In the

Supreme Court of the United States

ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL., Appellants v. STUDENTS CHALLENGING REGULATORY AGENCY PRODCEDURES (S. C. R. A. P.) ET AL	No. 73-1966
and UNITED STATES, Appellant, v. STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S. C. R. A. P.) ET AL	No. 73-1971

Washington, D. C.
March 26, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL.,	:	
Appellants	:	
v.	:	No. 73-1966
STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S. C. R. A. P.) ET AL	:	
and	:	
UNITED STATES,	:	
Appellant,	:	
v.	:	No. 73-1971
STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S. C. R. A. P.) ET AL	:	

Washington, D. C.

Wednesday, March 26, 1975

The above-entitled matters were consolidated and came on for hearing at 10:46 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

[Continued]

APPEARANCES:

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1966, Aberdeen and Rockfish Railroad Company et al against Students Challenging Regulatory Agency Procedures, et al consolidated with No. 73-1971, United States against Students Challenging Regulatory Agency Procedures.

Mr. Horsky, I think you may proceed when you are ready.

ORAL ARGUMENT OF CHARLES A. HORSKY, ESQ.

MR. HORSKY: Mr. Chief Justice, and may it please the Court,

This, I think, is the third time this proceeding has been before this Court. I hope I can persuade you that it should be the last.

The present posture of it involves basically two questions, the jurisdiction of the lower court to enter an order on the merits, whether the order was correct.

Because it has been the position of the intervening railroads, whom I represent, that the lower court lacked jurisdiction and we have urged that, I am seeking first and I will try and confine myself to the jurisdictional issue.

Mr. Randolph will deal with the merits should the Court reach them.

QUESTION: Mr. Horsky, are you going to cover the jurisdiction of this Court as well as of the District Court?

MR. HORSKY: I had hoped that I could rely on our briefs for that, but I'll be glad to comment on it if you like.

Let me put this case in context. This proceeding began in 1972 and the course of events at the courts and at the Commission since that time is set out in our briefs in detail. I think I can make our present posture of it clear in a very few words.

At the 1972 term, this Court dealt with the problem of a temporary emergency surcharge which had been proposed by the railroads in early 1972. As the Court is aware, as the Chief Justice indicated in the preceding argument, in the railroad industry, tariff changes are made by the railroads and subject only to a power in the Commission to suspend for a period of seven months, the rates proposed by the railroads go into effect as a matter of law and they remain in effect unless and until the Commission itself finds them unlawful.

In 1972, when the Commission declined to suspend the temporary emergency surcharge, this District Court, the same District Court we have now, enjoined the Commission to do so.

This Court reversed that decision on the ground of Arrow Transportation Company, that the Court had no jurisdiction to deal with suspension orders.

In the meantime, the railroads had replaced 2.5 percent surcharge with a general 4 percent rate increase which became generally effective in October of 1972 with one exception. As applied to recyclables, the Commission did suspend the increase until June 1973 while it undertook a rather elaborate effort to further explore the environmental problems.

Shortly before June 1973, when that 4 percent increase was to take effect on recyclables, the Respondents here sought an injunction and the District Court again enjoined the rates.

Again, this Court reversed.

While that appeal by our side from that injunction was pending, the Appellees, the Respondents here, sought declaratory judgment in the lower courts. They sought two things; they sought, first, a declaration that the environmental impact statement prepared by the Interstate Commerce Commission was inadequate and that therefore, its order allowing the rate increase to go into effect was invalid and that the Commission should be directed to prepare a new environmental impact statement and, second, that the rates should be enjoined.

A divided District Court this time concluded that it had jurisdiction to review the general revenue orders by reason of a supposed NEPA exception -- the National

Environmental Protection Act -- it is too hard to say, so, NEPA, if I may and on the merits, the environmental impact statement as applied to recyclables was inadequate and must be redone by the Commission.

It declined, however, to enjoin the collection of the rates and they are now being collected.

Now, that is the posture of the case as it is now before you.

The Respondents do urge, Mr. Justice, that there is no jurisdiction in this Court on two grounds, that the order of the Commission was phrased in terms of "setting aside" rather than "enjoining the Commission," and the case may be moot.

QUESTION: The order of the Court?

MR. HORSKY: The order of the court below.

QUESTION: You said the order of the Commission.

MR. HORSKY: I am sorry. The order of the court below.

QUESTION: This was phrased in terms of setting aside rather than enjoining.

MR. HORSKY: Setting aside rather than enjoining. We have dealt with that, Mr. Justice in our reply brief at some length, both the Government and ourselves and in the interests of time I don't think the arguments are meritorious and I would prefer not to take my time on them, but I will

if you like.

I'd like to deal with the jurisdiction of the District Court, which is terribly important and I'd like to persuade you, if I can, that the dissenting judge below reached the correct result when he said they did not have jurisdiction.

QUESTION: Did I misunderstand you? Did you say you didn't think the arguments were meritorious?

MR. HORSKY: I thought they were not meritorious.

The argument as to the jurisdiction of this Court, to review this appeal -- I don't believe they are very substantial.

QUESTION: Your position is basically the revisers didn't intend any change in the --

MR. HORSKY: Well, quickly, it is clear under the Urban Deficiencies Act of 1913 that there would be jurisdiction. The revisers' notes say they didn't intend any change. In the Electronic Industries case, the same point was briefed and argued to this Court and the Court went ahead and decided it.

In our motion -- they made a motiong to dismiss the appeal on this ground and you did not reserve a question of jurisdiction of the merits. I think there is not very much reason why I should be worried about those arguments at this point.

The question of jurisdiction of the District Court, as I say, is really a very important question and I do want to talk about that. I can state it very simply.

For about 40 years, since a decision by Judge Chestnut in Baltimore in the Algoma case, the district courts, the federal district courts, have declined jurisdiction when asked to review general resolute orders of the Commission.

That is, orders which are so-called "ex parte" orders/which the railroads propose a general across-the-board rate increase and in which the decision of the Commission as to whether or not to suspend the orders, suspend the increases for the seven months' period, is really based on whether or not the railroads need additional revenue.

It has nothing to do with whether the rates are just unreasonable. In such cases and in this case, the commission makes very clear that the rates which have been increased by the general revenue order can be challenged in a subsequent proceedings before the commission under Section XIII or Section XV by any party on any ground that would ordinarily be available and in the Algoma case, as Judge Chestnut pointed out, the consequence/ is that challenging them in the general revenue proceedings is premature and that these people are properly remitted to the procedure where the rates, the actual legality of the rates can properly be tested.

QUESTION: What if one wanted to challenge the

Commission's determination that the railroad, in fact, needed more revenue?

MR. HORSKY: That would be open if the commission had relied on it in its determination.

In other words, you file a Section XIII proceedings -- I mean, a Section XIII complete against recyclable rates. The commission has a hearing. It is mandated to have an investigation. It is not optional. It must do it. And it must come out with a decision as to whether or not the rates are just and reasonable.

If the commission's decision is bottomed on the needs of the railroads, that is reviewable by the courts, just like anything else.

If the commission does not rely on that, that isn't at issue as to justness and reasonableness, then it need not be reviewed because it isn't relevant any more.

QUESTION: So that wouldn't be a reason for reviewing a general rate?

MR. HORSKY: I should think no. No, that is not any reason why you would need to review a general revenue order because if it becomes a matter of issue in a particular case where the real issue is presented, that is, is this a lawful rate? To the extent that the needs of the railroads for revenues enter into that determination, it is reviewable just like any other consideration is entered into.

The Algoma rule really is very similar to the more familiar rule in the Arrow Transportation case which this Court accepted and applied in the previous decision in this case, in the earlier S.C.R.A.P. case. That decision was, as I say, that the Arrow decision, that courts will not review suspension orders of the commission.

Because the ICC has no general power to get to give prior approval to the rates, these ex parte proceedings, the general revenue proceedings are handled essentially the same way as through the suspension power.

General revenue orders don't determine whether the rate is just and reasonable. They leave that, as does the suspension order, to a further administrative remedy.

Now, in this case, Judge Wright, writing for himself and Judge Ritchie, concluded not to follow the Algoma rule. He had, in fact, in 1970, dissented from his application in a case that I'll come to in a moment that reached this Court in the District -- from the District of Columbia, but in this case, he did not dissent from the Algoma rule, he found what he said was a NEPA exception to it.

That is, that under -- if the challenges under Environmental Protection Act, the court has jurisdiction to review notwithstanding the Algoma rule. We believe that that is directly in the teeth of prior decision of this Court in the earlier case, your earlier hearing in this case.

Let me refresh your recollection. In that case the lower court, the same district judge, concluded that although under the Arrow Transportation Company rule, district courts did not have the power to interfere with the exercise of the commission's suspension order.

Nonetheless, because this was a NEPA case, they could go ahead and do it. This Court reversed and it said in its opinion that NEPA did not contemplate any wholesale overruling of prior loss.

QUESTION: But, of course, Arrow is dependent upon a particular provision of statutory law and its general rate order is kind of judicially carved out --

MR. HORSKY: Well, I think that is a distinction, really, that's -- I don't think that is quite true, your Honor. You did refer to Section XV(7) and to the history but I believe that the analysis in Arrow and the analysis in the Algoma case are practically the same. They go back to the statute. They look to the statute. What does the statute contemplate?

You have a very nicely balanced system created after a great deal of experimentation by Congress using railroad initiative to create the rates, a certain amount of commission power to suspend them for awhile and an adequate remedy with reparation, if necessary, for anyone who is injured by this process and the District Court

decision in Algoma, just like the Arrow Transportation decision and the previous decision in S.C.R.A.P. are all part of that statutory system which has been worked out over the years.

QUESTION: Algoma, you say, was a decision some 40 years ago, by --

MR. HORSKY: 1935.

QUESTION: Judge Chestnut of Baltimore.

MR. HORSKY: Followed consistently. There have been no dissents from it.

QUESTION: That would be my question, followed consistently with no dissents from it.

MR. HORSKY: That's right.

QUESTION: And no --

MR. HORSKY: Let me come to that because the Algoma rule was before this Court in the 1969 term in three cases. In each case, the lower courts had applied it with only one judge, Judge Wright, dissenting out of the nine lower court judges.

In two of those cases, the Alabama Power case and the Atlantic City Electric Company case, this Court divided evenly and the cases were affirmed by an equally-divided court.

In the third of those cases, the Electronic Industries case, the decision of this Court was unanimous --

affirmed unanimously.

I'll come back in a moment to the --

QUESTION: Those are all summary actions of the Court?

MR. HORSKY: All summary actions.

QUESTION: And this was -- all three in the 1969 term?

MR. HORSKY: All three in the 1969 term. I'll come back to the Atlantic City and Alabama Power in a moment.

QUESTION: Mr. Horsky, is that an affirmance?

MR. HORSKY: That was an affirmance.

QUESTION: Summary affirmance.

MR. HORSKY: Summary -- unanimous affirmance.

QUESTION: Yes.

MR. HORSKY: Let me talk about the Electronic Industries case because I think you don't need to reach, really, the Algoma rule in this case because I think the Electronic Industries case applies here.

In the other two cases, in Atlantic City and Alabama Power, the challenge was, as Mr. Justice Rehnquist has suggested, to the -- whether the commission was right in its determination that revenue needs warranted the increase.

That cut across all the rates.

In Electronic Industries, the challenge was

to particular rates, on television sets, radio sets, components of those sets, just as here the challenge is to recycle commodities and we submit that the unanimous decision of this Court in Electronic Industries means that certainly you will not permit a challenge to particular commodities in the general revenue order proceedings, which is what this case is.

The Government, I am unhappy to say, agrees partially with that but not wholly with it. They agree that the Electronic Industries case means what I have just said it means but they don't agree that this is such a case.

They say, and I am quoting from their brief, the Respondents broadly attacked the commission's general revenue order.

I don't think that is correct. In fact, I think that is dead wrong. The general revenue order here decided essentially that the railroad's need for revenue permitted the commission to terminate the suspension which it had originally ordered prior to the expiration of this suspension date.

That determination isn't challenged by the Respondents. They zeroed in on a few specific rates, on a dozen or so recyclable commodities.

They say that those are the ones that are bad and that seems to me to be just like the Electronic Industries and if, as I suggested, Electronic Industries means that you

can't take particular rates and challenge them in a general revenue proceeding, I think that would dispose of this case but if the Court were to agree with the Government that this is not an Electronic Industries, if you were back to Algoma and the problem that divided the Court in 1969, I would like to take a moment or two to urge as strongly as I can that you do affirm the Algoma doctrine.

The basic point in that doctrine is that nobody is entitled to a rate which is less than just and reasonable and that there can be no resolution of that question, no definitive resolution of what that question, the answer to that question, except in a Section XIII or Section XV proceeding. You can't settle it in a general revenue proceedings.

In a Section XIII proceedings, the commission can and it does take into account all factors which go into the reasonableness of the rate, including, of course, environmental factors.

Allowing a review of it in a general revenue order is really no different than reviewing a suspension order and it really is no different than reviewing any kind of interlocutory order before there has really been a decision.

But it has been -- it is more than that. This would certainly encourage objections to all general revenue orders. Under our new legislation effective this

year, those objections now go not to district courts, but to courts of appeals, but I would venture to say we would have an appeal in each of the 11 circuit courts from every general revenue order by somebody.

QUESTION: Then that summary as to action is brought after a certain date, isn't it?

MR. HORSKY: Yes, at any time in the future.

QUESTION: It will be a couple of years before we get to that, I guess.

MR. HORSKY: Well, if a new order comes up.

If the railroads ask for a new general rate increase we are going to have objections. We are going to have injunctions with possibility of discriminatory decisions, different decisions and different circuits and any decision that they make, as this Court indicated in the previous reversal of the District Court in this case, would have an impact, a premature impact on the administrative procedure and would violate what you had said should not be done under Wichita Grain case.

Moreover, it seems to me that because one would expect these attacks and one would expect, as we have had in this case, injunctions after injunctions which have to be appealed to be reversed, the effect on the railroad revenues where these orders are based on revenue needs would be substantial. The railroads are in need of revenue

I don't mean that is a reason why the Court should have jurisdiction, but it does seem to me that that is a factor to be taken into consideration by this Court in determining whether a rule which has been in effect for 40 years, which is part of the framework of this nicely-balanced system which has worked out, as I say, in the statute between the rights of the railroads to propose rates, the rights of the commission to suspend them, the rights of the shippers and others to protest them, to be protected and get rebates or reimbursement if the rates are wrong, whether any change in a 40-year-old system should be made by this Court or, if it is to be changed at all, should not be made by Congress.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Horsky.

Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.

MR. RANDOLPH: Mr. Chief Justice and may it please the Court:

In the time remaining to Appellants, I would like to devote my attention to the merits of the case, as Mr. Horsky said.

Our position on the jurisdictional issue is set forth in our reply brief on page 2 to 4. The ICC and the United States have not taken any position against or

argued against the exercise of jurisdiction by the District Court since Appelleesinvoked the District Court's jurisdiction we are sure that they will devote substantial attention to it.

The issue on the merits in this case is whether the Interstate Commerce Commission adequately complied with the National Environmental Protection Act, NEPA. That is, did the ICC, in its final environmental impact statement in this case, adequately consider the environmental impact of its action?

In the first opinion that the Court rendered in this case in 1973, the Court remarked that the ICC, the Interstate Commerce Commission, had issued a report in October of 1972 which ran approximately 300 pages in length and gave extensive -- and I quote the Court --"consideration to environmental factors."

The commission at that time did not issue an environmental impact statement, as NEPA requires for significant federal actions affecting the environment because the commission believed that the action that they were then taking, which was allowing a rate increase to go into effect, would not affect the environment.

However, as Mr. Horsky has described, when the Commission's report was issued, there were a number of protests a number of critical comments.

As a result, the commission reopened the proceedings

in regard to one particular class of items, recyclables and I think it is well to define what we mean by recyclables here. It sounds like one small group or class of commodities. In fact, it is a huge class of commodities.

On page 13 of the Appendix, the commission drops a footnote and defines what is meant by recyclables. They list a number of classifications of different commodities.

Now, I emphasize the word "classifications." In other words --

QUESTION: On page 13, is it, of the brown --

MR. RANDOLPH: Page 13 of the Appendix. It is the last footnote on the page.

They may be confusing because in the upper right-hand corner there are numbers that say 91 -- it says "photo-offset" and I think that is the reason.

QUESTION: You want us to look at the bottom number?

MR. RANDOLPH: Yes.

QUESTION: On page 13, the footnote. Umn hmn.

MR. RANDOLPH: The footnote describes and defines what is meant by "recyclables" and then lists, by number and by description, various classifications of commodities.

However, it is misleading to think that these are the only commodities, that we are only talking about a dozen or so commodities because within each one of these

transportation classifications are hundreds and hundreds and hundreds of different commodities.

For example, I had xeroxed before the argument, the, all of the commodities comprised in the last two items, that is, 41, ashes and 42 waste or scrap.

Now, this is from the tariff that is issued by the American Association of railroads and it runs page after page after page.

QUESTION: A good many of these commodities I have never heard of before, like noils, rovings, cullets --

QUESTION: That is nails.

MR. RANDOLPH: No, they are noils.

QUESTION: They are noils.

MR. RANDOLPH: They are noils. They are --

QUESTION: And then there are rovings --

MR. RANDOLPH: They are rovings. They are basically --

QUESTION: And then there is cullet.

MR. RANDOLPH: Cullet. That is glass scrap and noils are basically filings.

QUESTION: These are goods and chattels of which I have never heard in my life.

MR. RANDOLPH: And they move on the nation's railroads every day, Mr. Justice. And they all have different tariff rates and I think I have heard it estimated and I don't

think anyone really knows how many different rates there are throughout the United States. Someone estimated a trillion.

I think a billion is certainly a very conservative estimate of the number of rates and all one has to do is to think of the fact that for any given commodity such as potatoes moving between Baltimore and Washington, D.C. will have one rate and if it moves between Washington, D.C. and some other city so for the tens of thousands of commodities that move on the nations railroads every day, between hundreds of thousands of points of origins and destinations, you have different rates.

We are dealing here with a group of commodities, recyclables. It is a large group of commodities and for every place, destination, origin, there are different rates that are applicable.

The ICC, the commission, in trying to determine what environmental impact a rate increase would have on these recyclable commodities, took a very general view.

It dealt with eight specific broad classifications of commodities and it dealt in general terms with recyclables and having reopened the proceedings to deal with recyclables and having issued a bibliography that it distributed to all the interested parties of 500 different sources setting forth what effect could be expected on the --

of the rate increase and contacting by telephone, by mail, compiling, analyzing, the commission finally issued a 200-page draft impact statement, a copy of which is reprinted in the Appendix.

After the commission issued that draft impact statement, they received comments from various federal agencies. They received comments from the parties to this case.

To give the Court an idea of how generally general revenue proceedings really is, just consider the fact that 469 attorneys entered appearances in this proceedings, 469.

The proceeding is very general. The commission asked for comments. It received comments.

The final report, which runs nearly 200 pages and is printed in the front of the Appendix -- for example, went into great detail about the general classes that the commission decided to consider.

Let me take steel, for example. The commission has a section, scrap steel. What effect will a 4.1 or a 6 percent increase on the transportation rate for scrap steel have on the environment?

To consider that, the commission went through a review of the steelmaking industry at large. It reviewed the steelmaking technology, how steel is made, what kind of furnaces are used. It took a look at the steel foundry

systems throughout the United States. It considered the scrap industry structure, the various different kinds of scrap that are used and then ferrous scrap technology.

As a result, 200 pages of very, very detailed and complex analysis, the commission came to a conclusion and the conclusion was that perhaps this whole impact statement was mistitled. Maybe it should have been called an environmental non-impact statement because the commission's conclusion was that this rate increase would have no significant effect whatever on the environment.

If the commission's consideration of environmental factors in October '72 was expensive, as this Court said, by the spring of 1973 it was tenfold more. It pervaded this entire proceedings.

Since this impact statement was issued, there have been five more general revenue proceedings. They are coming now at the rate of one every six or seven months, as the railroad's revenues decline, as costs go up and the railroads need more money.

The environmental impact statement issued in ex parte 295 which came after this proceedings was filed with this Court, lodged with the Court.

Also, an environmental impact statement was issued in a general overall investigation of the underlying rate structure of the railroads in this country, ex parte

270. That was lodged in this Court.

If one reads the brief filed by S.C.R.A.P. in this case and, particularly, the factual statement, one will come away with the conclusion, particularly on pages 10 to 11 of the sort of green-colored brief, that everything the Commission has done since this proceedings, since this impact statement, has contradicted itself.

That, although it found no significant environmental impact here, in later proceedings, it was using more sophisticated analysis and greater study and so on and so forth. It came to a different conclusion.

Nothing could be further from the truth.

On page 10, for example, in the S.C.R.A.P. brief, appellees state,"rather than having no significant environmental impact as claimed in the commission's previous boilerplate findings --" referring to this case, "that the commission found in ex parte 295 that the following would occur with respect to nonferrous metals." And then there is a quotation.

Let me read to the Court exactly what precedes that quotation. The commision said, and I quote --

QUESTION: I'm sorry, Mr. Randolph, page again?

MR. RANDOLPH: At the bottom of page 10 to 11, Mr. Justice Brennan.

QUESTION: Thank you.

MR. RANDOLPH: The commission said, and I'll read right up to the beginning of that quotation, "However, the quantitative effects of the three percent rate increase will be very small. In all cases, only a fraction of one percent of the presently recycled volume of any commodity. As a result, the environmental impacts in terms of the increased consumption of resources including energy and of pollution are expected to be insignificant."

And now we reach the quotation. "Specifically, in regard to nonferrous metals, the decrease in scrap consumption is expected to be two-one hundredths of one percent of the present volume as a result of which --" and then the quotation picks up -- "'An estimated 3,000 tons of metal will be annually required.'"

The same is true for the quotation on page 11. What the Appellees have set forth as seeming to be a great environmental impact actually, according to this commission's later environmental impact study is a decrease in recycled scrap of .18 of one percent, as a result of the 3 percent rate increase.

And I might add, too -- sir?

QUESTION: You lost me, at least as to what you were reading from when you added the omitted parts on page 10.

MR. RANDOLPH: I'm reading from -- yes, sir. I am

reading from a final environmental impact statement in a later general revenue proceedings.

QUESTION: I see.

MR. RANDOLPH: This has been filed and lodged with the Court. It is ex parte 295.

I might say also that this minimum impact that the commission found/confirms which everything that it said in this case, which involves ex parte 281 is on a worst case basis.

This is worst that could be expected, a two-100ths effect.

The District Court held here that the commission failed to give adequate consideration to the environment and must begin its proceeding all over again. Why? Because the commission failed to issue an environmental impact statement? Hardly. Because the commission did not comply with the NEPA's five requirements of what the commission must look at? No, the District Court said the commission did comply with NEPA as to form.

Because the ICC's consideration of environmental impact was not expensive? It could hardly claim that.

Because the commission's conclusion of no significant effect from the rate increases was mistaken?

Curiously, there's no one in this case yet that says the commission was wrong back in 1973 when it issued this impact statement, that that 4.1 rate increase would

affect the environment.

Nobody said that, no.

What the District Court held is that the commission didn't do enough. That it should have studied some more. That maybe it was right here. Maybe it was wrong. But it had to, and I quote, "Not limit its analysis," as it did here, to the "marginal impact of the most recent rate increase with no discussion whatever of the underlying rate structure itself as that significantly affects the environment."

I pause at this point and present to the Court that everything I have said so far in regard to analysis on this and also in regard to what the District Court held has very little to do directly with the environment.

Of the questions that I have talked about, you could have a team of the greatest environmental scientists in the world sitting in a room with all the books. They could never solve any of these questions.

Why not?

Because what we are really talking about here is economic forecasting, not -- and only derivatively the environment.

That is, if recyclables do not move on the nation's railroads, then as a result more virgin ore will have to be consumed to produce the final end product.

But what we are engaged in here and what the commission was engaged in is really economic forecasting. This is not a case, for example, like -- where the question was, what effect will thermal pollution have on the flora and fauna of the tidal estuary?

That is not the question here. The question here is what effect on the movement of goods on the nations railways will a three percent or four percent rate increase have?

Once we recognize that, we must recognize as well that any investigation into that kind of a question can mushroom into -- it is open-ended. It can mushroom into the entire American economy.

Let me give you an example.

You cannot begin to talk about what effect the rate of increases on the movement of scrap steel will have until you know how steel is currently made.

You have to know what the structure of the steel industry is.

You have to know, are virgin materials in short supply? Could scrap steel be used under present conditions? How is scrap steel collected? What is the structure of the scrap steel industry? How is it shipped?

You couldn't stop there. Still more, what is the demand for steel? Will the auto industry increase orders for steel or decrease?

What of the construction industry?

And once you reach that point, you have to go further. What is the public demand? Will people buy? What will the state of the economy be?

And so on until you have analyzed the entire American economy to determine what effect a certain rate increase could have on the movement of steel scraps throughout the nation's railroads?

And remember, we are not talking about just one commodity. We are talking about, literally, under these classifications, hundreds and hundreds and hundreds of commodities and having done all that, if it takes you six months or seven months or a year or two years and so on and so forth, by the time the ink is dry and the thing is printed up it is probably out of date because there has been a tax cut, an oil crisis, the prime interest rates have changed.

The District Court's critique, we submit, of the commission's environmental impact, comes down to simply this, that the commission could have done more.

But that, we submit, is a standardless inquiry, we submit, as well [as] that the commission could always do more when it is engaged in environmental forecasts, which brings us to what we think is the basic proposition in this case.

While we believe -- and we have said in our brief, that every agency must take a hard look at the environmental consequences of what it proposes to do, that, nevertheless, the nature of the inquiry depends on the nature of the function performed by the agency.

This was a general revenue proceedings. The commission's inquiry was very general. The one thing that is clear under Section XV(7) of the Interstate Commerce Act is that Congress wanted the commission to answer the question, do the railroads need increased revenue? Not to say, did the railroads need increased revenue way back when, which is what the commission will have to do if they are ordered back to reopen this proceeding and we submit as well that under NEPA what Congress wanted an agency to do was answer the question, will this action have an effect on the environment?

Not answer the question, did that action have an effect on the environment?

And the reason I say that is because if the commission does not act within seven months, then the rates go into effect under Section XV(7) of the Interstate Commerce Act.

Let me emphasize this again.

The Interstate Commerce Commission cannot revise the entire underlying rate structure in a general revenue

proceeding. It can only consider the question whether the increase in rate is justified by the railroad's needs.

We submit, in that situation, the only thing the commission has to analyze is whether that increase in rate will have an adverse effect on the environment.

QUESTION: The assumption is that the existing rate structure is satisfactory and the only question is whether you want to or need to increase it across the board.

MR. RANDOLPH: In a general revenue proceeding, that is correct.

Now, the commission did not say that, well, we are going to take the underlying rate structure as a given and we are going to ignore whether that has environmental effect.

The commission said that we are studying that in ex parte 270. We have hired a special counsel. We have these proceedings going on.

To consider the entire rate structure of the United States is no small task. This is only the second time in the commission's history that it has hired a special counsel and the Court, of course, knows who the first one was, Mr. Justice Brandeis.

But I just want to say one more thing about the question of looking into the underlying rate structure.

The District Court relied upon comments from other agencies and you have to read the District Court's opinion very carefully in this regard because the Court did not say that the commission failed to respond to comments of other agencies when it issued its impact statement.

On page 31-A, what the Court said is, "The commission did not order its conclusions in response to comments of other agencies."

Well, the other agencies, for example -- on page 706 of the Appendix, the Council on Environmental Quality gave a comment to the commission when it issued its impact statement. It said, "We are aware of the difficulties in accomplishing everything that we think you should do in a short time and therefore, what we suggest is that you postpone any rate increases on recyclables pending completion of ex parte 270, the separate proceedings."

The commission's response to that suggestion was, "You are right, we are going to go ahead with ex parte 270."

We can't postpone increases on recyclables.

Of course, under XV(7) of the Act, we can't say that, well, we are not going to allow this increase to go into effect after seven months because we are not sure what effect it is going to have.

Under XV(7) of the Act, the commission has to say, "We are going to allow the increase to go into effect unless

we have solid evidence that it would be unjust and unreasonable." Therefore, the commission had to allow the increase to go into effect.

There are a number of other comments that were made. I submit that the comments of other agencies here were answered, were responded to.

If you read through the impact statement, it is replete with responses to it, comments of other agencies and so on and so forth.

I'd like to conclude by just saying one word about the hearing requirement. The District Court said that when this goes back, the ICC has to conduct an oral hearing.

NEPA does not require oral hearing. XV(7) of the Interstate Commerce Act does not require oral hearing. Somehow, the District Court put those two statutes together and came up with a requirement of oral hearing. I am not entirely clear why and we don't think that kind of analysis should be affirmed by this Court.

Therefore, we ask for reversal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Randolph.

Mr. Hellegers.

ORAL ARGUMENT OF JOHN F. HELLEGERS, ESQ.

MR. HELLEGERS: Mr. Chief Justice, and may it please the Court:

I respectfully submit that this is a case in which this Court lacks jurisdiction. The case is here on direct appeals under 28 U. S. Code Section 1253 from the grant of a 13-month-old declaratory judgment that the Interstate Commerce Commission is obliged to prepare an adequate environmental impact statement in ex parte 281, this general revenue proceedings and that it did not, in fact, do so.

Now, if I had to depend for my information on this case on the jurisdictional statements and the briefs of the Appellants, I would have thought that this declaration had deprived the Appellant Railroads of millions of dollars in lost revenues and paralyzed the commission's ability to conduct general revenue proceedings and that this was why the judgment was appealed.

But on closer examination, it turns out that this simply is not so. It was left to us to bring it to the attention of the Court that the ICC has issued a whole series of general revenue orders in the last 13 months, probably more so than in any other year in recent history.

This includes one that was served just yesterday which was lodged with the Court and, also something that I would never have guessed from reading the Appellant's papers, was that if we take the rates, the actual rail rates that are allowed by the commission in effect just prior to ex parte 281 -- this proceeding as being 100 -- then it turns out that

now the rates on primary commodities -- defined as all those that are not recyclables-- would be in the neighborhood of 140 and those unrecyclables would be in the neighborhood of 120.

Now, I submit that the judgment from which these appeals were taken is certainly not an injunction and I would also point out that nobody claims that it is.

Rather, the claim is that there is an unwritten exception to Section 1253 which authorizes direct appeals to this Court, not only from the grant or denial of an injunction -- what 1253 requires -- but also from certain noninjunctions and I would point out that the Appellants do not rely on any currently effective statutory language for that proposition.

What they rely on is ghost language which was deleted from the traditional code 27 years ago in 1948.

QUESTION: If a case identical to this had been here in 1947, would you say that we had no jurisdiction over it?

MR. HELLEGERS: I was just about to answer your Honor's question.

The answer to that is that if this case had come up under the Urgent Deficiencies Act, on the surface of it, it might appear that the Urgent Deficiencies Act would confer jurisdiction but I think that there is some

considerable doubt about that under the peculiar circumstances of this case.

The Urgent Deficiencies Act allowed appeals not only from the grant or denial of an injunction but also from the final hearing in any case that was brought to suspend or set aside an ICC order.

Now, I'd like to call the Court's attention very particularly in that context to a case that was cited to us by the railroads and which I regret that we did not pick up in our brief, but I certainly would if the brief were being written today.

That is the case of the United States versus Griffin which is in 303 U.S. 226 and in Griffin, the Supreme Court in a unanimous opinion -- or a unanimous judgment in an opinion by Mr. Justice Brandeis -- construed the Urgent Deficiencies Act and held that its grant of extraordinary jurisdiction -- three-judge courts and direct appeals to the Supreme Court -- was not to be read even as broadly as its literal language when the result of that would be to authorize jurisdiction which had no substantial policy justification.

Specifically in Griffin, the issue was that the Urgent Deficiencies Act, on its face, authorized three-judge court jurisdiction in any suit brought to spend, set aside, enjoin or annul any order of the Interstate Commerce Commission and the Court held that the words "any order" did

not mean literally "any order," because there are some orders of the Interstate Commerce Commission which, said Mr. Justice Brandeis, are manifestly not of such public importance as to require this jurisdiction and the extraordinary procedure of a three-judge court and direct appeals to the Supreme Court.

So on the construction that the Court put on the Urgent Deficiencies Act in Griffin, I would say that it is doubtful whether, even had that statute been in effect, whether a case as highly unusual as this would warrant direct review by the Supreme Court and, a fortiorari, there is certainly nothing in the Urgent Deficiencies Act which requires the -- or certainly on the current statutes which requires the Court to give literal construction to a statute which has been dead for 27 years in order to authorize an appeal here which has no substantial policy justification.

QUESTION: Well, you cite a statute that has been dead for 27 years. Are you arguing, then, that the revisers of 1948 intended to change?

MR. HELLEGERS: Well, I am arguing, certainly, that they took out the language on which the Appellants relied for jurisdiction in this case.

QUESTION: Well, but then you argue that the revisers did intend to change?

MR. HELLEGERS: Well, I am arguing, your Honor, that the jurisdiction in this Court, it seems to me, is a matter that is governed by statutes and is governed by currently existing statutes and the rule for many years has been one of strict construction of jurisdictional statutes and the -- I think a fair paraphrase of that rule is that if Congress wants to confer extraordinary jurisdiction on this Court for direct appeal, that it has to do so specifically in terms and in literal statutory language and just last December, the Court had a case, the Gonzalez case, in which it was held that 1253, which is the statute under which this purportedly comes up, is not to be given the full breadth that/literal its language might imply, if this leads to undesirable results.

QUESTION: Well, it is one thing, I think, for this Court to say something like that but I think quite another to say that Congress, when it adopted a revision of the entire judicial code and one section was put in somewhat different form, intended a substantive change.

MR. HELLEGERS: Well, the case on this that is cited to us your Honors is the Rider case, which goes back to 1884 and the proposition/which Rider for is cited is that in this kind of revision that Congress has not intended to make changes.

But I have looked into this, [?] I have shepherdized

Rider, read the succeeding cases and I have never found a case and none has been cited to us by the Appellants, in which the Rider rule was used to create direct appeal jurisdiction in this Court, for that was in derogation of the then currently-existing statutory language, so --

QUESTION: Well, what is the deficiency? This order of the three-judge "vacated" the orders of the commission and "ordered" the commission to conduct "further proceedings."

Now, what is the deficiency in that, in 1253 terms?

MR. HELLEGERS: Well, I think that, as your Honor read that order, it is in two parts. One purports to vacate the Interstate Commerce Commissions orders in ex parte 281 and the other remands the case to the Interstate Commerce Commission for further proceedings in accordance with the opinion.

QUESTION: Well, and ordered the commission to conduct further proceedings.

MR. HELLEGERS: All right, fine.

QUESTION: Yes.

MR. HELLEGERS: I think that we have to look at those parts one-by-one and on the first part, the words "vacate" and "void," which the Court also used sound, certainly, as if they ought to mean something but when we

look more closely at this, we find that they mean almost nothing, even potentially; perhaps literally nothing.

We assumed in writing the brief that the lower court was correct in its characterization of the effect of vacating the commission's orders when it said, "The only effect of our vacating the commission's orders is that the railroads may not rely in certain hypothetical subsequent proceedings on a commission finding that the proposed rates in 281 were just and reasonable and we took that at face value.

The Appellants said nothing, which tended to suggest that that was wrong.

I have since been persuaded that the lower court's "vacating" of the Commerce Commission's orders doesn't even have that effect and the reason is that the Interstate Commerce Commission specifically declined to make any finding that these rates were just and reasonable and there is also some ambiguity in the Government's brief which we picked up in ours about whether the vacating of the commission's orders is going to have an effect on the burden of proof in hypothetical subsequent reparation proceedings, should any occur and the way that we picked it up from the Government's brief was that the vacating of the commission's orders would have the effect of shifting the burden of proof.

I have since been persuaded that that is not correct, either, that the burden of proof in a XIII(1) proceeding is

always on the complainant and that nothing that happens by way of voiding or vacating a general revenue order.

QUESTION: Well, now, what about the word "ordered?"

MR. HELLEGERS: Well, I think that --

QUESTION: That is sort of injunctive, isn't it?

MR. HELLEGERS: Well, I think for that we would rely on the Taylor versus Board of Education case, Judge Friendly's opinion in that in which he says that not every order that has words of command is an injunction, just as not every order that has words of prohibition is an injunction on that side, either.

But, certainly, what the Court did did not meet the requirements, say, of Rule 65 for an injunction as to form. It was not counched in language of injunction and, indeed, none of the Appellants here --

QUESTION: Do you think "injunction" in 1253 means only that which satisfies Rule 55?

MR. HELLEGERS: Well, "injunction " under 1253 is a word to be construed very narrowly, as your Honor will recall from cases like Mitchell versus Donovan and Gunn versus University Committee to End the War. The word "injunction" as it appears in 1253 has always been subject to this canon of very narrow construction. It is not a catch-all term which encompasses everything that doesn't fit

neatly into some other category.

So our contention on that is that this order comes in two distinct parts and neither one of them satisfies the test for injunction so the question is, why are we here and why does this Court have jurisdiction?

Now, in talking about United States versus Griffin, again, I brought out the point the test there was whether the order which was sought to be brought here was of a kind of public importance that would warrant that.

Here, of course, the order is 13 months old. It has never had any practical effect in the real world so far as I can determine on any rate charge.

It has had no practical effect whatever in impeding the commission in approving subsequent general revenue orders and, indeed, they have had more in these 13 months than I think they have had in any other 13-month period in recent history.

QUESTION: You mentioned that before but do you think inflation has anything to do with that?

MR. HELLEGERS: I am sure it does, your Honor. I think that is the reason that --

QUESTION: It is not very surprising that you have this great increase, unrelated to anything that has happened in the environmental situation.

MR. HELLEGERS: I did not intend to express

surprise that they had these. My point was that nothing in the lower court's opinion has had any practical effect on --

QUESTION: You haven't mentioned, or if you did, I missed it, the Wichita case here where the -- as I recall it, we remanded -- we were dealing with a case where the District Court remanded to the commission, much as was done here.

MR. HELLEGERS: Umn hmn.

QUESTION: What do you have to say about the Wichita holding?

MR. HELLEGERS: Well, I would treat Wichita along the --

QUESTION: In terms of our jurisdiction?

MR. HELLEGERS: Yes, sir. I would treat Wichita along with all of the other cases which the Appellants cite for the proposition that there is no practical distinction between enjoining and setting aside an ICC order and that that distinction has been blurred in previous cases and I think the reason that that has been blurred is that in those cases there was no practical distinction.

In all of these, including Wichita, so far as I can recall, there was some direct, immediate, practical effect from the lower court's order. Somebody either could do something or he could not do something or he was enjoined to do something or -- but it had an effect on what people

could do in the real world and here we don't. We have had 13 months and it has had no effect.

Now, I'd like to pass very briefly to the issue of the lower court's jurisdiction and on that I'd like to leave my argument principally to the briefs and specifically to some briefs that were not in this case, but to the Government briefs in the Alabama Power and Atlantic City cases that were before this Court five years ago, in which the commission took a long, hard look, as they say, at the jurisdictional issue of the lower court and came out to a conclusion that was squarely in favor of us and the Government has reaffirmed that conclusion here, saying that the Alabama Power and Atlantic City argument that it made is fully applicable in this case.

The only thing that I would like to say on that issue in addition to that is that it seems to me that the heart of Mr. Horsky's argument is that this suit is really just a backdoor effort to get rate reparations without going through the administrative procedure that is set up for rate reparations, a XIII(1) proceeding.

That, I would submit, is simply incorrect.

Nobody in this case has asserted that he has any absolute right not to pay the rates as raised. What the argument is, is that if the commission wants to raise these rates, and we concede that it is its discretion to do so,

that the commission has to comply with its statutory procedural mandates and we claim that that is not the case here and that therefore we are entitled to have judicial review of our claim that it is not and I would submit that that puts the case on all fours with the Overton Park case that was here four years ago where the Plaintiffs in that case did not assert any absolute right not to have a highway built through their park, they simply claimed that if the Secretary of Transportation was going to approve such a highway, he had to follow the proper procedure and the Court, of course, held that they were entitled to judicial review of their claim but that that did not happen there.

Now, I'd like to move, finally, to the merits.

The central contention, it seems to me, on the merits is that it is beyond the power of the lower court or of any court to tell the Interstate Commerce Commission that it has prepared an inadequate environmental impact statement in the general revenue proceeding and that is so even when the clear consensus of comments from sister agencies with environmental expertise -- which the Interstate Commerce Commission is specifically required by statute to consult and obtain the comments from in preparing its environmental impact statement, from the consensus of these other agencies, this is a sadly deficient statement.

In fact, I think we can fairly and conservatively characterize those comments as being scathing and I'd like to call the Court's particular attention to something that was filed yesterday by Mr. Merrigan which I just saw yesterday noon for the first time.

This is Mr. Merrigan's supplemental brief for Appellees National Association of Recycling Industries et al. Unfortunately, it is in the same shade of green, or almost, as our brief in chief but at Appendix D, which is pages 9A through 18A, we have correspondence from the -- between the United States Environmental Protection Agency and Mr. Merrigan-

QUESTION: Now, you have lost me here physically for a moment. What page in this and Mr. Merrigan's?

MR. HELLEGERS: It is in the one, your Honor, labeled "supplemental brief" and it would be at 9-A and following pages, Appendix D.

QUESTION: The one that was filed yesterday.

MR. HELLEGERS: That's right.

QUESTION: All right.

MR. HELLEGERS: On page 9A we have a letter to Mr. Merrigan from a deputy assistant administrator for solid waste management programs of EPA and then we have some correspondence between the Environmental Protection Agency and the office of the Solicitor General in which EPA requested permission to file a brief in this case and the

letter in which they requested leave to file was a fairly good precis, I would imagine, of what they intended to file and when I say "scathing comments," I refer, for example, to what is at the top of page 12A, where the Environmental Protection Agency actually calls into question whether the look that the commission took at environmental effects in this case was made in good faith. They actually used those words, which are words that go beyond anything that we have said or felt that we had to say.

There are many other comments that were made by other environmentally expert agencies and I emphasize again that the Commission was required to solicit their opinions in this case and consult with them.

They are extensively cited in our brief.

QUESTION: What is this letter we have from the Solicitor General that we just got this morning?

MR. HELLEGERS: Well, I just got that this morning, too.

QUESTION: That refers to this supplemental brief?

MR. HELLEGERS: It refers to this and, as I recall it, the substance of that letter is directed to Mr. Merrigan's allegation that C.E.Q., the Council on Environmental Quality also sought leave to file a similar brief.

QUESTION: Does this have any relation to your argument or is your argument --

MR. HELLEGERS: Well, I am arguing only from what I see in print before me.

QUESTION: Do you agree with the Solicitor General or not?

MR. HELLEGERS: About what?

QUESTION: What he has said, his criticism.

MR. HELLEGERS: Well, I have no knowledge of whether the C.E.Q., for instance --

QUESTION: I see.

MR. HELLEGERS: -- has tried to file a brief and I --

QUESTION: I'm sorry, I just --

MR. HELLEGERS: -- we got into a few time problems which is why this wasn't permitted to be put before the Court by the E.P.A. itself. It had to come through Mr. Merrigan.

Now, these comments here that I am directing the Court's attention to right now come from the Environmental Protection Agency which, through its office of solid waste management is also very actively and expertly involved in questions of recycling of commodities and the effect of rail rates there.

Now, I'd like to call the Court's attention to something else that was just lodged yesterday because we got it only yesterday.

This is the Interstate Commerce Commission's order

in ex parte number 310. The service date is March 25th, 1975, which was yesterday and I'd like to call the Court's particular attention to page 39.

QUESTION: Now, what does that one look like?

MR. HELLEGERS: It looks like this.

QUESTION: It came in yesterday.

MR. HELLEGERS: It came in yesterday. Yes, sir.

QUESTION: 39?

MR. HELLEGERS: Page 39 of that.

And there the Interstate Commerce Commission makes the statement that it remains a basic economic fact -- this is, oh, maybe 10 or 15 lines down in the second paragraph, right after footnote 4 -- it remains a basic economic fact that not granting a proposed rate increase for recyclables will generate a degree of positive environmental benefit and then if you read down to footnote five, you find that their expert authority for the effect of rate increases on the environment is the U. S. Environmental Protection Agency, 1974.

Now, also this proposition that the -- that it lies beyond the Court's power to tell the Commission that its impact statement is inadequate would require the Court in this case to disregard the history of the case which is the history of the ICC using the word "insignificant" like a rubber stamp to characterize the environmental impact of

raising freight rates.

As we point out in our brief, the prior history prior to this impact statement is that the ICC had never prepared an impact statement on any rate regulation activity of its and its device for avoiding this was that it made a boiler plate finding in each of a great number of cases that the proposed action would have no environmental impact and the lower court found that this was "glorified boiler plate, a mere strategem " and words to that effect and that, of course, is not challenged in this Court.

But the point of this is that the ICC kept using this word "insignificant" and so we come to the present impact statement and lo and behold, we find a very prolex document and after each section the ICC tells us that the environmental impact of what it proposes to do will be "insignificant." There is that word again.

And it doesn't give any figures to tell what it means by "insignificant."

Now, there has been criticism of our use of the impact statement in ex parte 295 but in ex parte 295, the ICC finally got around to saying what it meant by "insignificant" and it turns out that what they mean by "insignificant" is that a three percent rate increase on metal scrap alone, not counting any other kind, will have the effect of requiring increased consumption of electric power sufficient

to supply a residential city of 130,000 people or 43,000 households, assuming about three persons to a household, according to the current census data and it turns out that the fuel cost of generating that electricity alone is going to be in excess of $6 million which is a figure that no one has contested since we have used it in our briefs.

It turns out that the capital costs of creating the generating capacity for that is in excess of $39 million.

Now, the point of these uncontested figures is that maybe you think that these figures are insignificant. Maybe you don't. But it is a point on which there can be disagreement and there is nothing -- and I emphasize that -- there is nothing in the historical expertise of the ICC which automatically validates its characterization of an insult to the environment or costs as being insignificant so we have to know what they mean by insignificant.

Now, it is argued that the 295 and following impact statements merely reaffirmed the Interstate Commerce Commission's finding in ex parte 281 that the impacts were insignificant but the difference is that we know what "insificant" means now and we didn't know then and, as I said, you can differ as to whether that word ought to be applied and other agencies have differed.

On the last page of the ex parte 295 impact statement -- I'm afraid there is only one copy, I think,

with the Court but the Department of the Interior quite gently points out that the assumption that a change of less than one percent in metals consumption is insignificant can be questioned. I think that is a very conservative statement and EPA, in this material that is filed at the rear of Mr. Merrigan's brief, on page 14A, looks at those figures and looks at the conclusion "insignificant" and it says that in ex parte 295, which is certain scrap commodities, the commission has reached conclusions contrary to those of its cursory analysis in ex parte 281.

Now, in conclusion, I'd like to point to something that has greatly struck me about the briefs in this case that we have gotten from Appellants and that is the distance travelled in those briefs between the jurisdictional statements in the original briefs and the reply briefs.

I thought that the reason that this case was brought to this Court when I read the jurisdictional statements in the opening briefs was that the lower court's judgment was going to require things that were literally impossible.

Now, in the reply briefs, we find that, well, they are arguing that not only are these things not impossible but the deficiencies have been cured since and these supposedly impossible things have been done.

We found it argued in the opening brief that this

would bring general revenue proceedings to a screeching halt. We were not told that -- there have been four or five, depending on how you count, since that -- we were not told that the rates had gone up by 40 percent on virgin materials and 20 percent on scrap.

Thank you. That -- yes, sir?

QUESTION: Mr. Hellegers, I was reading over this United States against Griffin that you cited to the Court and that seems to go to a limited construction of the District Court's jurisdiction rather than to a limited construction of this Court's jurisdiction.

I would think that would enter into the proposition that perhaps the District Court didn't have jurisdiction, not that we don't have it.

MR. HELLEGERS: Well, it seems to me, your Honor, that what it is doing is taking jurisdictional language from the Urgent Deficiencies Act which, as the Court says, creates extraordinary jurisdiction and the words "extraordinary jurisdiction" can obviously be applied as well to this Court's jurisdiction, perhaps more so, as to the lower courts and it is saying that when that language literally followed, or blindly followed is going to lead to a result which has no policy justification, then it will not be followed and it seems to me that that is equally as applicable to the question of direct appeal jurisdiction in

this Court which has always been most narrowly confined.

QUESTION: Do you say then it is quite conceivable that even though Congress wanted a case to be heard by three judges rather than one in the District Court, it might not have wanted it appealed directly to this Court?

MR. HELLEGERS: Your Honor, the answer to that is that this case was brought before a three-judge court because we asked for an injunction. We asked for an injunction against the collection of certain rates pending the completion of an adequate environmental impact statement.

Had we asked only for the relief that was, in fact, granted, I would submit that that would have been proper to bring before a single judge and that that would have gone to the Court of Appeals.

Now, I would call your Honors' attention also to the Brashear case which we cite in which it is held obviously that not everything that is heard before a three-judge court by virtue of that alone qualifies for direct appeal to this Court.

MR. CHIEF JUSTICE BURGER: Mr. Merrigan.

ORAL ARGUMENT OF EDWARD L. MERRIGAN, ESQ.

MR. MERRIGAN: Mr. Chief Justice and may it please the Court:

I appear here today for the National Association of Recycling Industries, your Honors.

This industry represents -- the trade association represents all the processors, collectors and manufacturers who utilize waste paper, textile wastes and nonferrous metal scraps such as copper, lead, aluminum and so forth in manufacturing processes.

NARI, of course, has been a party to the 281 proceedings before the commission and intervened in the case before the District Court and has participated in all those proceedings since before -- I think before this case was last before this Court.

I want to say from the very outset, your Honors, that this case clearly does not involve any complicated abstract environmental issues such as Mr. Randolph seemed to try to indicate to this Court today.

He -- I think that his description of the situation is pretty much the same type of approach the commission has taken. They really simply can't see the forest for the trees and they haven't tried to see the forest. They have been climbing over tree after tree.

There are three statutes that this Court really has to look at when you approach this case to understand what Congress has been trying to get this commission to do.

First is NEPA itself. NEPA says in the very opening section, 4331(b) that it is the duty of the Federal Government to use all practicable means consistent

with other essential considerations of national policy to enhance the quality of renewable resources and approach the maximum obtainable recycling of depletable resources.

That is statute number one.

Statute number two is the Resource Recovery Act of 1970 whereinCongress directe d the Government to study the transportation rate situation and the picture covering recyclable commodities and to correct it where it discriminated against recyclables.

And then just recently, when Congress had before it the Railroad Reorganization Act of 1973 which was dealing with the failing railroads in the east, it again concluded a section 603 which directly pointed to the Interstate Commerce Commission and directed the commission to adopt appropriate rules to eliminate discrimination against the shipment of recyclable materials in rate structures where such discrimination exists.

So we start this case with an understanding that the commission has been clearly directed by Congress and this Court has a legal basis to proceed from, not a complicated, abstract environmental basis, you have a legal basis to proceed from to understand that the commission simply has not been doing its job in this area and that is what this is all about.

Now, the history in this case is that right on

through the rendition of its final order in ex parte 281, the commission plainly refused to file any impact statement whatsoever -- any impact statement that could be called an impact statement. And they approved the increase on recyclable commodities without filing anything under NEPA.

It was only when an injunction was there and then threatened -- because they would have been clearly beyond the pale of the law that they then reopened the case at that point and five months later, after they had approved the rates on recyclables already, they issued a draft statement and seven months later, without holding any hearing whatever, they issued the final statement which is of course before the Court today.

Now, your Honors, to understand the real essence of this case, I ask you please to look at pages six to seven of our main brief before this Court which is the green original brief. It sets forth what the real rate picture is and what Congress has been trying to get at with its commission and what this commission has been refusing to do.

In 1959, the --

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch, and I think your five minutes is consumed, Mr. Merrigan.

[Whereupon a recess was taken for luncheon from 12:00 o'clock noon until 1:01 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Merrigan, you have a minute.

MR. MERRIGAN: Thank you very much, your Honor.

I was directing the Court's attention to pages six and seven of NARI's main brief in this case and with the limited time I have left I can only ask your Honors to look at those rates which are taken from the commission's files.

Those are the net average rates for the transportation of competing recyclable waste paper and wood pulp and competing metal scrap and ores to show how the annual rate increases by their steady application alone can continue to exascerbate the discrimination in those rates year by year by year.

I also just want to briefly say, your Honor, that when Mr. RAndolph for the Solicitor General said that section under -- there are really different rates in these ex parte proceedings, I would ask your Honors to look at 23 of our supplemental brief and understand that that makes the section XIII complaint procedure absolutely no remedy whatever because that means that the shipper in a case of this kind must challenge rate after rate after rate and we estimate on the basis of the railroad's own figures that it would take 1,000 to 3,000 case years to challenge just the

rates in the eastern district alone. That is in our supplemental brief.

In his closing, the Solicitor General stated, "When Congress passed NEPA, it intended to say, well, this Court, what impact will an increase have?" Not, did it have an impact.

In this case we say that this is the nub of this case, that the impact statement was not made until after the commission had approved the increase and then for the first time had looked at the impact.

Thank you.

QUESTION: Mr. Merrigan, does it make any difference in the applicability of NEPA to this case that the rates are set by the carriers rather than by the commission?

MR. MERRIGAN: No, your Honor, we say not because under XV(7) the statutory scheme is that they file the rate then it is subject to commission approval and in answer to what Mr. Horsky said in his argument, the commission passes not only on the -- the commission passes in a XV(7) proceedings on the lawfulness of the rates and that is what is involved here.

We say these rates are unlawful because of the violation of NEPA.

QUESTION: But there has presumably been no violation of NEPA by the railroads.

MR. MERRIGAN: Well --

QUESTION: Because they are not subject to it. [?]

MR. MERRIGAN: Well, NEPA is a draft of the federal agency, the commission and the commission has its statutory duty under the Interstate Commerce Act and, of course, under NEPA, too, to perform its function under NEPA and this act and I don't understand the Government to argue, either the Government or the railroads to argue that the commission does not have the duty to prepare an impact statement.

That seems to be out of the question any more that they would argue that.

They do have the obligation under NEPA and since this is a proceeding under the Section XV(7) of the Interstate Commerce Act, this is a major federal action which has to be supported by a NEPA statement because of the Government's involvement.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Butler.

ORAL ARGUMENT OF E. BRUCE BUTLER, ESQ.

MR. BUTLER: Mr Chief Justice and may it please the Court,

I'd like to summarize to the Court what we feel to be the basic inadequacies with this statement.

These are essentially that the commission failed

to come to grips with central issues posed by other federal agencies.

QUESTION: Could you preface that by a statement of what you understand to be the role of the Court in this area with respect to the subject matter you just spoke of?

MR. BUTLER: We would suggest that the courts -- the lower courts -- have an obligation to look first at whether there has been procedural compliance with the specific statutory requirements of NEPA, namely, whether the commission in this case has filed an impact statement discussing the points outlined --

QUESTION: Well, assume procedurally the commission has complied. Beyond that, what is this Court supposed to do?

MR. BUTLER: Well, I think that that is the real question here, what -- where does procedure end and substance begin? And we would suggest that, certainly, at the bottom end, the underlying rate action is clearly a substantive matter.

The conclusion of the commission as to whether -- is there an environmental impact? That, we would also suggest, is a conclusionary.

Those, we would also agree that [they] should be tested by the arbitrary and capricious standard.

The question, did the commission come to grips with

central issues? we believe is a procedural matter and therefore, tested under the rule of reasonableness, we suggest in our brief.

And looking at that in that manner, we feel that the lower court was entirely correct in concluding that the commission did not come to grips with the central issues.

CEQ --

QUESTION: What does that mean, "Come to grips with the central issues"?

MR. BUTLER: Well, CEQ --

QUESTION: You mean, just ignored issues or they dealt with them but you don't like the way they dealt with them?

MR. BUTLER: The former, clearly.

QUESTION: And both, I gather.

MR. BUTLER: And obviously the second but that is not what we are here arguing.

We are suggesting that CEQ and EPA made numerous comments to the federal agencies suggesting that various matters be considered. What is the impact on long-term investment? What is the impact of the underlying rate structure?

Some of these issues such as the underlying rate structure clearly, the commission offers a conclusion. It offers no supporting data, another issue which simply does

not address the subject matter and, as evidence for this, we would cite the comments of these five agencies.

I don't think it serves any purpose to try and read these to you now. They are in the record. They have been excerpted by each of us. But, as was suggested earlier, the comments are scathing and they continue till today.

QUESTION: You think they must, then, affect writing opinion?

MR. BUTLER: No, a --

QUESTION: That covers all the points you think should be covered. Otherwise, there has been a procedural default.

MR. BUTLER: No, I think -- and this was not something that was an after-the-fact suggestion by these various agencies. These are comments that were made very early in the proceeding by all the -- not only agencies but the parties involved.

QUESTION: Well, if they omit to discuss and dispose of a suggestion by an agency expressly, you take it there has been a procedural default?

MR. BUTLER: Well, it is the rule of reason, I would suggest, that you have to look at it in its totality, how many various --

QUESTION: Well, your answer is yes, with some

issues that is true. If they don't expressly say something about it, there has been a default.

MR. BUTLER: That is clear, yes.

QUESTION: Even if you are convinced that the agency knew about it and rejected it, and had to reject it in order to --

MR. BUTLER: I think the purpose of NEPA is that in the environmental impact statement, the commission is to set forth what its reasoning is so that not only the courts can judge what the issues are but NEPA is also for the benefit of Congress and the President so that they can judge what the basic environmental issues are and take future actions depending on that.

If there are no further questions, I thank the Court for its indulgence.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. RAndolph.

REBUTTAL ARGUMENT OF A. RAYMOND RANDOLPH, ESQ.

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court:

Justice White, I'd like to pick up with a question that you just ended with.

The fact of the matter is, in this case the District Court did not charge the commission with failing to respond to the comments of other agencies. What the District

Court said, precisely -- on page 31A of its opinion -- is that the commission responded but it failed to alter its conclusions, not that it didn't respond.

It simply failed to alter its conclusions because the fact of the matter is that throughout this entire impact statement, the commission responded again and again and again to the various comments of the federal agencies.

For example, EPA, CEQ, Department of Commerce thought that the commission should engage in a study regarding whether increases or costs justified for each recyclable commodity.

On page 149 of the Appendix, the commission responded. It said that burden would thrust upon the railroads to cost-justify increased rates on each of tens of thousands of commodities between hundreds of thousands of points and "could ensnare the railroads in a morass of calculations from which they would never be able to extract themselves."

GSA said that the ICC should keep transportation of recyclable commodities under continued surveillance.

At page 158 of the Appendix, the ICC responded "will do so." It is doing so in ex parte 270.

The Commerce Department, EPA and CEQ all said, examine the present rate structure. At pages 24 to 58 of the commission's environmental impact statement, the

commission said, "Whether the increases in rates over the years have caused a misalignment or discrimination against certain commodities is a matter we are studying in ex parte 270," which is an ongoing investigation of the entire rate structure.

Interior Department suggested that the ICC include a table of contents in its impact statement. You'll see at Appendix page 199, the ICC did so.

The Interior Department -- or the CEQ said that the ICC failed to analyze the effect on investment decisions. The ICC responded to that at page 157.

On and on and on, this whole impact statement but curiously enough, the ICC has responded to all these comments. The curious thing is the other agencies haven't responded to the ICC's response. I don't know where one cuts off this dialog back and forth but it seems to me that, as I stated originally, that the point that the District Court made and said was the fundamental defect in the ICC's impact statement -- on page 34A of the decision of the District Court -- was its failure to discuss the underlying rate structure and CEQ said to the ICC, you ought to do that.

Now, we understand your time constraint, so do it. What you should do is, hold down the rates on recyclables and continue your investigation in this other proceeding, ex parte 270.

The ICC said, we don't have any power to do that under the Interstate Commerce Act.

I take it the ICC, out of all these agencies, was the expert on that question.

I would also like, in the ime remaining, to bring to the Court's attention -- there has been a great deal of talk about the supplemental brief that was filed yesterday.

The supplemental brief was filed by counsel for NARI and it is a green-- sort of an off-green color and I would direct the Court's attention to pages 14A to 15A of that supplemental brief. It is kind of buff-green in color.

That contains the letter from EPA that was directed to the Solicitor General, the letter is dated, I believe, February the 4th. If you take that letter and compare it to pages 10 to 11 of the SCRAP brief, you'll notice something quite peculiar.

Beginning at the bottom of page 10 of the SCRAP brief -- which is the large green copy -- and carrying over to page 12 of the SCRAP brief, there is a whole series of quotations that I pointed out originally in my opening argument which we think were taken completely out of context and distorted what the commission found in later proceedings.

The exact same quotations appear in exactly the same form in the EPA letter to the Solicitor General. We think the EPA -- and I might add that we think the EPA

letter came to the Solicitor General's office one week before the SCRAP brief was filed.

I don't think I have to say much more about that.

The other point is that there has been a great deal of talk about what significance ex parte 295 has here. The SCRAP people tell you that the commission has now quantified its findings. It is giving you numbers.

What they fail to point out is that, just last week, Mr. Merrigan filed a suit -- almost the same as this -- challenging ex parte 295, the commission's later findings.

Why? Because in ex parte 295, as in ex parte 281, as in every general revenue proceeding the commission has had, it has not been able to examine the underlying rate structure which is supposedly the fundamental defect that the District Court found.

It would be impossible for the commission to examine the underlying rate structure in a proceeding which is coming now at the rate of every six months.

The District Court said that that was the fundamental deficiency in the commission's decision, failure to examine the underlying rate structure.

I repeat that the point that we want to get across to you most emphatically is that in a general revenue proceeding, the commission cannot alter the underlying rate structure. All it can simply do is look at whether the

increases are cost-justified, whether the revenues that the railroads are bringing in as opposed to their costs justify an increase.

The ex parte 310 that was served on the Court this morning shows that the commission's findings are clearly correct. The railroads suffered the greatest losses since the Depression in the first quarter of this year.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:14 o'clock p.m., the case was submitted.]