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In the

Supreme Court of the United States

UNION ELECTRIC COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 74-1542
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

Washington, D. C.
January 21, 1976

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v.	:	No. 74-1542
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	:	

Washington, D. C.

Wednesday, January 21, 1976

The above-entitled matter came on for argument at 10:07 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

WILLIAM H. FERRELL, ESQ., 314 North Broadway, St. Louis, Missouri 63102, for the petitioner.

PETER R. TAFT, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20530, for the respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 1542, Union Electric Company against the Environmental Protection Agency.

Mr. Ferrell, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM H. FERRELL

ON BEHALF OF PETITIONER

MR. FERRELL: Mr. Chief Justice, and may it please the Court: This case arose in the United States Court of Appeals for the Eighth Circuit. It arose by petition brought under the judicial review section of the Clean Air Act Amendments of 1970 to review the sulfur emission regulation in the Missouri implementation plan.

Section 307(b)(1) says that petitions may be brought within two different time periods. In the first place, petition may be brought within 30 days after the Administrator of EPA approves the implementation plan. In that event, it is probable that there would be an administrative record which is susceptible of review by the Court of Appeals.

The section secondly says that petitions may be brought at a later date if they arise solely on grounds that have occurred more than 30 days after the EPA approved the State-devised implementation plan.

So far as we have been able to ascertain, this is the only case in the United States that has been brought more

than 30 days after the EPA-approved implementation plan and, of course, brought on grounds that arose more than 30 days after such approval.

There were a substantial number of cases that were filed within this initial 30-day period which in 99 percent of the cases occurred within the month of June 1972, and those cases have resulted in a fairly substantial number of opinions by the several United States Courts of Appealsin the various circuits because these implementation plan review petitions must be brought in the appropriate circuit, First to Tenth.

Results differ in those decisions, and I think it's the differing results that have occurred, vis-a-vis themselves, and the differing result in many of those cases with the result reached by the Eighth Circuit in the instant case that is now before your Honors is the reason this case is here. That is the basis for the grant of certiorari.

Now let's take a quick look at the allegations of the petitioner's petition. Union Electric alleges that three of its base load electric generating plants -- and base load plants are the ones that supply the bulk of the electricity -- three of them, all located in the State of Missouri, in the Eighth Circuit, do not meet the sulfur emission regulation in the State-devised implementation plan that by EPA approval has become Federal law.

We allege that grounds which have arisen more than

30 days after the EPA approval make it impossible for Union Electric on technical grounds to comply with this regulation and we allege that it would be manifestly against the public interest for Union Electric to make an attempt to comply.

Now, going on a scientific possibility of compliance -- not saying it may work out -- there are as far as we know and as far as we allege in the petition only two scientific bases on which a compliance could hope to be attempted. One is by the utilization of what is called sulfur dioxide removal equipment. In the industry it's commonly known as scrubbers, and perhaps that's the way I shall refer to it from time to time.

The other method would be the use of a low sulfur content coal that is ordinarily found in the Midwest and is not too frequent these days.

We allege in our petition that in the time following the period 30 days after the Administrator-approved EPA plan -- I mean the Administrator of EPA approved the implementation plan, thereby making it Federal law, that it has been demonstrated that no scrubbers have been developed or invented that would permit or enable a compliance with this sulfur-emission regulation. So we demonstrate that it is technically impossible to comply with this Federal law. And we allege that those grounds have arisen more than 30 days following EPA approval.

Now, it is true that a considerable number of years

ago utilities, suppliers, began to work on what I will call scrubbers, develop them, invent them. Union Electric was deeply engaged in this project. There were high hopes, high expectations. But unhappily in life, and in this case, the
110 expectations have not been realized. And there is an averment in our complaint, one that we think is susceptible of proof, and I think should be taken by this Court in its deliberations as being fact.

Going to low-sulfur coal, I think, even -- and I'm not saying this in any derogatory manner, but my brethren of the Department of Justice, the respondent EPA, would agree that there unhappily is just not enough low-sulfur coal to go around at this time. And if we go into the market and corner it, bid it up, up, up, up, up, up, we are going to run into electric rates. Money has to come from somewhere. And it comes from the consumers. So we are going to have electric rates so high, we corner the market on low-sulfur coal, that it would throttle, virtually destroy, the economy in the St. Louis area and much of Missouri, Illinois, Iowa where we serve. So we contend that it would be manifestly against the public interest for us to attempt, if we could, to corner the market.

Now, turning a minute to scrubbers, if I may. I am sure all of your Honors are familiar with the fact there has been, and is, a serious inflation in the world today.

Unhappily, the price of these ineffective scrubbers, these inefficient scrubbers that will not enable us to comply, have increased so enormously that to install them on our three electric generating plants would cost us over $500 million.

Assuming that we could go into the market in New York and get $500 million for nonproductive equipment -- we have terrible carrying charges, as we allege, of over $100 million per year -- it would call for a terrible increase in our electric rates. We don't allege a percentage, but it would be so high that we say it would be manifestly against the public interest, and again we would be imposing upon our economy an economic condition that would be manifestly against the public interest.

I think there is one very important allegation in our complaint that has to be realized and considered in this entire case, and that is our allegation that although Union Electric, the petitioner, is not meeting the State sulfur emission standards in the Federally approved implementation plan, it is fulfilling the national ambient air quality standards, both primary and secondary. And these national ambient air quality standards are really the thrust, the purpose, of our Clean Air Act.

I suppose when you get down to the precise question, as you have to at some time, or should, in any lawsuit, perhaps making it just as precise as it's possible to do, what do we

mean by the word "grounds" in the judicial review section?

Well, it's a word of general import. Lawyers use it all the time. Judges use it. I don't know whether we always know exactly what we mean by it. But here I don't think we can take that word alone. You have to look at the congressional history. We have a somewhat ambiguous statute here. We have to look at the congressional history. And there is one other thing that I want to point out, and that is this Court is familiar with the rule that you should construe an act of Congress to be constitutional rather than unconstitutional where reasonably possible.

So sometimes in the constructional process itself we are confronted with constitutional questions.

Now, let me divert, if I may, for just one second. There has been a kind of a thread that has run through this litigation, and that is that, well, really, you shouldn't and maybe you don't intend to place a fact-finding, original type jurisdiction on a Court of Appeals. We claim that you have here, that the statute has, the congressional Act has. Maybe that's unfortunate. I suppose it is unfortunate. The courts have more than they can do anyway. But it has been done here, and the question is what are the facts to be found?

We say that these/technical and economic factors are making it impossible for petitioner to comply with the

regulation, although we are fulfilling the Federal standard --

QUESTION: Are you suggesting, Mr. Ferrell, that none of these factors could have been anticipated in time for a different type of review?

MR. FERRELL: Well, I do in my brief, and I will now point out that we think from a constitutional point of view there are three different methods that the constitutional requirement should be. When you talk about a different type of review, in a sense you have to look at the two periods of time. I hope I'm not taking too long to answer your question, but when you have in the Court of Appeals 30 days after the Administrator of the Environmental Protection Agency has approved the plan, then you do have some kind of a record before the court. But when you are alleging in your petition the Court of Appeals grounds that arose long after the Federal agency has acted, you do not have an administrative record for review, with one possible exception, which I refer to in my brief. I think it's a possible one, one that might be adopted by this Court. Maybe it's the best one, I don't know. We are unhappily dealing with sort of an ambiguous act of Congress. You're presented with a very difficult problem. You don't want to throw it out completely as being too ambiguous.

QUESTION: Didn't the Eighth Circuit say in effect that even if you had raised this within the 30-day period

they wouldn't have listened to it?

MR. FERRELL: They did say that. They did say that. And I have been anticipating whether there would be a question as to whether the time period really makes a difference. Procedurally, I think it probably might.

In my initial brief I skirted around it. In my reply brief, in the adversary heat we have sometimes I got a little more definitely to it. But I am not at all sure. I am rather inclined to think that technical and economic factors must be considered at any time.

QUESTION: Yes, but I thought Judge Gibson's opinion said you can't consider that until you bring in an enforcement --

MR. FERRELL: Yes, he -- I mean, it's a little hard to say what's exactly part of the opinion and what is dicta, but he did say that this is a political matter, these technical factors and economic factors are matters of politics, matters which the Judiciary cannot touch, matters beyond the Judiciary.

That to me brings in sort of the constitutional feeling I have that here we have something that a person can lose his business by, a Federal law.

QUESTION: What constitutional problem would Union Electric run into if its allegations were in fact true, but it couldn't raise this until the enforcement proceeding?

MR. FERRELL: Well -- There is the other. I do say

that in an enforcement proceeding it's possible. I question whether that's a very clear interpretation from the statute that it should be raised in an enforcement proceeding.

QUESTION: But you say there is a constitutional issue if we don't rule in your favor on the statutory ..

MR. FERRELL: No. In fact I say that if you rule as has I think the Seventh Circuit in the Indiana & Michigan Electric Company case, a former Justice of this Court was the head of the panel there, Mr. Justice Clark. Or in, I think it's the Buckeye case. I think that's the Sixth Circuit. It held that constitutional difficulty is saved, and I would agree with them, if the point may be raised in an enforcement proceeding.

Now, of course, the statute itself says that you may not raise anything in an enforcement proceeding, there's a preclusionary provision, if it may be raised in a judicial review proceeding.

May I mention just one practical matter; maybe it isn't a legal matter. But the utility industry is engaged in a very large capital-raising campaign, and it may be true that it will come about. But you hate to go to Wall Street when you are right sitting in an enforcement proceeding that may close down all your plants or require you to pay as much as a $50,000 a day fine per plant to keep them open, which would mean you couldn't get the working capital to go on. And you

kind of hate to go and try to raise money to build new plants. And we must build new plants. In fact, new plants must be built just to stay on an even line.

QUESTION: Mr. Ferrell, as I listen to you, I am just thinking about the interest of the State of Missouri. I suppose the people in Missouri would be unhappy if they had to close up the utility and not serve the community any more. Is your reaction to not proceeding in that area, that arena, because they have ruled against you on the merits? Is there no procedure in Missouri at all in which you can raise any of these questions?

MR. FERRELL: Well, the variance procedure, this Court did, I think Mr. Justice Rehnquist was the author of the opinion, decide one and only one case under the Clean Air Act, and that is that a variance approved by the State under the State law may thereafter be considered a revision of an implementation plan and approved by the Environmental Protection Agency under, to be precise, I think it's 101 or 110(c) of the Clean Air Act, if there will not be any jeopardy to the maintenance of the national air quality standards.

But at least in Missouri, and I will not go beyond Missouri, there is one difficulty about that. The statute that governs the EPA's approval of a variance to revision section 101(c) says there must be a public hearing. And the Missouri statute that provides for variances, and I think others, too,

as well as Missouri, say that a variance may be granted without a hearing, and at least 90 percent of them are. The Executive Secretary -- I don't like to say percents; I don't really know. But many of them are.

The Executive Secretary approves the grant of a variance to the Air Conservation Commission and it's granted without a hearing. So at least in Missouri we cannot have EPA approved variances unless there is a hearing.

Now, if there is a hearing, the EPA still proceeds with the enforcement of the Federal law. We have a sort of a bifurcation; we have a State law and we have a Federal law. It doesn't really have any particular concern what the State is doing. The State can have a proceeding that goes on for four, five, six years, hearings --

QUESTION: Mr. Ferrell, what is the Government referring to at page 10 of its brief that you are before some appropriate State agency now on matters of emission controls?

MR. FERRELL: Well, we say that that is not correct. We are trying to get variances, but we would hope that --

QUESTION: Do you have a proceeding pending before some --

MR. FERRELL: We have applica -- we always have applica -- we have an application for a variance, we do that, yes. Right now they are all applications.

QUESTION: What is the status of that proceeding at

the moment?

MR. FERRELL: Just resting.

QUESTION: For any reason? Aren't you pressing it, or what?

MR. FERRELL: I think the reason is that it's just waiting on a decision. I think everybody quit doing anything.

But we would anticipate -- we have recommendations, by the way, for the granting of a variance by the Executive Secretary. Now, if those recommendations are approved, we will have a variance given. They have not been approved by the Air Conservation of Missouri. But if the Air Conservation does approve them, we will have a variance granted without a hearing. And then that cannot be approved by the EPA. It cannot be an EPA-approved variance. So we don't have any variances as far as Federal law is concerned.

Then there may be --

QUESTION: Under Missouri practice are you permitted to ask for a hearing if you need that in order to validate your Federal --

MR. FERRELL: Well, it would be only collusive.

QUESTION: Pardon me?

MR. FERRELL: It would only be collusive.

QUESTION: But would it satisfy the Federal requirement if that's the only problem?

MR. FERRELL: There are two methods of getting a

hearing. One is if the Executive Secretary does not recommend against a variance, then there is a hearing, if the utility requests it.

And the second is, if there is an intervenor, some party that -- normally an environmental agency would be -- that intervenes in the proceeding because they do not want a variance granted, then there is a hearing. And then we would have a procedure. During that procedure the Federal law would be enforced. We would be fined $50,000 a day, $25,000 a day. We would be subject to a fine for all this time. And it's no great vindication after four or five years to have an EPA-approved variance if during that four or five years you either had to shut down your plant, if you were an individual, you go to jail, or you had to pay an enormous amount in fines.

And, of course, your Honors know we are not going to shut down any plants under any circumstances until the Army tells us to do so or this Court.

I notice that my white light is on. I would like, if I may, to retain just a few minutes.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Ferrell.

Mr. Taft.

ORAL ARGUMENT OF PETER H. TAFT ON BEHALF OF RESPONDENT

MR. TAFT: Mr. Chief Justice, and may it please the Court: I think the question has been well presented here.

Primarily we are concerned with whether or not in approval of a State air implementation plan the EPA must consider the economic and technological feasibility of the plan before approving it. The court below said no. They said no at any time as a matter of law whether within 30 days or thereafter.

We agree. We believe that from the face of the statute it is clear. We believe from the history of it it is clear. And also from the structure.

If there is one thing that is clear in pollution control law, when you go to Congress, it's technology and economics. In the Water Pollution Control Act it is a technology Act. Under section 301 they refer for '77 to the best practicable control technology available, for '83 they refer to the best available technology economically achievable. In the Clean Air Act it comes up again and again. It comes up with respect to technology is relevant to aircraft, it's relevant to fuels, to motor vehicles, to new source performance standards. And section 110 itself twice brings technology into play, in section 110(e) and section 110(f).

So I think when the standards are set forth in section 110(a)(2) as to what the EPA shall review when it reviews a plan, it sets eight of them out, and when it chooses to omit technology and economics, I think it is very clear that that choice by Congress was clear and intentional. In fact, when you go through the history of the Act it's even more clear.

It's set forth well in the Court of Appeals. It's set forth well in our briefs. The Act adopted the Senate language. The reports before debates, statements after the fact, all make very, very clear that as far as Congress was concerned, the primary air quality standards were to be met or the plants were to close, or they were to return and get an extension from Congress itself.

QUESTION: I take it you would agree with your friend that there are no circumstances under which a plant like this can be closed, as might be true of some other types of --

MR. TAFT: Yes, I would. I think the one case that is clear is that I don't think any court would turn the lights out. I happened to be in New York when the blackout came on for 12 hours. The health damage by a blackout within 12 hours will outweigh the advantage to health of the Clean Air Act over years.

QUESTION: What's the ultimate solution, then, Mr. Taft? Suppose confrontation finally occurs? The utility says it can't get the financing for this without drastic rate structure, suppose they can't satisfy the rate-making authority. Does that mean a Federal district court or the EPA must take over the operation of the plant until standards are met?

MR. TAFT: No, your Honor. I would suggest that this can be brought up in enforcement that in this case of a

shutdown of electric plants, we would have to balance again the health factors involved here. I think that a decree could be fashioned by the trial court that would take into consideration what could be done as fast as it could be done. You have an adjudicatory hearing at that time. The decree, for instance, could require that low-sulfur coal be used in those plants in a high concentration area. It could require that a particular plant might be closed down. It may require that a research program be instituted by the utility to find the kind of equipment that can work. It can fashion under its powers of equity, which could be reviewed every six months, for instance, the kind of decree that could be as effective as possible.

QUESTION: Mr. Taft, when would an equitable decree of this kind be handed down by a court? I understand the position of the Solicitor General to be in accord with that of the Eighth Circuit, that the courts no longer have any power to review the plan to consider whether it's economically or technologically feasible. When would this decree you describe come down and where and under what circumstances?

MR. TAFT: That, your Honor, I think would be in a trial court when an enforcement proceeding is brought under section 113. At that time it could be heard.

QUESTION: When the parties have reached an impasse?

MR. TAFT: That would be correct, your Honor.

QUESTION: The utility would say, We've got to put

the lights out. The Administrator would then bring a suit to say, Turn the lights on. All you need is $500 million.

MR. TAFT. I would suggest to the Court if you look under section 113 that when he enters an order, first, an order of compliance, it requires a conference. It also requires that the Administrator when he issues his order under section 113, it requires that in the order itself after conference that he consider the nature of the violation and set forth a time for compliance that is reasonable, taking into account the seriousness and the good faith efforts to comply. In other words, before you even get to court, the EPA, the Administrator, must satisfy these kinds of terms before he can seek a decree from the court.

But I think that when you come into the court, what you ask for would necessarily be affected by those kinds of considerations, and it's not white or black by the time you ask the judge what he requires.

QUESTION: You are suggesting the decree of the Eighth Circuit, the judgment of the Eighth Circuit be affirmed and that the parties then proceed to the point where they have the type hearing you are now describing.

MR. TAFT: Yes, your Honor.

QUESTION: Would there be any res adjudicata effect of the Eighth Circuit decision? Would the company be free to raise every issue it has raised there?

MR. TAFT. They would be free to raise any question or issue that has not been reviewed by a Court of Appeals on the action of the Administrator of the EPA. 307(b)(1), which is what they came into the Court of Appeals on, only permits review of the action of the Administrator. It is not a review of the plan as a whole. It is only of what he acts as, what he does. And we claim that as a matter of law under section 110(a)(2) he cannot consider economic or technology factors. And as a result, as far as that section is concerned, or the exclusionary or preclusionary review is concerned, he would not be affected by the review.

QUESTION: Is that the section that provides in substance that the plan must be implemented as promptly as practicable and in any event within three years?

MR. TAFT: Yes, your Honor. 110(a)(2), yes.

QUESTION: Do you think the requirement that the plan be put into effect as promptly as practicable is affected by the feasibility of the plan as it affects a given utility, for example?

MR. TAFT: May it please the Court, the three years has passed, and as a result we have run into the absolute barrier of the three years. At that point the"practicable" language has no application whatsoever.

QUESTION: That's however impractical the plan may be after the three years?

MR. TAFT: That's correct, your Honor.

But, your Honor, the question is where that can be heard, and that can be heard, we believe, in the State. It's a State plan. And as I say the Court of Appeals is not there to review the plan, they only review the narrow grounds that the EPA acts on on approving the plan. An overall review of the plan must be under State law. It can be reviewed in the State and it can be reviewed, as we say, if it's a constitutional type ground, it can be reviewed on enforcement.

QUESTION: I am not sure I can reconcile that with your footnote on the bottom of page 36, Mr. Taft, the last full paragraph of the footnote where you say, "It is the Administrator's view, however, that claims of infeasibility are not relevant to whether there has been a violation of the implementation plan. Such claims, in other words, may not be used to render invalid the emission limitations ..." and so forth.

Now, I am not sure I understand that. Does that mean that a district court cannot make some adjustment in light of intervening events, or is that subsequent to the three-year period?

MR. TAFT. May it please the Court, that is what the Administrator claims under the Act, applying the Act. If there is a constitutional ground, substantive due process ground, a balancing of health factors where to close a plant

would be more adverse to health than the advantages of the Clean Air Act, that is a matter which a court can consider at that time.

I can't begin to set forth what those factors may be. I will only admit one, which is the closing of the plant.

QUESTION: That's not a constitutional -- Congress could require every electric utility in the country to shut down tomorrow subject only to the eminent domain clause, couldn't it?

MR. TAFT. Yes, your Honor.

I would suggest that health codes, health inspectors have closed down plants for a long time and Congress has the power, and has exercised the power here under section 110(a)(2), it has exercised that power that is necessary to meet the primary air quality standards, then they must close. So that I think constitutionally the power is there. There may be a balancing factor, as I say, on health if you are going to try and turn the lights out.

If I may, let me just go back again to 110(a)(2). The way the statute is structured, EPA sets the primary air quality standard in sulfur dioxide that has been set. The State had nine months to come up with a plan which had to comply. Section 110(a)(2) states that the Administrator must approve a plan which does comply with the primary air quality standards. It is for that reason, to meet that standard, that

Congress was prepared to face the closure problem and did.

The rest of the Act and a good deal of the rest of section 110 deals with softening the effects of the strictness of that standard. I would suggest to the Court that under section 110(a)(3)(A) that the plan can be revised by the State, and this court in Train gave that the broadest interpretation it could in the sense that it can be revised plant by plant, it can be revised source by source, company by company, as long, again, as the primary air standards are met.

Under section 110(e) when the plan was submitted to the EPA, the Governor of the State could request a two-year extension to five years if technology was not available and they did not expect it within the three years. Under section 110(f) after the three years, or when the three years is up, the Governor may come in and request a postponement, again because of technology not being available.

I would suggest to the Court especially to look at section 110(f). If the petitioner is correct, section 110(f) is a nullity, because if he says it's infeasible technologically or economically, the petitioner claims the plan is void. Section 110(f) gives four grounds for a postponement of one year of the plan. The second ground is technology is not available.

Now, it seems to me under section 110(f) as soon as he proves the second ground, he isn't postponing the plan, he

just voided it. The plan is void at that point. And as a result you don't have to go through good faith compliance with national interests, with health, or welfare requirements as set forth in the rest of 110(f). Just as soon as he proves technology is unavailable, he voided the plan.

QUESTION: Excuse me. I don't have that part of the statute in front of me just to follow you. In what kind of a proceeding does he raise the 110(f) issue?

MR. TAFT: The Governor of the State must come --

QUESTION: Supposing that the State is against the utility, as it is here, and the State is satisfied, what can the utility do to raise the 110(f) issue? Can it do anything?

MR. TAFT: It cannot, no, your Honor.

QUESTION: So that really isn't relevant to Union Electric here, then, is it?

MR. TAFT: I don't know if they tried. They have indicated --

QUESTION: Let me put it just a little differently. Let's look just for a moment at 307(b)(1) which is where they seek to come in. They may not raise technological factors, as I understand your position. Is there anything they can raise in 307(b)(1) proceeding if you assume that the State has complied with the minimum requirementsin the eight subparagraphs of 110? What grounds would be reviewable at the petition of the utility in the 307(b)(1) proceeding?

MR. TAFT: I'm not sure if many would.

QUESTION: I don't think there would be any, would there?

MR. TAFT: Most of them would be for a different kind of plaintiff. Most of them would be, for instance --

QUESTION: Really, if we are talking about review at the request of the utility, this provision really is a nullity.

MR. TAFT: I don't think it would have tremendous benefit to them, no. There may be one, but I can't think of one.

QUESTION: I just couldn't think of any when I was trying to think of what it might be.

MR. TAFT: But there are many that could come in under that, namely, for instance, if the air quality standards have not been met after the fact, then you come in --

QUESTION: An environmental group might come in and say the standards are not strict enough, that sort of thing.

MR. TAFT: It's more likely to be the kind you get.

QUESTION: Mr. Taft, before you go on, do you consider the decisions in this area in I think the Fourth, Sixth, and Seventh Circuits are in conflict with the decision of the Eighth Circuit in this case?

MR. TAFT: I would say that the Sixth and Seventh, as far as what's directly before the Court, are in accord,

namely, that under section 307(b) a review proceeding of the plan, or the Administrator's action on the plan, cannot bring up these factors. The Sixth and Seventh, I believe, said that they could be brought up on enforcement, but they agree with the Eighth Circuit that they could not be brought up now.

QUESTION: How about the Fourth?

MR. TAFT: The Fourth and the Third both, I think, are in direct conflict, yes.

As I say, 110(f) would not need to be there if the petitioner were correct, because the plan would be void as soon as he proves the technology is not there.

May it please the Court, may I also just point out the timing. Congress set up nine months for the State to adopt its plan after hearings. It then set up only four months for the EPA to approve, not just one plan, but 55 plans. Effectively, the EPA had two days per plan to approve 55 State implementation plans. I think as the Third Circuit makes clear in the Duquesne case, if Congress had ever expected these factors of technology and economy to be considered, there is no way within that period of time it could have been done.

Again this goes, as I say, to the structure of the Act. The Act is strict up front and then sets up the means whereby it can be relaxed and softened. But I also point out 110(a)(3)(B) the Energy Act of 1974, where again Congress suggested, in fact required, the EPA to review State plans and

when they were more strict than required, could suggest to the State that they be softened, so long again as they stay within the primary air quality standards.

As I pointed out before, in section 113 on enforcement, they make it very clear that the enforcement process through tne EPA is to take into consideration good faith attempts at compliance and a reasonable time schedule.

So that I think the structure of the Act is very strict up front and then attempts to soften as you go through the other parts of the Act.

QUESTION: Mr. Taft, may I ask another procedural question. Apart from the variance procedure in Missouri, is there a State procedure by which the utility may challenge the basic plan that Missouri submits for approval by the EPA?

MR. TAFT: I'm informed that they can bring a declaratory judgment action at any time, I have been informed by the Attorney General's office in the State.

QUESTION: In the State courts.

MR. TAFT: Yes, in the State courts.

I might also point out on the hearing point on the variance, the State now as a matter of course always grants a hearing when a variance is complied with. Section 110(a)(2) only requires the fact that a hearing took place, not that the law requires it. So when the agency in fact provides the hearing, it satisfies the Act.

I have here the notice of hearing for the Sioux Plant variance just to show that in fact Missouri is going through that procedure there.

QUESTION: But Missouri is under some constraint, I suppose, in granting a variance in that it may not so amend its plan that it could no longer meet the approval of the Administrator.

MR. TAFT: That's correct.

I might point out just an error, I believe, in our brief in the footnote. The variances that were applied for in the Labadie and Meramec plants were in fact denied by the EPA, they are not pending. They were denied. They were denied by the EPA because it simply was a postponement as opposed to a modification setting forth times for compliance and increased compliance.

QUESTION: What happens, Mr. Taft, if the State grants a variance which the EPA does not agree with or approve?

MR. TAFT: Well, whether the EPA agrees or not, if it meets the primary air quality standards under 110(a)(2), it must approve.

QUESTION: Well, who decides that?

MR. TAFT: The EPA must.

QUESTION: I am supposing a confrontation.

MR. TAFT: Well, if the EPA says they don't meet the primary air quality standard under the variance, then you have

a question that will go to the Court of Appeals on review under 307.

QUESTION: Are the sanctions then against the State or against the utility?

MR. TAFT: Well, the review itself, if the review upheld the utility, would be that the revision -- well, it would direct, I suppose, a number of things. Among other things it could direct the EPA to approve the change, if in fact the utility was right that the primary air quality standard was still met under the variance.

I might suggest to the Court that in fact the Courts of Appeals are not the right place to consider the kinds of things that petitioner wants to have heard. As I said, if he claims there is a right to be heard someplace for constitutional grounds, for substantive due process grounds of some kind, then I don't think the court should have it heard at the one place where Congress said it shouldn't, which is at the point of approval of the plan and review therefrom.

QUESTION: You don't question, I take it, the right to be heard somewhere, do you?

MR. TAFT: I do, your Honor.

QUESTION: You do?

MR. TAFT: Well, I believe that they can be heard under the State implementation plan in the State courts.

QUESTION: Are you suggesting no right to a due process hearing before a utility plant is closed down, no right to have such a hearing anywhere?

MR. TAFT: Your Honor, I think that there may be constitutional grounds, there may be due process grounds. There are not statutory grounds.

QUESTION: But you are entitled to a due process hearing before an automobile can be repossessed.

MR. TAFT: That clearly is an enforcement type hearing where absolutely you are entitled to an adjudicatory hearing before a court. That would be the enforcement stage.

QUESTION: So you agree that the utility is entitled to a due process hearing somewhere.

MR. TAFT: Yes. I don't know what the grounds could be heard on. The grounds might not be all the grounds that he would like to have heard.

QUESTION: The ground would be that the plant would be shut down.

While I have interrupted you, let me say this: This is not really an adversary case in the normal sense. The Government perhaps has the greater interest than the petitioner here in seeing that the public is served and served at reasonable rates and served without polluting the atmosphere.

Now, the briefs indicate that a half a billion dollars will have to be raised to meet the standards and keep the plant

going. There ought to be, there must be, some way to bring this issue before a fact-finding tribunal with authority and power to decide the issue properly and promptly.

Now, these people went to court. You say they went to the wrong court. I would like for you to review again so it would be clear to me what the next step ought to be. You represent the Government of the United States. What should this utility do? They can't go to the market and raise a half a billion dollars. That's practically absurd in the present climate of affairs. What should be done?

MR. TAFT: May it please the Court, I think -- and this goes into the enforcement on where it should be heard, assuming there is a thing there to be heard, assuming that what you have put forward as going to the market for $500 million is a legitimate ground under some standard. Assuming that, I would suggest really what they did was they had an order, a violation from the EPA. Rather than go through the 113 procedure, a conference of going through the various grounds that the EPA must incorporate into its order of compliance, it chose to go to the Court of Appeals. I think there is a good reason why they did. They did that because if they can win in the Court of Appeals, if those things can be heard in the Court of Appeals under 307, they have voided the plan and they start the procedure all over again back at the State.

If you look at what the Third Circuit did in

Duquesne, they have been back and forth to the EPA four times on the original plan on economic and technological grounds. The Court of Appeals couldn't keep up with the change in technology. At argument last March they were still submitting new studies on technology to the Court of Appeals, and all they were getting to, a voiding of the plan which would require going back to the State, back to the EPA, back to the Court of Appeals, and then finally, only at that time, could you get an enforcement started again. And when you have two years in the Ninth Circuit Court of Appeals for the case to be heard, you are talking about the fact that if they could win by this route, we cannot get back to enforcement, to a compliance schedule, perhaps up to three years. In fact, if you go through a compliance hearing and order to enforce and a case to enforce by the EPA, which the State could moot at any time by revising the plan provided they still come under the primary air quality standard, they could revise the plan along the way. But assuming that you get to an enforcement proceeding, assuming they have an equitable ground that must be heard, like going to the market, like they can't close down all the plants, assuming they have such a ground, the court at that point can fashion an order after full adjudicatory type hearing, can fashion an order which will make the Clean Air Act as effective as it can immediately.

Then you go up to the Court of Appeals on review at

that time and they review the record before the trial court which must have findings of fact and conclusions of law and the decree is in effect at that point, unless the Court of Appeals were to stay it. If new technology comes up, if a new report comes up, you go back under rule 60(b) in the Federal Rules, and you reopen at the trial court. You don't submit technology reports to the Court of Appeals on oral argument, as was done in Duquesne.

The fact is that once you get into economics and to technology inevitably it's not a broad standard you are concerned about. You get down to how it affects one plant. All the plan does is set an emission standard. How the plant complies is up to it. It may be if it has an old plant it can't use a particular kind of technology, it may be if its financial structure is weak, it can't get to the market. Maybe if its financial structure is strong it could. But as Duquesne indicates, you are getting to the point where to consider these you have to consider it case by case. And if you are going to consider it case by case, enforcement is the only way you can, because at that point you call witnesses, you have your experts on the stand, they are under cross-examination at that time, and that is the way that this kind of issue must be heard.

So that I think that enforcement is the stage where if they have a ground, then that's where it must be raised. It

may be equitable. It may be -- I just don't know what they will be, but that will be fashioned as you go. But to have it heard in the Court of Appeals is impossible.

I think if the Court would look at the State of Texas v. EPA which had to do with the Texas plan where the EPA changed the plan because they didn't think the model used on oxides would work, and the Court of Appeals at that point had to go through a diffusion model on oxides as it applies not just to electric utilities, but to all the various kinds of sources that put oxides out, including automobiles and every kind of plant that uses heat of any kind. And if you see there -- I believe it was Mr. Justice Clark in concurring said that this is no way to review this kind of matter as to technical -- they did not have findings of fact or conclusions of law. In fact, after it was argued, they had to hold hearings informally with the parties from both sides and in fact with experts so that for the benefit of the Court the expert could take them through the diffusion model used by the State and the one used by the EPA. And I think if you look at that -- and that's just the overall model used, that didn't even get into the question of whether or not it was feasible as to particular plants and sources.

As far as the SO_2 standard is concerned, 60 percent of your SO_2, according to the EPA, comes out, as reported in Duquesne, comes out from electric power plants.

QUESTION: Mr. Taft, let me just get one thing off my mind. You have been assuming, I think, that the issue can be raised in an enforcement proceeding and that such a proceeding would be an equitable proceeding. Is it not possible that the enforcement proceeding would be a criminal proceeding and would the issue be raisable in such a proceeding?

MR. TAFT: May it please the Court, I'm not sure what -- I'm not conceding what the standard would be or what could be raised. The only one I will concede is that they can't turn out the lights and that's a health balance that would be drawn by the court.

QUESTION: You are saying it's possible that the argument might be successful in an enforcement proceeding. You do not concede -- you don't necessarily agree with the Seventh Circuit, then.

MR. TAFT: Well, the question is what the grounds could be that they would raise, and I think you have to go case by case when that happens.

QUESTION: Is it the position of the Solicitor General, or does he have a position, on whether these issues may be raised in an enforcement proceeding?

MR. TAFT: Your Honor, I think that it would not be strictly that the plan is void if feasibility is not economically or technologically achievable. But the power to close is there and Congress saw it. The question would be a different kind of

choice. The question would be that if it's impossible for this plant,at that point I don't think your ground would be that it's impossible, your ground would be that the health danger --

QUESTION: It's always possible to close.

MR. TAFT: At that point the health --

QUESTION: I think the question would be if the defendant could show that it Was impossible to comply without closing, would that be a defense in an enforcement proceeding or an issue that could properly be raised in an enforcement proceeding?

MR. TAFT: If it were electricity and turning out the lights, if it were a marginal and weak plant that's not involved with utilities which is producing, say, some product and produces SO_2, it's a marginal plant, it's a weak company, it can't comply, I think the answer is, yes, it would close.

QUESTION: The question is whether that is an issue that defendant,in the judgment of the Solicitor General, is that an issue that can appropriately be raised in an enforcement proceeding (a) civil, (b) criminal?

MR. TAFT: (a) Yes, I think it can be raised. The scope of it will be decided by the courts at that time. As far as criminal is concerned, I would suggest that if it's an electric plant, if you couldn't close it, you can't put them in jail for not closing it. So I think that will just have to wait and see how it comes up in fact. I don't believe that they

will bring that particular case. If they do, I would be surprised.

QUESTION: Meanwhile the utilities must live with that uncertainty, is that not so?

MR. TAFT: Yes, your Honor. I think the statute does shift the risk. It puts the risk on them, and the risk was intentional by Congress to force them to do the best they can, if perhaps under the fear that they may not prevail on enforcement. And that's a technology enforcing act, and it's a very powerful persuadant to persuade them to in fact develop the technology if they can.

QUESTION: Mr. Taft, we are dealing with a utility, and I suppose it's a regulated industry. I suppose it's regulated by the State, isn't it?

MR. TAFT: That's correct.

QUESTION: And rates have to have State approval?

MR. TAFT: Yes, your Honor.

QUESTION: And I suppose under its permit it's obligated to perform service until it is permitted to close.

MR. TAFT: I believe so.

QUESTION: So that it's got to go to the State one way or the other so the State can make up its mind.

MR. TAFT: The State is heavily involved. I would suggest that under the utility laws they have to give them a rate of return against proper expenditures, and the Clean Air

Act would be a proper expenditure.

The Third Circuit got into that and wanted the Court of Appeals to make a judgment as to whether the PUC would properly apply the law, and that I think --

QUESTION: There is no chance anyway that a utility will say, "I must obey the law," namely,the Clean Air Act, "therefore I shall shut down and tell nobody." They have to go --

MR. TAFT: If you're helping me out, I think you are absolutely right.

(Laughter.)

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Ferrell, do you have anything further?

REBUTTAL ARGUMENT OF WILLIAM H. FERRELL

ON BEHALF OF PETITIONER

MR. FERRELL: If I may, your Honor, I would like to take only one or two minutes not to respond point by point or to any extent to the argument that has been made. I will refer to our briefs on that, but I want to make one unique point. It arises for the first time, I think, in American juridical history. And that is that we have here the very anomalous situation where a State can place an emission limitation in a plan that exceeds the national air quality standard and that by EPA approval of that plan it becomes Federal law. Whereas, the Federal Government itself if it made an implementation plan could not place emission limitations that exceed the national

air quality standards.

That is due, I think, to a clear misreading of section 116, both as to Congressional history and as to the section itself. So we pray for a reversal in accordance with our prayer and petition.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:07 a.m., oral argument in the above-entitled matter was concluded.]