id.
passing through those wholesale rates to retail consumers. Further, the Court held that the pre-emptive effect of FERC's jurisdiction did not turn on whether a particular matter was actually determined in FERC proceedings since FERC had jurisdiction over wholesale rates and agreements affecting them. The Court concluded, "Mississippi's effort to invade the province of federal authority must be rejected."

**LEGAL BACKGROUND**

The federal authority to regulate wholesale transactions of electricity was created in the Public Utility Act of 1935. The Act responded directly to a 1927 U.S. Supreme Court decision that struck down a state's attempt to regulate interstate wholesale rates as a direct burden on interstate commerce. The Act created the Federal Power Commission (FPC), now FERC, and vested it with exclusive authority to regulate the rates governing interstate sales of electricity for resale. Language in the act and subsequent cases make clear that Congress' intent was to "fill the gap" in regulation of electric power sales created by Attleboro and to displace prior state regulation with comprehensive federal regulation of wholesale electric rates.

One expression of this comprehensive scheme is the "filed rate doctrine," first enunciated in 1951 in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* In the case, a company sued in federal court to recover damages for alleged unreasonable electric utility rates. The rates, approved by the FPC, stood. The U.S. Supreme Court said, "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one."
The FPC’s jurisdictional preeminence was further protected by the "bright line" established in Federal Power Commission v. Southern California Edison Co.\(^{49}\) The Court held in 1964 that the Act gave the FPC jurisdiction over all sales of electric energy at wholesale in interstate commerce.\(^{50}\) The Ninth Circuit Court of Appeals had ruled that FPC jurisdiction was restricted to wholesale sales that were constitutionally beyond the State’s power to regulate.\(^{51}\) The appeals court relied on the plain language of a clause in the Federal Power Act: "[S]uch Federal regulation, however, [is] to extend only to those matters which are not subject to regulation by the States."\(^{52}\)

The Supreme Court rejected the lower court’s plain language argument and its corollary that FPC jurisdiction should be examined in each case in light of the Congressional intent of the Federal Power Act.\(^{53}\) The Supreme Court said, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."\(^{54}\) Wholesale rates were the business of FERC, while retail rates remained the province of the states.

**State Power Boosted**

Almost 20 years later, however, the bright line marking the wholesale/retail division of jurisdiction was blurred in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*.\(^{55}\) The Arkansas Public Service Commission (PSC) asserted jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corp. (AECC) to its member retail distributors, all of whom were in the state. The Supreme Court upheld the PSC’s jurisdiction despite the fact that it intended to regulate wholesale rates.\(^{56}\)

Justice Brennan, writing for the majority, said that if AECC were not a rural cooperative, its wholesale rates would be subject exclusively to federal regulation since AECC was tied to a multistate electricity "grid,"

\(^{49}\) 376 U.S. at 215.

\(^{50}\) Id. at 210.


\(^{52}\) 310 F.2d at 785 (citing Federal Power Act, 16 U.S.C. § 824(a) (1982)).


\(^{54}\) Id. at 215-16.


\(^{56}\) Id. at 377.
which meant AECC engaged in interstate commerce. However, since the co-op was under the jurisdiction of the Rural Electrification Administration (REA), the FPC had no jurisdiction over AECC's wholesale rates. The Court said Congress did not intend to leave the area unregulated, either, which also could have pre-empted any state regulation. The REA itself allows state regulation of both retail and wholesale rates.

More importantly, the Court blurred the bright line separating jurisdiction between wholesale and retail rates by allowing the Arkansas PSC to set wholesale rates. The Court said if Atleboro were applied, it would require setting aside the PSC's asserted jurisdiction over wholesale rates, but it refused to apply the "bright line" test:

"It is difficult to square the mechanical line drawn in Atleboro and its predecessor cases, and based on a supposedly precise division between "direct" and "indirect" effects on interstate commerce, with the general trend in our modern Commerce Clause jurisprudence to look in every case to "the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.""

Since no federal regulation applied, the Court was free to find that "modern" Commerce Clause analysis allowed state regulation. The Court noted that it had not had an opportunity in about 50 years to reject this "anachronistic" division of jurisdiction based on the retail/wholesale split; it seized the opportunity in Arkansas Electric Cooperative. "Atleboro can no longer be thought to provide the sole standard by which to decide this case, and we proceed instead to undertake an analysis grounded more solidly in our modern cases."

Using the modern standard, the
Pike v. Bruce Church, Inc. test,\(^ {66}\) the Court found "the PSC's assertion of jurisdiction over the wholesale rates charged by AECC to its members offends neither the Supremacy Clause nor the Commerce Clause."\(^ {67}\)

The next expansion of state authority came when a court transferred the rationale from *Arkansas Electric Cooperative* to a traditional utility, one regulated by FERC. A Pennsylvania Commonwealth Court in *Pike County Light & Power v. Pennsylvania Public Utility Commission* used *Arkansas Electric Cooperative* to affirm the action of its state utility commission, which had rejected a retail utility's claim for a purchased power expense.\(^ {68}\) The court, ruling just four months after the 1983 Arkansas case, said, "The FERC focuses on . . . whether it is just and reasonable for that company to charge a particular rate, but makes no determination of whether it is just and reasonable for Pike to incur such a rate as an expense."\(^ {69}\) By contrast, the court said, the state public utility commission’s jurisdiction focuses on whether "it is reasonable for Pike to incur such costs in light of available alternatives."\(^ {70}\) In other words, the Pennsylvania court, like the Supreme Court in *Arkansas Electric Cooperative*, had found a "silence" in federal regulation. In *Pike County Power & Light*, the silence went to FERC’s non-jurisdiction over the reasonableness of incurring a cost. The state court found that the state could regulate that "silence" without offending the Commerce Clause. "Recent holdings of Supreme Court have indicated . . . that for state regulatory action to violate the commerce clause it must impose a direct burden on interstate commerce."\(^ {71}\) The court found no burden since the public utility commission's decision did not hold it unreasonable for Pike to buy power in the interstate arena, from just one particular company.\(^ {72}\) Thus, the Pennsylvania court held that a regulatory commission could examine the reasonableness of incurring costs.\(^ {73}\)

\(^{66}\) The test states:

Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes of one degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

\(^{67}\) *Id.* at 393-94 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

\(^{68}\) *Id.* at 396. Dissenters Justice White and Chief Justice Burger argued that Congress has occupied the field of wholesale power rate regulation. *Id.*

\(^{69}\) *Id.*

\(^{70}\) *Id.*

\(^{71}\) *Id.*, 465 A.2d at 738 n.6 (citing *Arkansas Elec. Cooper.*, 461 U.S. 375).

\(^{72}\) *Id.*, 738.

\(^{73}\) *Id.* One commentator argues that the *Pike County* "exception" does not create parallel state review of allocation agreements found by FERC to be just and reasonable, the issue in *Mississippi*
FERC itself endorsed the distinction described in *Pike County Power & Light* between the reasonableness of rates and the reasonableness of incurring those rates, according to the 1985 case *Appeal of Sinclair Machine Products, Inc.*. The New Hampshire Supreme Court quoted FERC as stating that its "decision to accept the agreement for filing is premised on the fact that the formula rate for this jurisdictional sale will not produce excessive revenues [and] is not . . . based on a determination that the . . . purchase is prudent." The New Hampshire court stated the evolving standard for review this way:

The approach of this modern trend . . . is to examine those matters actually determined, whether expressly or implicitly, by the FERC. As to those matters not resolved by the FERC, State regulation is not preempted provided that State regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved.

The court then remanded the case to New Hampshire’s Public Utilities Commission to determine whether the electric company was reasonable when it purchased power under FERC-approved rates in light of other purchase options available to the utility.

**Court Pulls the Plug on State Power**

The Supreme Court in 1986 reined in the expansion of state oversight and mandated automatic pass-through of FERC-approved rates in *Nantahala Power & Light Co. v. Thornburg*. FERC had allocated low-cost hydroelectric power between two utility companies, but the North Carolina Utilities Commission later changed the allocation, giving Nantahala more of the low-cost power than FERC had. The Supreme Court held that FERC’s allocation, which was set in a wholesale rate proceeding,

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*Power & Light. Duffy, Will the Supreme Court Lose Patience with Prudence? 9 ENERGY L.J. 83, 896 (1988).*

76. *Id.*
77. *Id.*, 498 A.2d at 705; see also Public Serv. Co. of Colo. v. Public Utils. Comm’n of Colo., 644 P.2d 933 (Colo. 1982) (which affirmed *In re Western Slope Gas Co.*, 31 Pub. Util. Rep. 4th (PUR) 93 (Colo. P.U.C. 1979) (although FERC-imposed cost was reasonable operating expense, the state utilities commission could refuse to automatically pass the cost increase on to natural gas consumers).
78. 476 U.S. 953 (1986); see also Ercolano, *Narragansett Update: From Washington Gas Light to Nantahala*, 7 ENERGY L.J. 333 (1986). In *Nantahala Power & Light*, "the Court drove home the message that local utility commissions have a duty not to interfere, in any manner, in the area of the FERC’s exclusive domain—regulation of interstate wholesale rates." *Id.* at 341.
pre-empted the state commission’s allocation of low-cost power. The North Carolina Supreme Court, in affirming the commission action earlier, had found that its utility commission’s decision fit within an exception to the “filed rate” doctrine since it did not order Nantahala to disobey any FERC order. The United States Supreme Court rejected the argument:

No such explicit exception by Congress has been alleged here. . . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

Further, the Court said FERC’s filed rate doctrine is not limited to rates. “Here FERC’s decision directly affects Nantahala’s wholesale rates by determining the amount of low-cost power that it may obtain, and FERC required Nantahala’s wholesale rate to be filed in accordance with that allocation. FERC’s allocation of entitlement power is therefore presumptively entitled to more than the negligible weight given it by [the Utilities Commission of North Carolina].” The Court said North Carolina should not have used cases like Pike County Power & Light that challenged a utility’s source of power, noting they did not challenge the FERC-approved rates involved. “Accordingly, the North Carolina Supreme Court erred in relying on cases treating the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power.”

The Court seemed to leave the door slightly ajar, however, with this dicta:

Without deciding this issue, we may assume that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price.

81. Nantahala Power & Light, 476 U.S. at 966. The state court said the commission was not questioning the reasonableness of the rates themselves, but of Nantahala passing all those costs on to its retail customers. State ex rel. Utils. Comm’n, 332 S.E.2d at 405-06.
82. Nantahala Power & Light, 476 U.S. at 967.
84. Id. At least one commentator believed the dicta created a question: “However, the Court leaves unanswered the extent to which a state commission may examine whether a less expensive
ANALYSIS

The Mississippi Supreme Court relied heavily on the *Nantahala* dicta in its decision to order the state's public service commission to investigate the prudence of buying into the nuclear power plant. The United States Supreme Court also relied on *Nantahala*—but it reached the opposite result. "We hold that our decision in *Nantahala* rests on a foundation that is broad enough to support the order entered by FERC in this case and to require the MPSC to treat MP&L's FERC-mandated payments for Grand Gulf costs as reasonably incurred operating expenses for the purpose of setting MP&L's retail rates." Apparently, the Court wanted to stop the state trend of challenging FERC's jurisdiction even where that jurisdiction had not been fully exercised.

The Mississippi court said *Nantahala* does not "forc[e] the [Mississippi Public Service Commission] to set rates based on the construction and operation of a plant (nuclear or otherwise) that generates power that is not needed at a price that is not prudent." The U.S. Supreme Court disagreed but did not reply directly. It said, "The reasoning that led to our decision in *Nantahala* applies with equal force here and compels the same conclusion—States may not alter FERC-ordered allocations of power by substituting their own determination of what would be just and fair." The Court explained its "reasoning," and presumably the policy driving the decision, as "fundamental principles concerning the pre-emptive impact of federal jurisdiction over wholesale rates on state regulation."

Using *Nantahala*, the Court linked power rates and power allocations to the plenary power of FERC. It explained the Mississippi dicta this way:

As we assumed, it might well be unreasonable for a utility to purchase unnecessary quantities of high cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power. But if the integrity of FERC regulation is to be preserved, it obviously cannot
be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for.91

The only "obvious" fact is that the Court equated a FERC decision with a reasonable decision on all the utility issues. The Court did not directly defend FERC's decision, only its jurisdiction to make it. Further protecting FERC's jurisdiction, the Court said the place to attack FERC's "unreasonableness" decision was in front of the Commission or in front of a court reviewing the FERC order—not in state court.92

Preferring jurisdictional form over precedential substance, the Court assumed that FERC "decided" the prudence issue whether it considered it or not. The Court apparently discarded FERC's own theory, espoused in Appeal of Sinclair, that it could decide the reasonableness of a rate independent of deciding the reasonableness of incurring the rate.93 In fact, the New Hampshire court in Sinclair noted that FERC preferred not to consider a potential purchaser's decision to acquire the power.94 The Supreme Court failed to defend or even discuss FERC's policy preference when it mentioned Sinclair in its pre-emption discussion.95 Instead, it moved to its holding that the pre-emptive effective of FERC regulations was dispositive.96 In sum, the Court focused on FERC's power; it missed the point of the line of cases that acknowledged FERC's former reluctance to wield its mighty power in the area that, in effect, decided all retail rates.

In his dissent, Justice Brennan (who wrote the majority opinion in Arkansas Electric Cooperative) clearly distinguished the two types of prudence standards by which to judge MP&L's action—the reasonableness of the amount of power that MP&L bought because FERC ordered it to buy that much, and the reasonableness of MP&L's decisions to help build Grand Gulf at all.97 On the first issue, Brennan said FERC's jurisdiction gave it authority to determine the amount of wholesale power and the rate, which meant MP&L's "decision" to buy that much power was reasonable (since it had no choice).98 Then he said the second prudence issue was "whether, to the extent [MP&L's] decision to participate in

91. Id. (emphasis added).
92. Id.
94. Id.
95. Id.
96. Id. at 2437. In fact, the Court said later in the opinion that the parties missed their chance to challenge the prudence of completing the nuclear plant. Id. at 2441. The parties, however, may have been simply following FERC's previously announced policy of declining to hear prudence testimony.
97. Id. at 2437-38.
98. Id. at 2445 (Brennan, J., dissenting).
the Grand Gulf project involved the purchase decision of a retail utility, a state utility commission has jurisdiction to review the prudency of that purchase." Brennan said Nantahala did not answer the question, as the majority argued, because FERC did not order MP&L to participate in building the plant: "[T]he question remains whether [MP&L] imprudently incurred those costs in the first place. I am convinced that the state utility commission does have jurisdiction over this prudency issue."  

To explain his decision, Brennan recounted FERC's jurisdictional history, concluding that the Court, not the agency, should decide FERC's jurisdiction. He cited his opinion in Arkansas Electric Cooperative and the state court opinions in Pike County Light & Power and Appeal of Sinclair Machine Products. He wrote, "In short, the reasonableness of charging a rate as a wholesaler is distinct from the reasonableness of incurring that charge as a purchaser." The peculiar attributes of interstate electricity pools, he said, added the complicating twist. The decision to participate in a pool's building of a power plant (a decision at the wholesale level) was simultaneously a decision to purchase power generated by the pool (a decision at the retail level). Both FERC and state utility commissions seem to have jurisdiction.

Brennan said the Court should not defer to FERC's conclusion "that it has exclusive jurisdiction to determine all prudency issues concerning the participation of a retail utility in an interstate pool." On this point, Justice Scalia disagreed with Justice Brennan and argued in a concurring opinion that FERC's jurisdiction should be accorded deference. Brennan said the Federal Power Act and its legislative history intended to preserve states' authority. He also noted that FERC, in the MP&L case, originally took the position that it had no jurisdiction over the prudence of a pool member's purchase decision; i.e., the prudence of MP&L's decision to help build Grand Gulf. Then it changed positions. He said

99. Id.  
100. Id.  
101. Id. at 2448. The D.C. Court of Appeals, however, generally defers to FERC interpretations of FERC orders. See Nelson, The Chevron Deference Rule and Judicial Review of FERC Orders, 9 Energy L.J. 59, 71 (1988), which states that Chevron compels deference to FERC even on "pure" questions of law. See also Energy, 55 Geo. Wash. L. Rev. 862 (1987) (examines D.C. Court of Appeals decisions on energy, concluding that the court is deferential to agency determinations).

103. Id.  
104. Id.  
105. Id.  
106. Id. at 2444 (Scalia, J., concurring).  
107. Id. at 2447 (Brennan, J., dissenting).  
108. Id. at 2448. "[T]he [Administrative Law Judge] stressed throughout the hearing the distinction between prudency issues relevant to setting wholesale rates and issues regarding the prudence of power purchases and their effect on retail rates, and stated several times that he and FERC would and could only address the former." Id. at 2448 n.*.
that FERC's new position on jurisdiction "would divest states of authority
to determine the prudence of costs incurred by retail utilities whenever
those utilities belong to an interstate pool—a result that I do not think
can be squared (particularly given FERC's shaky jurisdictional founda-
tion) with the clear intent of Congress to preserve the authority of States
to regulate retail utilities."109

Both the majority and Brennan saw the case as a jurisdictional struggle,
but only Brennan examined the consequences of the decision. The ma-
jority seemed content to tell the Mississippi state officials "You missed
your chance" through its observation that they attended the FERC hearing
but did not present the prudence issue, notwithstanding the fact that FERC
deprecated to hear the evidence. The case means that states, local industry,
and consumer groups must appear in front of FERC. They must travel
to Washington, D.C., even to argue that their own retail utility might be
making an imprudent decision by joining a power pool or agreeing to
build a power plant.110 Brennan argued that this rather recent policy change
in FERC should not be allowed to usurp state jurisdiction, and that states
should continue to be able to review—at home—the retail utility's actions
and its pass-through of FERC-mandated rates.

CONCLUSION

This case cuts off the authority of state public utility commissions to
review the prudence of retail utilities incurring costs for "power that is
not needed at a price that is not prudent."111 In so doing, the case also
turns away a trend among states to question these types of decisions.
Once FERC approves the rate and the amount, they are settled, and the
utility may pass through the cost without question. This was accomplished
through an abrupt shift in FERC policy, a shift that the majority refused
to acknowledge in its quest to preserve plenary power in FERC.

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109. Id. at 2449.

110. FERC "as a rule" holds its hearings on wholesale rates in Washington, according to Martha
Altamar, legal assistant to the chief administrative law judge of FERC. Telephone interview (Feb.
14, 1989). Rarely, she said, does FERC conduct field hearings away from Washington. The hearings
outside Washington are on applications to construct facilities, not who will be paying for them or
their future power allocations. She said the hearings are in Washington because that is where the
Commission is.