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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KANSAS AND MISSOURI, ETC.

V. UTILICORP UNITED, INC.

CASE NO: 88-2109

PLACE: Washington, D.C.

DATE: April 16, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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KANSAS AND MISSOURI, ETC. :
Petitioners :
v. : No. 88-2109
UTILICORP UNITED, INC. :
-----X

Washington, D.C.
Monday, April 16, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

THOMAS J. GREENAN, ESQ., Seattle, Washington; on behalf of the Petitioners.

FLOYD R. FINCH, JR., ESQ., Kansas City, Missouri; on behalf of the Respondent.

LAWRENCE S. ROBBINS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of United States, as amicus curiae, supporting Respondent.

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1 a contract in the form of a purchased-gas adjustment
2 mechanism, which provides that that pass-on shall be
3 complete and that it shall be immediate.

4 QUESTION: Mr. Greenan, you say the 100 percent
5 pass-on is required from the wellhead to the burner.
6 You're saying, then, I take it, the utility corp --
7 utility commission in the state must require that a
8 utility pass on all of the cost?

9 MR. GREENAN: Yes, Your Honor. The purchased-
10 gas adjustment mechanism is set forth at Tab 3 of the
11 Addendum to the Joint Brief that was filed in the Tenth
12 Circuit, and it does -- it is -- does mandate that it
13 shall be passed on.

14 QUESTION: And is that a Federal rule?

15 MR. GREENAN: That is a state rule. It is also
16 contained in the purchased-gas adjustment mechanism
17 promulgated by the Federal Energy Regulatory Commission,
18 yes, Your Honor.

19 QUESTION: Well, if it were just a state rule, I
20 suppose some states might have it and some states might
21 not.

22 MR. GREENAN: No. In this instance the -- the
23 interstate pipeline is regulated by the Federal Energy
24 Regulatory Commission. Their purchased-gas adjustment
25 mechanism requires a pass through. In this particular

1 instance the states of Kansas and Missouri are -- the
2 local utility distributors are regulated by their state
3 commissions, and there are purchased-gas adjustment
4 mechanisms on the state level that have that same
5 requirement.

6 QUESTION: So what you are speaking then is --
7 from wellhead to burner, is true of residential consumers
8 in Kansas and Missouri?

9 MR. GREENAN: I believe that it is established
10 in the brief of the amicus, the State of Illinois, Your
11 Honor, that those are present in 40 states.

12 QUESTION: 40 states --

13 MR. GREENAN: 40 states.

14 QUESTION: -- by virtue of the rulings of public
15 utility commissions?

16 MR. GREENAN: That is correct, Your Honor.

17 One particular item of interest in this case is
18 that the states are proceeding *parens patriae* pursuant to
19 15 U.S.C.15(c), and in that instance that they are
20 representing residential consumers who are natural persons
21 in their non-business capacity. These residential
22 consumers, the record is clear, do not have the ability to
23 switch to alternative fuels, at least in the short term.
24 They have in place their heating plants, their natural gas
25 furnaces. And in order for them to make a switch to an

1 alternative type of fuel it would be necessary to change
2 to some other type of heating and to go through --

3 QUESTION: Well, I guess they could just turn
4 the register down and be a little colder in the winter and
5 a little hotter in the summer.

6 MR. GREENAN: Certainly.

7 QUESTION: And might affect the total usage.

8 MR. GREENAN: That is correct, Your Honor. In
9 fact, I think we have to concede that that in fact has
10 happened.

11 QUESTION: So this isn't a fixed quantity
12 contract.

13 MR. GREENAN: It is not a fixed quantity
14 contract.

15 QUESTION: And the language, at least in
16 Illinois Brick, referred to a fixed quantity pass through.

17 MR. GREENAN: That is correct. The reference in
18 Illinois Brick was to cost plus a fixed quantity. The
19 reference --

20 QUESTION: So you propose that -- that the Court
21 find an additional exception in --

22 MR. GREENAN: No, I think, Your Honor, it is the
23 same exception. What -- the way the Court described it in
24 Illinois Brick was that it was a situation where it would
25 be easy to demonstrate that the direct purchaser had not

1 absorbed any part of the overcharge, but that it had been
2 passed on. And in that instance the regulation that we
3 have in place here operates exactly as does a cost-plus
4 fixed quantity contract.

5 QUESTION: Do you think we could be assured that
6 the residential consumers would have the same incentive to
7 sue that the Court found was important in Illinois Brick
8 for the -- in this case, direct purchasers, the utilities?

9 MR. GREENAN: I think yes. One of the concerns
10 of Illinois Brick was that there be vigorous enforcement
11 of the antitrust laws. In this situation we have the
12 attorneys general asking permission to proceed *parens*
13 *patriae* on behalf of the residential consumers, so I don't
14 think that that is a concern. We have chief law
15 enforcement officers --

16 QUESTION: But there would be a general concern
17 by the Court if we are to articulate a general rule. Is
18 there any empirical indication that these indirect
19 purchasers --

20 MR. GREENAN: I think there is, Your Honor.

21 QUESTION: -- would vigorously pursue?

22 MR. GREENAN: Let's put them side by side with
23 the utility. What we have to understand is that in the
24 regulated industry the utility is not really making a
25 profit on buying and selling natural gas. It is not a

1 product that it receives, marks up and passes on. Rather,
2 it carries it through from the point of origin to the
3 consumer. As the -- testimony of Mr. David Black, who was
4 the senior vice president and general counsel for one of
5 the utilities says, we merely perform a transportation
6 service. We take title to the gas for the few hours that
7 it requires for us to get it from the wellhead to the
8 burner tip, and then we charge them penny for penny,
9 dollar for dollar, whatever the cost is to us, and that is
10 shown forth on their bill.

11 Now, if that is the situation, the utility then
12 does not earn a profit on the sale of natural gas. A
13 utility makes its money by a guaranteed rate of return on
14 its invested capital. It is allowed to earn so much to
15 return that investment, and so much by way of a return on
16 the investment.

17 QUESTION: Yes, but that -- but that return, as
18 I understand it, unless these rate-making bodies operate
19 quite differently from what I am familiar with, that rate
20 is established now for next year.

21 MR. GREENAN: That is correct.

22 QUESTION: Isn't that right? So next year, if I
23 end up selling more gas than the state really expected me
24 to sell, I keep the difference. Right?

25 MR. GREENAN: That is correct.

1 QUESTION: I mean, the effect of regulatory lag
2 is that if I sell more gas I get the -- now, the state
3 will get back at me the next time we have a rate making,
4 right, and they will cut it back down. But I get a profit
5 on the basis of selling more gas than the state expected
6 me to sell. And I lose money by selling less gas than the
7 state expected me to sell.

8 MR. GREENAN: In the short run, that is true,
9 Justice --

10 QUESTION: Well, but life is in the short run.
11 We are just talking annual profits here.

12 MR. GREENAN: That -- that situation is
13 unaffected by the facts of this case. The point that I
14 was making was in answer to Justice O'Connor's question as
15 to what was the incentive here. And Your Honor I think
16 just pointed it out well. In the rate-making case, the
17 rates are established based upon what level of sales is
18 necessary in order to achieve that guaranteed rate of
19 return. And as you have observed, if the utility sells
20 more gas than it had expected, it keeps that. If it sells
21 less gas than that it does not achieve its rate of return.
22 So what does it do? It goes back to the utility
23 commission and it files a new rate case, and it says that
24 our historic sales are now below what we had before. We
25 need a higher percentage --

1 QUESTION: In the future.

2 MR. GREENAN: In order to get the rate of
3 return.

4 QUESTION: In the future. But it has lost the
5 money for the past if -- if its volume of sales has gone
6 down because its rates have been higher.

7 MR. GREENAN: Exactly. And that is what Judge
8 Posner, in the Panhandle Eastern case, said was a lost
9 profits damage that was for sales that were not made, has
10 nothing to do with the overcharge for the sales that were
11 made and were passed on.

12 QUESTION: Oh, I -- I agree with that.

13 MR. GREENAN: Okay.

14 QUESTION: But it does not demonstrate -- you
15 answered Justice O'Connor by saying that the Illinois
16 Brick theory was if you can be sure that the intermediate
17 purchaser has not been harmed it's -- it's okay to apply
18 Illinois Brick. But we can't be sure that the
19 intermediate purchaser here has not been harmed, can we?

20 MR. GREENAN: I don't believe that Illinois
21 Brick says that you can be sure that the intermediate
22 purchaser not be harmed. What Illinois Brick does say is
23 that we do not want to get involved in the questions as to
24 output determinations and price determinations that exist
25 in the real world, as distinguished from the economist's

1 model. We are not going to get involved in the interplay
2 of supply and demand forces as to what affect prices.

3 But Illinois Brick itself said if it can be
4 easily demonstrated that the overcharge -- that the direct
5 purchaser did not absorb the overcharge, then it might be
6 that there would be an allowance of a recovery by the
7 indirect purchaser. And that was reaffirmed by the Court
8 recently in the observations that were made in California
9 v. ARC America.

10 QUESTION: But he does absorb some of the -- of
11 the overcharge, does he not, if he loses sales by reason
12 of the overcharge? If he is selling a product that not as
13 many people buy, and therefore he loses some of the profit
14 he would otherwise have made.

15 MR. GREENAN: He loses some of the profit. He
16 does not pay any of the overcharge. And that is the
17 point, I think, the real point of distinction. We are
18 looking at several things with Illinois Brick. We want
19 vigorous enforcement of the antitrust laws. We also want
20 to see, if it is possible, that the people who were
21 injured are compensated. In this particular instance
22 there is no difficulty in demonstrating from wellhead to
23 burner tip that that overcharge went down the line and was
24 paid by the people at the end of the line.

25 Now, if the utility lost profits because of a

1 decline in sales, then that is a claim which the utility
2 has and which the utility can make. This Court has never
3 been concerned with whether there were multiple parties in
4 antitrust litigation. This Court has never said that we
5 are going to only allow claims for overcharges, or that we
6 are only going to allow claims for lost profits.

7 Going back to Bigelow and Storey Parchment, all
8 of the seminal cases on damages, the Court has recognized
9 that there can be claims for lost profits, that there can
10 be claims for decrease in -- or increase in the amount of
11 operating costs, that there can be claims for loss of
12 investments, and all of these are separate and distinct
13 claims.

14 In this particular instance, Justice Scalia, the
15 proof will not change one iota by giving the claim to the
16 residential consumer. The utility will still have to make
17 its claims and make its proof with regard to those lost
18 sales.

19 QUESTION: So you say that you can concede
20 easily that the -- both the utility and the consumer has
21 been hurt, but at least you know for sure, because the law
22 requires the pass-on, exactly how much the consumer has
23 been hurt.

24 MR. GREENAN: That is correct.

25 QUESTION: Now, you wouldn't -- you wouldn't --

1 would you be making the same argument if the law did not
2 require the pass-on?

3 MR. GREENAN: No, Your Honor, I --

4 QUESTION: Because then you really would get
5 into a real bog, wouldn't you?

6 MR. GREENAN: Yes. We -- we in no way, Your
7 Honor, are -- are trying to deviate from what the Court's
8 reasoning was in Illinois Brick. We have here a mandated
9 pass-on where, in the words of the Court, it's easy to
10 prove that the direct purchaser did not absorb the
11 overcharge. And in that instance Illinois Brick, and
12 indeed in the various cases that the Court has referred to
13 Illinois Brick since then, recognized that this might be
14 an appropriate situation.

15 QUESTION: Your opposition suggests that if the
16 utility recovers, makes the entire recovery, that it would
17 have to pass on to the consumer the windfall.

18 MR. GREENAN: UtiliCorp concedes that, Your
19 Honor. The government says that they can't concede.

20 QUESTION: I know. I know, but I would suppose
21 -- do you agree that they would have to?

22 MR. GREENAN: I think that is a question that is
23 up to the various regulatory bodies.

24 QUESTION: But if it is, then there would be the
25 problem right there of separating out the two injuries.

1 MR. GREENAN: If -- if -- that would be a
2 problem on the administrative level if --

3 QUESTION: Well, it wouldn't be any problem at
4 all if you know precisely how much was passed on.

5 MR. GREENAN: We -- and we do know, of course,
6 precisely how much is passed on.

7 The -- the question of what the regulatory
8 agencies are going to do when that is before them is one
9 that we can only speculate on. The government chose to
10 speculate on it in its brief --

11 QUESTION: But if they would -- but if -- even
12 assuming that they would do that, why then, then the
13 assumption is that you can identify easily how much was
14 passed on.

15 MR. GREENAN: Certainly. Certainly. You can
16 identify easily how much was passed on in this instance
17 without a doubt.

18 QUESTION: I guess you can read it off the
19 utility bills to the --

20 MR. GREENAN: You can read it off the utility
21 bills. You can read it --

22 QUESTION: -- residential consumer.

23 MR. GREENAN: Right. There are forms, referred
24 to as Form 2s, that are filed with the Federal Energy
25 Regulatory Commission that shows how much the pipeline

1 passed on. There are filings that are made by the local
2 utility districts of the various state regulators --
3 regulators that show the volumes to each class of customer
4 and the prices to each class of customer.

5 Now, one major problem that we have here in this
6 question of vigorous enforcement is that the utilities who
7 brought this litigation do not represent all of the
8 consumers who purchase natural gas that was involved in
9 this alleged illegal price fix. We have a significant
10 number of consumers, some 50,000, maybe as much as 20
11 percent of the gas consumers in eastern Kansas, who
12 purchased from utilities other than the ones that chose to
13 bring these lawsuits.

14 QUESTION: Well, we have no indication here that
15 the states would have brought the lawsuit on their own.
16 Didn't they come in after the fact --

17 MR. GREENAN: Three months later.

18 QUESTION: -- after the utilities had filed the
19 suit, and kind of piggybacked on their suit?

20 MR. GREENAN: I would say piggybacking is not
21 correct, Your Honor. We filed three months after the
22 first case was filed. The first case was filed in April
23 of 1985. The state case was filed in July of 1985, I
24 believe. UtiliCorp, the utility that is here before the
25 Court, filed their case in 1985, dismissed it in 1986, for

1 what reason only they can tell us --

2 QUESTION: Voluntary dismissal?

3 MR. GREENAN: Voluntary dismissal. And then
4 asked and received permission to file again in October of
5 1987, very shortly before these motions for summary
6 judgment were brought.

7 Now, the defendants in the litigation claim that
8 their claims, the claims of UtiliCorp, are time barred.
9 And indeed it appears that they do have very significant
10 statute of limitations problems.

11 So relying upon the utilities here means, first
12 of all, that there are any number of consumers that are
13 not represented by the utilities. And secondly, if it is
14 the utility UtiliCorp that has this claim, rather than the
15 attorneys general as parens patriae, those claims may well
16 be time barred.

17 QUESTION: As to the consumers in eastern Kansas
18 that you are -- were they served by a utility which would
19 have had a claim, but the utility --

20 MR. GREENAN: Yes.

21 QUESTION: -- simply didn't bring a lawsuit?

22 MR. GREENAN: Yes, Your Honor. It's Union
23 Natural Gas, and I believe it is at Tab 2 or 3 of the
24 Addendum to our Joint Brief.

25 QUESTION: Well, if everybody else ends up

1 winning these cases, I assume that the regulating
2 authority could make that utility pay dearly for not --
3 for not having brought a suit, and simply say you'll --
4 you'll not be allowed to charge as much next time around,
5 in order that the consumers whose money you have frittered
6 away can be made whole.

7 MR. GREENAN: But why? But why would the --

8 QUESTION: But why? It would be considered not
9 sound business practices. You have been running a sloppy
10 operation, not bringing suits for money that you're
11 entitled to.

12 MR. GREENAN: But why, Your Honor, should I, the
13 utility, bring this suit when you are going to make me
14 disgorge, if that is the situation? Why should I -- why
15 should I bring this suit if in fact it is going to go back
16 to the -- to the end-user? After all, we just perform a
17 transportation service. We just bring this stuff down --

18 QUESTION: May I interrupt there? Is it clear
19 that treble damages will all go to the end-users if they
20 prevail? Has that ever been decided by --

21 MR. GREENAN: It has never been decided.

22 QUESTION: So how can --

23 MR. GREENAN: The government says -- the
24 government says we don't concede that a regulator would
25 make them give up the double and triple damages. I

1 suggest to the Court then in -- in an instance where they
2 have had a pass through dollar for dollar, where they have
3 the guaranteed rate of return so that they can come back
4 to have their rates adjusted within a short period of
5 time, that it is highly unlikely that any regulators are
6 going to let them keep that, because it will be a total
7 windfall that should have gone to the people that paid for
8 the natural gas. But we don't know. It's -- it's up to
9 the regulators.

10 QUESTION: Well, it seems to me it's an
11 unresolved question, what happens to the two-thirds profit
12 in treble damage litigation.

13 MR. GREENAN: That is correct.

14 QUESTION: Mr. Greenan, what does the state do
15 with the money? You sue as *parens patriae*, do you get it
16 back to the actual people who were overcharged, or does it
17 go into the general state funds? What -- what happens to
18 it?

19 MR. GREENAN: Well, those two alternatives exist
20 under 15 U.S.C.15(d), I believe, Your Honor -- or 15(a).

21 QUESTION: Either one.

22 MR. GREENAN: Either one. Either that it goes
23 back to the people, or that it goes into the state general
24 fund for the benefit of everyone. In this --

25 QUESTION: Which wouldn't necessarily be rate

1 payers.

2 MR. GREENAN: Would not necessarily be rate
3 payers.

4 QUESTION: And anybody that has moved out of the
5 state since these overcharges were made, they are just out
6 of luck, I guess, if they have moved to New Jersey?

7 MR. GREENAN: Probably, if they have moved to
8 New Jersey. But the most likely thing --

9 (Laughter.)

10 MR. GREENAN: Rather than some other state. But
11 the most likely thing in this instance is that because
12 these people who do now still live within Kansas or
13 Missouri and purchase natural gas within those states are
14 known and can be identified, that the recovery, whatever
15 it may be, can be returned to them, either in the form of
16 dollars or in the form of reduced charges for natural gas
17 purchased down the line.

18 QUESTION: Do we know, does the record disclose
19 what would happen to the recovery, if any, if the states
20 were allowed to proceed?

21 MR. GREENAN: All the record shows, Your Honor,
22 is what the authority is under the *parens patriae*
23 statutes.

24 QUESTION: Which could be either, keep it or
25 not.

1 MR. GREENAN: Could be either. Yes, could be
2 either, Your Honor. I am just saying that the most
3 likely, because of the easiness with which to identify
4 them. And I believe that that is up to the Court.

5 QUESTION: What happens to the commercial
6 purchasers, Mr. Greenan? You say that this is just
7 residential purchasers. What about the overcharges made
8 that were passed through to commercial purchasers? How -
9 - what happens to that if you win this case?

10 MR. GREENAN: If we win this case, Your Honor,
11 that belongs to the utilities, because the commercial
12 purchasers are neither natural persons in the ordinary
13 sense, and they are businesses which doesn't allow *parens*
14 *patriae* recovery. But also --

15 QUESTION: Could they bring suits on their own,
16 not relying on the state's *parens patriae*?

17 MR. GREENAN: They could, Your Honor, they
18 could, but I think they would be faced with Judge Posner's
19 reading, Judge Posner's reasoning as to why he would only
20 allow it to the residential consumers. And that is
21 because in the commercial and industrial area there is a
22 significant number of users that have the ability to
23 switch to alternative fuels, that have the capacity by
24 flicking a switch to go from oil to gas, let's say, or
25 from electricity to gas.

1 And that ability creates the interplay of supply
2 and demand which does not exist at the residential level,
3 and which was the reason why Judge Posner said I would not
4 allow it for --

5 QUESTION: What if I am an individual commercial
6 purchaser that doesn't have that capacity? Why shouldn't
7 I be able to sue?

8 MR. GREENAN: I see no reason to distinguish,
9 Your Honor.

10 QUESTION: I don't either.

11 MR. GREENAN: I see no reason to distinguish.
12 In that instance it is easy to demonstrate that the
13 utility did not absorb the overcharge.

14 QUESTION: But even in the residential consumer,
15 as Justice O'Connor pointed out, there are some people who
16 turn the thermostat down and have to buy an extra sweater.

17 MR. GREENAN: That's right.

18 QUESTION: And there is no way they can recover
19 for that sweater.

20 MR. GREENAN: There is no way that they can
21 recover for that sweater, right. But the cost of new
22 insulation, the cost of putting in storm windows, all of
23 the things that has followed this tremendous increase in
24 the price of fuel, there is no way to recover for those.
25 All we are talking about is the overcharge. All we are

1 talking about is can we trace that overcharge and know
2 exactly where it went. If we can, and we can, then it is
3 easy to demonstrate.

4 QUESTION: But the problem isn't all that easy,
5 because you don't know what the (inaudible) is.

6 QUESTION: Until you have a lawsuit.

7 MR. GREENAN: Until we have a lawsuit, right.
8 But that -- that doesn't change --

9 QUESTION: You don't know how much the price
10 went up.

11 MR. GREENAN: No, but that is true in any case,
12 Your Honor. That is --

13 QUESTION: That may be, but who's going to --
14 who's going to take on that job of proving the conspiracy
15 and the result on competition?

16 MR. GREENAN: In this particular instance it is
17 the attorneys general acting *parens patriae* in the actions
18 that they have brought. We have to prove what the
19 allegedly illegal price was at the -- at the wellhead, and
20 we have to prove what the but-for price would be if they
21 had been competing. But that remains unchanged. Whether
22 -- that problem of proof exists whether UtiliCorp has to
23 do it or whether the state has to do it. The amount of
24 the overcharge in every instance, in every instance, is
25 going to be one that is litigated and proved, unless

1 somebody comes in and says we overcharged them X -- X
2 amount of money.

3 QUESTION: And as you -- you say that a group of
4 consumers could bring the same suit you could, and they
5 would not be barred by Illinois Brick?

6 MR. GREENAN: As long as it's easy to
7 demonstrate, Your Honor, it's easy to demonstrate that
8 that overcharge did not rest with the first purchaser.

9 QUESTION: Well, what do you mean that it was
10 required by law to pass it on?

11 MR. GREENAN: The Federal -- the purchased-gas
12 adjustment mechanisms which are in force on the Federal
13 and state level require this pass-on. And they are
14 mandatory.

15 QUESTION: Because they have to -- to set their
16 rate they have to tell --

17 MR. GREENAN: It has nothing to do with rates.
18 It's -- it's an immediate -- I am glad that you've
19 mentioned this, Your Honor, because it is entirely
20 different from rates. Every time the cost of natural gas
21 goes up by one-tenth of one cent per mcf, that is one mil
22 --

23 QUESTION: Yes.

24 MR. GREENAN: -- the purchased-gas adjustment
25 mechanism goes into effect. The utility raises -- is --

1 the pipeline raises its price to the local utility. The
2 local utility raises its price to the burner tip users.

3 QUESTION: And you have identified the statutory
4 requirement in your --

5 MR. GREENAN: We have, at tab 3, Your Honor, set
6 forth the purchased-gas adjustment mechanism.

7 QUESTION: Okay.

8 MR. GREENAN: And more than that, it is
9 immediate in this sense, that the local utility district
10 reports to the pipeline each month, after it has received
11 the gas and delivered it, what its volumes have been that
12 it delivered to each of its class of customers. And it is
13 then, and only then, that it is billed for that gas by the
14 pipeline, after it has made delivery. So it is -- it acts
15 immediately that the local utility is billed and it bills
16 -- it bills the end-user.

17 QUESTION: Does the mechanism also work for
18 price decreases?

19 MR. GREENAN: Yes. The purchased-gas adjustment
20 mechanism works both ways, Your Honor. Any increase or
21 decrease in the price of natural gas, in the level of one
22 mil per mcf in the purchased-gas adjustment mechanism.

23 QUESTION: That is just Federal, what you are
24 referring to there?

25 MR. GREENAN: Yes, Your Honor.

1 Your Honor, I would like to reserve my remaining
2 time for rebuttal, except to point out that there is the
3 other issue that was raised on the briefs, with regard to
4 15 U.S.C. Section 4(c), and I would like to rely on what
5 was said in the briefs in connection with that.

6 QUESTION: Very well, Mr. Greenan.
7 Mr. Finch.

8 ORAL ARGUMENT OF FLOYD R. FINCH, JR.
9 ON BEHALF OF THE RESPONDENT

10 MR. FINCH: Chief Justice Rehnquist, and may it
11 please the Court:

12 I must disagree with Mr. Greenan about a number
13 of issues, first about what the issue of Federal antitrust
14 policy is before the Court today. The issue as we see it
15 is whether this Court will continue to consolidate
16 antitrust damage claims in an injured direct purchaser, or
17 whether it will cloud the clear direct purchaser rule of
18 Illinois Brick by creating a regulated utility exception.

19 There is no need, we submit, in this case to
20 change the direct purchaser rule, which has been clear
21 since 1968 at least, because in this case we have over 85
22 percent of the antitrust damages being pursued by KPL,
23 which has over 75 percent of the damage claims, by
24 UtiliCorp, with about 5 percent, and by the other
25 municipal utilities which are represented, properly so, we

1 contend --

2 QUESTION: Well, it does seem to be pretty much
3 a windfall to the utilities, when 100 percent of it is
4 passed on to the customers.

5 MR. FINCH: Well, Justice O'Connor, if I may,
6 it's not true that 100 percent is passed on to the
7 customers. It simply isn't true, and that's one point --

8 QUESTION: Well, what if it were?

9 MR. FINCH: If it were, then, I submit that this
10 is the perfect case not to make an exception, because you
11 would have a utility regulatory commission that can force
12 those overcharges to be passed on to the people who
13 actually paid them.

14 QUESTION: So you can identify them?

15 MR. FINCH: They can be identified --

16 QUESTION: Which is completely different from
17 the Illinois Brick type of case.

18 MR. FINCH: It is different, but I must point
19 out that there is no precise identification. I must
20 disagree with Mr. Greenan on that score.

21 QUESTION: Why can't you read it off the utility
22 bills? The increase.

23 MR. FINCH: Because the utility bills do not
24 reflect all of the overcharge, Justice O'Connor. First,
25 UtiliCorp uses natural gas itself. It is a direct

1 purchaser. It uses it to heat its facilities, and it uses
2 it in peaking units where it generates electricity.

3 QUESTION: Well, it may be that 100 percent of
4 the damages aren't passed on, but you know to the -- you
5 know the extent to which the consumer has been damaged.

6 MR. FINCH: We know that the consumers
7 ultimately paid a majority -- by the consumers, I mean all
8 consumers.

9 QUESTION: You know that the -- that because the
10 price to the utility went up, that the price to the
11 consumer went up also, to some extent.

12 MR. FINCH: Yes, Justice White, we do know that.

13 QUESTION: And you know precisely how much.

14 MR. FINCH: Well, we --

15 QUESTION: Once you find out what the -- what
16 the price would have been.

17 MR. FINCH: At the close of discovery in the
18 summer of 1989 our experts were finally able to determine
19 the amount of the overcharge. The suit was filed in 1984,
20 and it took approximately five years for that
21 determination to be made.

22 QUESTION: But you made it.

23 MR. FINCH: Yes. Indeed it was made. But one
24 thing that hasn't been made, Justice White, is a
25 determination, an actual factual determination that 100

1 percent of the overcharge was passed on to all of the
2 customers. That was assumed in the Tenth Circuit opinion.
3 The district court did not find that, and there has never
4 been a finding on that in this case. In fact, I would
5 submit that there -- that not 100 percent of the
6 overcharges were passed on, but some lesser number.
7 There are, for example, line losses, in that
8 when you have pipes running all over the countryside, gas
9 leaks out. And it doesn't get billed to consumers.
10 UtiliCorp pays for the natural gas when it -- at the
11 wellhead when it purchases gas.
12 QUESTION: Well, I take it you know, you
13 determined after five years that if it hadn't been for
14 this conspiracy the price would have been lower.
15 MR. FINCH: Yes, sir.
16 QUESTION: And so let's assume that it would
17 have been a dollar lower per whatever kind of a unit you
18 are talking about. Now, you say that a hundred -- that it
19 is not clear in this record that 100 percent of that
20 dollar was passed on to the consumer?
21 MR. FINCH: That is right.
22 QUESTION: But you do know how much of it was.
23 MR. FINCH: Well, it could be determined,
24 Justice White. It has not been determined in this case.
25 QUESTION: Well, I know, but wouldn't it be easy

1 to do?

2 MR. FINCH: Well, I submit it would not be easy.
3 The purchased-gas adjustment clauses are based on
4 estimates, and what happens is that on a particular day
5 the supplier announces that in 30 days its price is going
6 to go up to X amount per mcf, the word you're looking for,
7 a thousand cubic feet. And the court -- the company then
8 estimates how much its gas cost per customer, per customer
9 class will have to go up. But those are only estimates.
10 And there has to be an additional procedure that is gone
11 through later in the year where you try to true that up.
12 And I will certainly agree that there is an effort to true
13 it up, to make it the same. But it is not something that
14 was determinable at the time this litigation was started.

15 QUESTION: Well, how would it ever be
16 determinable later if you say that -- let's assume you
17 recover from the pipeline X million dollars, and you say
18 that you know that some of it was passed on. And you say
19 the utility commission could force you to pass on to the
20 consumer part of your recovery.

21 MR. FINCH: Yes, Justice White, in fact --

22 QUESTION: Well, wouldn't you have to then
23 determine how much it was?

24 MR. FINCH: Yes. There will have to be some
25 sort of a determination made at that point, or at least a

1 reasonable estimate. But I think the point is -- so
2 that you QUESTION: Well, then at the end of the year
3 when the utility does make these final adjustments on the
4 customers' bills, you can look at the bill and see how
5 much the overcharge was. percentage of these -- of the total
6 damages? MR. FINCH: If you were to look at each? When
7 individual customer (inaudible) -- ing lost in the pipeline,
8 and the? QUESTION: Yes. That's possible to do. It's
9 there. inking de minimis, but is there some way you can give
10 me an est MR. FINCH: And then -- but I guess my point is,
11 Justice O'Connor, that there is a damage to UtiliCorp. It
12 is an injured direct purchaser. anybody, there is nothing in
13 the record QUESTION: Yes, but that is a separate question.
14 Admittedly there is some damage, I suppose, to the utility
15 corporation itself. And there are also damages, if you
16 want to look at it that way, by the reduction in demand
17 from the customers. Those could be established, I
18 suppose, based on averages.
19 MR. FINCH: The plaintiffs in this case have
20 never suggested that residential customers, and indeed
21 industrial and commercial customers, were not damaged to
22 some extent by defendant's action. That is why I go back
23 to my original point, the question is of antitrust policy.
24 Do you want to continue, as in Illinois Brick,
25 concentrating the damage recovery in one party, so that

1 that party will have the greatest incentive to sue, so
2 that you will minimize the complexities that we have been
3 talking about here.

4 QUESTION: Is there anything in the record to
5 give us an idea of the percentage of these -- of the total
6 damages that were absorbed by the utility directly? When
7 you talk about some of the gas being lost in the pipeline,
8 and the fact that you have to heat your own facilities. I
9 am thinking de minimis, but is there some way you can give
10 me an estimate of what percentage of the damages were
11 absorbed by the utility itself?

12 MR. FINCH: Justice Kennedy, there is nothing in
13 the record from which that could be determined. It was
14 assumed by the trial court, and there could have been
15 discovery on it. I can give you an idea that you are
16 correct that it would be a relatively small number, that
17 most of the overcharges were then passed on to the
18 customers.

19 But you get into a problem of allocation.
20 Remember, we are talking about a preliminary question here
21 of, not quite standing, but antitrust injury.

22 And the way we got into this was at the very
23 beginning of the case we filed a motion for summary
24 judgment against not the states, but against the
25 defendants on the pass-on defense. Because the defendants

1 were saying you don't have a right to recover anything in
2 this case.

3 And so, instead of having us litigate the issue
4 of allocation which you have raised, and try to determine
5 well, UtiliCorp has got 2 percent of the total
6 overcharges, whatever that number may be, the district
7 court quite properly concluded, under the doctrine of
8 Illinois Brick, that there should just be -- an antitrust
9 damage claim should be concentrated in the direct
10 purchaser.

11 QUESTION: Mr. Finch --

12 MR. FINCH: Yes, Justice Scalia?

13 QUESTION: You say that it is likely to have
14 been minimal, the amount of the overcharge that was passed
15 on. Is it likely to have been minimal the damage suffered
16 by the utilities, which would include the amount of the
17 overcharge that wasn't passed on plus other damages, such
18 as their loss of additional sales that might have been
19 made because of the commercial users who are convertible
20 and switch to some other fuel, and -- and the residential
21 users, if one could ever figure that out, who put on
22 sweaters?

23 MR. FINCH: Justice Scalia, that is a
24 substantial number. In the case of KPL it is over \$15
25 million, according to the experts. In the case of

1 UtiliCorp it is over \$4 million of lost margin damages.
2 Now, that does not include whatever additional damages the
3 utility suffered by paying more for gas that they did not
4 resell to consumers. But it is a substantial number. And
5 though the states make much of our incentive to bring this
6 case, in fact it was KPL, the first direct purchaser, who
7 brought the lawsuit in 1984. And it wasn't until several
8 months later that the states of Missouri and Kansas did
9 join in the suit.

10 QUESTION: What is in it for you if you have to
11 pass it on to the consumers?

12 MR. FINCH: Treble damages and protecting our
13 market, Justice Scalia. Because, as you point out, if you
14 are a residential home owner, for example, and you put
15 more insulation in your attic, we are not going to be able
16 to sell you as much gas in the future. It's not just an
17 immediate downturn because we have been able to sell you
18 gas in the past and we'll get that back, because we have
19 lost market for the long term. And that is particularly
20 also true for the commercial and industrial customers.

21 If a home owner goes out and installs a wood
22 burning fireplace in his house and starts burning a lot of
23 wood, that is demand loss to us. That is a loss to our
24 margin permanently.

25 Now, Mr. Greenan suggested that we could go back

1 to the utility commissions and try to get some of this
2 margin back. But in fact UtiliCorp, particularly the
3 Missouri public service division, did not have a rate case
4 between 1983 and 1988, the major portion of the damage
5 period. And we do believe that the company suffered
6 substantial damages, and it was certainly enough to cause
7 us to bring this suit.

8 QUESTION: Well, Mr. Finch, even if we agreed
9 with the states that in this -- under these circumstances
10 the residential consumer should be entitled to recover the
11 pass-through, the utility still would have suffered
12 substantial damage, according to you, and still would have
13 an incentive to be in this suit.

14 MR. FINCH: Yes, they would. And I guess the
15 question is what incentive is enough, and what level of
16 complexity and what level of expense is enough. Mr.
17 Greenan pointed out that UtiliCorp dropped out of the case
18 for a while. I wasn't privy to that decision; I don't
19 know why it was made. But I suggest that part of the
20 reason may well have been the concern that you just
21 raised, Justice O'Connor, that when you don't know how
22 much of it you are going to be allowed to recover, and
23 when you know there is going to be tremendous expense
24 right up front in the litigation, litigating about whether
25 you can even be involved in the case, that is a tremendous

1 disincentive that this Court frowned upon in Illinois
2 Brick, and should continue to frown upon, we submit.

3 The question that Justice Scalia raised about
4 who recovers for the industrial and commercial customers
5 should be a significant one on the Court's mind, for,
6 after all, there is some inconsistency here in the states'
7 position. They say well, when it comes to residential
8 customers, we or the consumers themselves, can sue. But
9 when it comes to industrial and commercial customers, then
10 the utilities can sue. As Justice Posner suggested,
11 because perhaps the utilities ate some of the overcharges,
12 didn't pass along all the overcharges. But the fact is
13 that the industrial and commercial customers of these two
14 parties, UtiliCorp and KPL, have not sued, probably, I
15 would submit, in reliance upon Illinois Brick and the fact
16 that they would be entitled under the utility regulatory
17 scheme to get back a large part of their damages. So we
18 have a question of equity and justice here for those
19 customers whose claims would now be barred by the statute
20 of limitations.

21 QUESTION: Does the parens patriae amendment to
22 the antitrust laws, Mr. Finch, bar a claim by individual
23 consumers?

24 MR. FINCH: It does not, as I read it, Justice
25 Rehnquist, bar a claim by individual consumers, but the

1 states, when they file their lawsuit, are supposed to have
2 given individual consumers notice so they could opt out.
3 In fact that has never been done in this case, even though
4 the states filed their claims back in 1985 and 1986. So
5 we don't know, if there was such a notice given, how many
6 consumers might well choose to opt out and pursue their
7 own litigation.

8 QUESTION: You say they are supposed to give
9 notice. Under the statute?

10 MR. FINCH: Yes, sir. I want to point out, if
11 you -- if the Court would like to discuss the argument
12 that Section 4(c) allows the state attorneys general to
13 bring this case, that it was not raised in the court
14 below. It was not presented in the certiorari petition
15 before this Court. Moreover, I would suggest the Court
16 has already rejected that argument in footnote 14 of
17 Illinois Brick. Indeed it would be an odd statutory
18 construction, if Section 4(c) is based on Section 4, to
19 have a rule like in Illinois Brick, that an indirect
20 purchaser cannot sue under Section 4, but under Section
21 4(c) a state may sue on behalf of that indirect purchaser.
22 And indeed, the statute doesn't make any sense that way,
23 for if you allow a consumer to opt out under Section 4(c),
24 but you don't give him the right to sue under Section 4,
25 it's just internally inconsistent.

1 Apparently there was the assumption of some
2 congressman in 1976 that Illinois Brick might have come
3 out the other way. But I think the states have
4 recognized, by their efforts to go back to Congress and
5 get Illinois Brick changed, that in fact Congress did not
6 authorize in Section 4(c) parens patriae suits on behalf
7 of indirect purchasers. Surely the proof that Congress
8 has not acted shows there is no strong sentiment in
9 Congress for changing the direct purchaser rule that this
10 court enunciated in Illinois Brick.

11 In this case, I contend that the purposes of the
12 antitrust laws is -- are best served by concentrating the
13 recovery in the direct purchaser, instead of splintering
14 the recovery among industrial customers, commercial
15 customers, the state attorney generals or any consumers
16 who may bring their own cases. The incentive should be
17 maximized, so the deterrent will be maximized.

18 I point out that one of the concerns in Illinois
19 Brick was that the direct purchaser should have the best
20 knowledge, and that is -- does appear to be what happened
21 in this case, in that the Kansas Power and Light Company,
22 the direct purchaser, did the investigation and filed the
23 antitrust suit, and the states, and for that matter
24 UtiliCorp, piggybacked in on KPL's (inaudible) product.

25 I point out that this is a case in which the

1 utilities have gotten it right. They have sued for treble
2 damages to protect their market, and to some extent, I
3 suppose, out of a sense of public service duty that a
4 public service commission has.

5 But if this Court were to take away 50 to 95
6 percent of this recovery, I would ask how much of an
7 enthusiastic plaintiff will a utility be the next time
8 around, the next time there's an antitrust case.

9 I would submit that the ruling of the Tenth
10 Circuit should be upheld.

11 QUESTION: Thank you, Mr. Finch.

12 Mr. Robbins.

13 ORAL ARGUMENT OF LAWRENCE S. ROBBINS

14 ON BEHALF OF UNITED STATES,

15 AS AMICUS CURIAE, SUPPORTING RESPONDENT

16 MR. ROBBINS: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 With respect, I believe Mr. Greenan has
19 misformulated the question before the Court. The rule of
20 Illinois Brick is not that the direct purchaser is the
21 proper party to sue unless it is easy to demonstrate that
22 there has been no absorption of the overcharge. The rule
23 in Illinois Brick is as follows, that with a cost-plus
24 contract the purchaser is insulated from any decrease in
25 its sales as a result of attempting to pass on the

1 overcharge, because its customer is committed to buying a
2 fixed quantity, regardless of price. Even if it were the
3 case that the regulatory framework in which this case
4 comes before the Court solved the problem of
5 apportionment, that would only be the tip of the iceberg.
6 Illinois Brick is not simply about the apportionment of
7 overcharges.

8 Instead, Illinois Brick and Hanover Shoe stem
9 from a longer tradition in which this Court has uniformly
10 held that an injured direct purchaser is entitled to sue
11 for the entire overcharge, regardless of whether and to
12 what extent that direct purchaser passes on the overcharge
13 to its customers. It is that tradition that Hanover Shoe
14 and Illinois Brick dealt with when it adverted to the
15 possibility that there might be a cost-plus exception.

16 Now, one thing is perfectly clear. If there is
17 a cost-plus exception, it does not cover this case,
18 because, as Petitioners freely concede, the direct
19 purchaser in this case was injured. It suffered the loss
20 of profits as a result of having to pass on an overcharge,
21 to whatever extent it did, to its customers.

22 And so, what is clear beyond, I think,
23 contradiction, is that if there is to be an exception to
24 cover this case, it will be a new exception, an exception
25 that departs from the tradition that has always held that

1 an injured direct purchaser, injured in any form, injured
2 by the overcharge or injured by lost profits, and lost
3 profits are not contravened in this case, is entitled to
4 sue for the entire overcharge.

5 QUESTION: And keep it.

6 MR. ROBBINS: And keep it.

7 Now, it seems to me, Justice White, and this
8 returns also to the question Justice O'Connor raised
9 before: is this a windfall. Well, in one sense I suppose
10 it is a windfall, but it was a windfall that this Court
11 recognized and anticipated the possibility of in Illinois
12 Brick, recognizing that it may well be the case that some
13 indirect purchasers who suffered an injury may not be
14 compensated. But that was anticipated for a reason,
15 anticipated because the Court concluded, as it had in
16 Hanover Shoe, that locating and maximizing the incentive
17 in the direct purchaser is the best policy for the
18 antitrust laws, seeking the maximum deterrence at the most
19 efficient price.

20 QUESTION: Of course, the language of Section 4
21 of the Clayton Act doesn't make the distinction the Court
22 has made in Hanover Shoe and Illinois Brick. This is just
23 a Court-created doctrine.

24 MR. ROBBINS: The language, to be sure, Justice
25 O'Connor, is quite sweeping.

1 QUESTION: It is.

2 MR. ROBBINS: But that was equally true, I might
3 suggest, in Associated General Contractors, where the
4 Court took that issue on directly and said that there are
5 a variety of limiting principles that have always been
6 used to constrain what would otherwise be the sweeping
7 embrace of Section 4.

8 QUESTION: But I guess the real question is
9 whether, in a case like this, the fundamental concerns
10 that motivated the Court in Illinois Brick would be met by
11 permitting the residential consumers to sue.

12 MR. ROBBINS: I think --

13 QUESTION: You can separate out the damages that
14 they suffered by the -- by the pass-through of the
15 overcharges. It is possible to do that in this kind of
16 case.

17 MR. ROBBINS: I think the answer is yes, it's
18 possible. It is not, however, easy. It will be possible
19 after litigation about the very issues that concerned the
20 Court in Illinois Brick. In the first place, it will not
21 be easy to decide even the question of apportionment that
22 is supposedly solved by the regulatory frame work. And,
23 by the way, that is the only policy that is solved at all.
24 So if it doesn't even solve that problem free of
25 litigation, it hasn't done very much. And I would suggest

1 that the --

2 QUESTION: How difficult is it to look at the
3 utility bills after the fact and say that's how much the
4 residential consumers had to pay that they shouldn't have
5 paid?

6 MR. ROBBINS: Well, it is not hard to say that,
7 but it won't be correct. And it may not be correct for
8 two reasons. First of all, you are going to have
9 litigation about whether the regulation in fact requires
10 the utility to pass it on. These parties are in dispute
11 about that very question. The -- the PJA clauses
12 throughout the states may be different. They may be hard
13 to read. And you are going to have litigation about
14 whether it is even required.

15 You will then have litigation about whether it
16 has been complied with. What looks like a dollar-for-
17 dollar pass-through may be nothing more than the
18 postponement of the rate increase that would have come
19 about anyway, a concern which this Court expressly
20 identified in Hanover Shoe. What looks like a pass-
21 through may be an increase for other reasons.

22 But even if they had solved the apportionment
23 problem, and they haven't -- they haven't solved it with
24 the ease that Hanover Shoe requires, you then have a
25 variety of other problems that they haven't come close to

1 solving, and indeed in some respects have made worse. The
2 complication of litigation. It is not going to go away,
3 it is going to come back fourfold. It's going to come
4 back because you are going to increase the number of
5 litigants in court.

6 You are going to increase the kinds of damages
7 they are seeking. The indirect purchasers will seek the
8 overcharge. The direct purchasers will sue either for the
9 lost profits and, as Petitioners have conceded this
10 morning, some portion of the overcharge for unrepresented
11 customers that the state's *parens patriae* can't -- can't
12 represent. Lost profits are very hard to calculate,
13 because they require you to prove the overcharge, and then
14 calculate the effect of the overcharge on the demand
15 curve, how inelastic or elastic is the demand, the very
16 thing this Court wanted to get away from in Illinois
17 Brick.

18 As a consequence of the proliferation of parties
19 and the complication of the damage theories, you will do a
20 couple of other things. You'll reduce the incentives on
21 direct purchasers --

22 QUESTION: But won't those same difficulties
23 stand in the way of the utilities' recovering lost
24 profits?

25 MR. ROBBINS: Well, in our view, Mr. Chief

1 Justice, if the direct purchasers are in that lawsuit
2 alone they may attempt to seek both kinds of damages. But
3 as a practical matter, because the overcharge will always
4 be greater than, or at worst equal to, the lost profits,
5 they will tend in the aggregate to seek only the
6 overcharge. And as a result, the more complicated inquiry
7 for lost profits will in the main wash away.

8 There will also not be competing claims for the
9 same total recovery, a concern that this Court articulated
10 in ARC America. You will not have two or more categories
11 of plaintiffs suing over a common Federal pot under
12 Section 4. And that competing claim, and the
13 proliferation of theories and parties that will inevitably
14 ensue, and only gets worse under Petitioners' theory, is
15 what is going to ultimately dilute the intended incentive
16 on the direct purchasers to sue.

17 What is more, finally, I think, if you open the
18 door the crack that they seek this morning, there will be
19 many more exceptions brought to your doorstep. If today
20 it's 100 percent regulation, tomorrow it will be a 95
21 percent regulation, because in theory there is no greater
22 reason why the 95 percent pass-through plaintiffs
23 shouldn't be in court as well.

24 And it is precisely that concern, I suggest,
25 that caused this Court to hesitate to even say whether

1 there is any cost-plus exception at all. In each of the
2 Court's cases the suggestion has been that there might be
3 such an exception. And I think that hesitation makes a
4 good deal of sense, because in a case in which it's not
5 required to reach that result, it ought not to be reached.

6 QUESTION: Do you think the 4(c) issue is here
7 (inaudible)?

8 MR. ROBBINS: No. I think it is not here. It
9 was not in the question presented, it was not resolved
10 below, and it is not for this Court to decide.

11 QUESTION: And you don't have any view on it
12 anyway, or do you?

13 MR. ROBBINS: Well, we think that this Court
14 resolved the question and resolved it correctly in
15 footnote 14 of Illinois Brick. And we think that the same
16 answer on that -- on -- on the merits, if appropriate,
17 should apply here.

18 QUESTION: Of course, if we don't decide that
19 question the case doesn't mean very much, does it?

20 MR. ROBBINS: I am sorry, Justice?

21 QUESTION: If we do not decide the 4(c) issue,
22 there is not much to this lawsuit, as far as for long-run
23 precedential purposes.

24 MR. ROBBINS: Well, there is still the claim,
25 which we think is mistaken, that Section 4 and the

1 suggested cost-plus exception is sufficient to cover this
2 case even if 4(c) isn't recurred to.

3 QUESTION: I understand, but if we leave out in
4 the -- if we rule the way you recommend that we rule, and
5 don't decide the 4(c) question, you are going to have this
6 same problem come up again in the next lawsuit.

7 MR. ROBBINS: It may, with a party that has
8 chosen to rely on 4(c), and at that time I suspect our
9 answer will be the same as to the 4(c) question. But
10 that's not here, and I think for good reason.

11 Now, it may be that in the end Petitioners'
12 clients bore some or most of the overcharge. And it may
13 also be that the regulatory framework alleviates to some
14 extent some, but hardly all, of the concerns in Illinois
15 Brick. But this Court has anticipated such possibilities
16 and has refused to carve out an exception for particular
17 markets. It has discouraged that venture at every turn.
18 There is every reason to do so this morning.

19 QUESTION: Thank you, Mr. Robbins.

20 Mr. Greenan, do you have rebuttal? You have
21 four minutes remaining.

22 REBUTTAL ARGUMENT OF THOMAS J. GREENAN

23 ON BEHALF OF THE PETITIONERS

24 MR. GREENAN: I do, Your Honor.

25 I think it should be clear that the fact-

1 specific arguments that UtiliCorp has made are not before
2 this Court. This action is here based upon summary
3 judgment motions brought by UtiliCorp which were decided
4 before discovery was well underway. The court below
5 assumed that there was a perfect and provable 100 percent
6 pass-on, and that is the facts that are before the Court
7 today.

8 Justice O'Connor, I agree that you can look at
9 the utility customer's bill and determine what amount they
10 had been charged for what amount of gas. Fortunately, in
11 the *parens patriae* situation that is not necessary,
12 because the statute clearly provides that the attorneys
13 general may aggregate those claims to make them easily
14 provable so that individual consumers do not have to come
15 in and prove that. That procedural device was
16 specifically spelled out.

17 When the government says that clearly the court
18 was relying upon a rule without deviation that the direct
19 purchaser recover, it ignores *Hanover Shoe*, it ignores
20 *Illinois Brick*, it ignores the discussions that this Court
21 has had with regard to this rule since then. Note 12 in
22 *Illinois Brick*, referring to the pass-on defense which the
23 Court recognized in *Hanover Shoe*, said that they recognize
24 that because the preexisting cost-plus contract makes the
25 normally complicated task of demonstrating that the

1 overcharge had not been absorbed -- excuse me, makes easy
2 the normally complicated task of demonstrating that the
3 overcharge had not been absorbed by the direct purchaser.
4 That is the law of Illinois Brick. That is what we are
5 talking about here. This particular situation is one that
6 the Court has always recognized, that the -- would exist.

7 With regard to whether or not the 4(c) question
8 is here, Your Honor, we have to admit that it was not
9 argued below. But I think that Justice Stevens has -- has
10 put his finger on it, that the -- that the complaints were
11 brought pursuant to 4(c). Only 4(c) permits --

12 QUESTION: (Inaudible) the answer to 4(c), I
13 suppose, is that if -- is that the consumer under Illinois
14 Brick hasn't suffered any injury.

15 MR. GREENAN: The answer to 4(c) -- under
16 Illinois Brick, I don't believe the Court specifically
17 addressed that, Your Honor. Under Illinois Brick what the
18 Court said is that you can --

19 QUESTION: Well, what does -- what does 4(c)
20 authorize?

21 MR. GREENAN: I think if one looks at the
22 legislative history with regard to the bills that were
23 passed, that it was clearly the intent of Congress that
24 4(c) allow the attorneys general to proceed *parents patriae*
25 on behalf of consumers, indirect as well as direct.

1 QUESTION: Well, they can -- they can attempt to
2 recover the damages that the indirect purchasers couldn't
3 recover themselves. But if the indirect purchasers can't
4 recover any damages, what good is parens patriae action?

5 MR. GREENAN: Well, Your Honor, I believe that
6 the clear intent of 4(c) is demonstrated by the
7 legislative history that is set forth, particularly in the
8 brief of the amicus, the National Council of -- or
9 National League of State Legislatures, demonstrates that
10 Congress intended that 4(c) provided a separate cause of
11 action for the attorneys general to proceed on behalf of
12 consumers --

13 QUESTION: To recover what?

14 MR. GREENAN: To recover damages under the
15 antitrust laws, both indirect and direct.

16 QUESTION: Well, you have to say both indirect
17 and direct, but that isn't what it says.

18 MR. GREENAN: It does not say that in so many
19 terms, no, Your Honor. We have to look to the legislative
20 history. I think that the cases of this Court clearly
21 demonstrate that the United States is in error when it
22 says that the Court has always assumed only the direct
23 purchaser.

24 In the very next term after Hanover Shoe, this
25 Court examined a question in Perkins v. Standard Oil and

1 followed a claim down through several levels in a chain of
2 distribution to allow Perkins to have standing to proceed
3 with that claim in that action. Here, as the Court
4 recently said in the ARC America case, if it is easy to
5 prove the extent to which the overcharge has been passed
6 on to the indirect purchaser, then this Court -- the
7 phrasing in that was might allow an exception.

8 We believe that this Court should recognize that
9 this exception is within the language set forth in
10 Illinois Brick, and that an affirmance of Illinois Brick
11 would require --

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Greenan.

14 The case is submitted.

15 (Whereupon, at 11:58 a.m., the case in the
16 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-2109 - KANSAS AND MISSOURI, ETC. Petitioners V.

UTILCORP UNITED, INC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)

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