ORIGINAL

In the

Supreme Court of the United States

MOBIL ALASKA PIPELINE COMPANY, Petitioner,	No. 77-452
EXXON PIPELINE COMPANY, Petitioner,	No. 77-457
BP PIPELINE COMPANY, Petitioner,	No. 77-551
ARCO PIPE LINE COMPANY, Petitioner,	No. 77-602
VS.	
UNITED STATES, ET AL., Respondent.	

Washington, D.C.
March 28, 1978

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Washington, D. C.

Tuesday, March 28, 1978

The above-entitled matters came on for argument at 10:52 o'clock 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
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW J. KILCARR, ESQ., Donovan, Leisure, Newton & Irvine, 1666 K Street, N. W., Washington, D. C.; on behalf of Petitioner Mobil Alaska Pipeline Co.

RICHARD J. FLYNN, ESQ. Sidley & Austin, 1730 Pennsylvania Avenue, N. W., Washington, D. C.; on behalf of Petitioner Exxon Pipeline Company

FRANK H. EASTERBROOK, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Respondents, the United States

AVRUM M. GROSS, ESQ., Attorney General of Alaska, State of Alaska, Juneau, Alaska; on behalf of Respondents the State of Alaska and the Arctic Slope Regional Corporation

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mobil Alaska Pipeline Company, Exxon Pipeline Company, BP Pipelines, Inc., and ARCO Pipe Line Company, v. United States, et al., Nos. 77-452, 457, 551, and 602.

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

ORAL ARGUMENT OF ANDREW J. KILCARR, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. KILCARR: Good morning, Your Honors. Mr. Chief Justice, and may it please the Court:

Your Honors, in early 1969 and shortly after the discovery of oil on the North Slope of Alaska, planning commenced to build a pipeline that would reach from the Arctic Ocean, the location of Prudhoe Bay, 800 miles south to the Port of Valez on the Gulf of Alaska.

After overcoming numerous engineering design and environmental obstacles, the Trans-Alaska Pipeline System, indeed "TAPS" was constructed. TAPS is a unique feat of engineering, not alone its cost of $9 billion, but it is unique also, Your Honors, because it took two acts of Congress to get it started, the Alaska Native Claims Act, which settled claims, aboriginal land claims by Alaskan Natives, and, of course, the Trans-Alaskan Pipeline Authorization Act passed in November of 1973, which effectively disposed of that massive environmental litigation which had delayed the project from its very

inception.

The TAPS situation, Your Honors, is also unique because of the regulatory treatment afforded it. It was subjected to an unprecedented rate-making and suspension order -- and I say unprecedented because there is nothing like it in the 90-year history of the Interstate Commerce Commission. Now, to put that order and the activities of the ICC in perspective, one point should be emphasized, and that is though in fact this is a single pipeline, it is in law eight separate pipelines, and this results from the decision on the part of the owners to form an ownership of the line on the basis of undivided interest, so that as a result we are looking at eight common carriers who are required under the Interstate Commerce Act to fill the capacity of their share of the line as common carriers and thus are subject to all the responsibilities of the Act as well as all of the rights given to a common carrier under the Act.

In that context, the eight owners of the Trans-Alaska Pipeline formulated their independently calculated tariffs for submission pursuant to section 61 of the Interstate Commerce Act in early June. For example, Mobil Alaska filed its tariff on June 10, to be effective June 20, and at the request of the ICC it postponed the effective date until the 30th of June.

The point to be emphasized here and at this point is

that the calculation of these eight separate tariffs all followed a methodology that had prevailed in the industry for thirty-five years. It is referred to repeatedly in the briefs as the consent degree approach to rate determination, which is referenced to the Atlantic Refining case that was settled by consent decree in 1941, it was an Elkins Act case. And the aspects of that formulat was before this Court in 1959 in Atlantic Refining v. United States, and very basically what that consent decree requires is that owners of pipelines can receive no more than 7 percent of their share of the valuation of the pipeline. That is an effective limitation on what can be paid out of the rate of return of the pipeline. That is how these rates were independently calculated and following submission of the tariff, again pursuant to section 61, there occurred the issuance of an order by the ICC indicating that on June 27th a summary proceeding to consider possible suspension of the tariffs would be conducted by that agency, and that contrary to past practice, the entire Commission would sit en banc in the proceeding and not a suspension board or some intermediate board.

The issuance of that notice of summary proceeding resulted in four protests being filed in writing with the agency. Two were by -- one was by the Justice Department, another by the State of Alaska, and one by an organization representing Alaskan Natives, and the fourth protest by the

ICC's own Bureau of Enforcement.

The protestants requested suspension of the filed rates, investigation of those rates, and the seeting of interim rates in recognition that it would be contrary to the public interest to shut the line down.

QUESTION: Counsel, there was no protest filed by any independent producer in the North Slope?

MR. KILCARR: No, sir, there was not. There were four in number.

QUESTION: Have any indicated dissatisfaction with the situation? Do you know why there was no protest filed?

MR. KILCARR: We assumed at the time, Your Honor, it was recognized by all that the situation had no financial impact, that is no impact on the end price of the oil, if you would, that the price of Alaskan North Slope oil was not going to change as far as the refinery and ultimately the consumer of petroleum products based upon this tariff dispute.

We are at trial right now in the rate proceeding before the FERC, and in that proceeding we have had intervention by one public interest group, but there was none during the regulatory phase.

The Interstate Commerce Commission held their summary proceeding. It was characterized or described by the agency as an oral argument and that indeed is what it was. It took place on June 27th, and in that connection the owners of the

line, through their representatives, had opportunity to try in very summary fashion to defend the calculation on the basis of their rate submissions, and at the same time there was opposition in that argument to any authority on the part of that agency to suspend these rates or to set interim rates during the seven-month suspension period.

The very next day, on June 28th, the ICC issued its order and in that order it purported to do and indeed in fact did four things. It suspended the rates as filed by the carriers; set them for investigation; set interim rates as to which the carriers could file on one day's notice, and those interim rates were substantially in the case of my client 23 percent less than the rate as originally filed; and in addition they established a refund provision in the order, making the filing of the interim rate conditioned upon the carrier's undertaking to pay back the difference between either the filed rate, the interim rate and whatever rate was ultimately determined to be the reasonable rate in accordance with the investigation ordered in the same order.

QUESTION: At this point, could I ask how far in advance of the start-up time were these tariffs filed?

MR. KILCARR: In the area of June 10th and the start-up time, the actual loading of the first tanker in Valdez was July 31st, Your Honor.

QUESTION: Would it have been possible for the tariffs

to have been filed, say, seven months ahead of start-up time?

MR. KILCARR: Realistically, no, Your Honor, because this was a new entity, a new service, the line was under construction, and one had to wait until at least they had some reasonable basis to determine what their operating expenses would be and what their construction costs would be, all for purposes of casting the rate base for purposes ultimately of determining what rate of return in accordance with the consent decree formula.

Admittedly, when the tariffs were filed, that information was still estimated, but it was a better, more sophisticated degree of estimation than it would be seven months in advance.

After issuance of the June 28th order, petitioners sought review and reversal in the Firth Circuit. A divided panel of that circuit found principally that the suspension provision of the Interstate Commerce Act had no plain meaning. This is section 15(7) and the majority of the court found that since there was no plain meaning to the language of that Act, that indeed the agency did have suspension authority, and further, although the court was troubled, it appears, by the setting of these interim rates, concluded or reasoned that this indeed did not constitute the setting of an interim rate, but rather was the exercise of a limited waiver of discretion on the part of the agency that did have suspension authority.

The dissenting judge, Circuit Judge Roney, characterized the order in our opinion, respectfully, Your Honors, for what it was. He said that it was a rate-making order and as a rate-making order, it was unlawful and it did not comply with the rate-making procedures and provisions explicated in section 15(1) of the Interstate Commerce Act, and on that basis he found find the order unlawful, and he did not have to consider the question of suspension.

We are here, Your Honors, on a write of certiorari. As I said, we are already at trial. Trial commenced on the rate proceeding in November, and since that time we have, of course, received from this Court a stay of the June 28th order. That was on October 20th. The subsequent order was entered superseding but not effectively changing the stay, and that second order was on November 14th.

Your Honors, as to the suspension or alleged suspension authority of the Interstate Commerce Commission, now, of course, the Federal Energy Regulatory Commission, because jurisdiction of all pipelines has been transferred via the Department of Energy bill or act to FERC.

We have analyzed in detail, Your Honors, in our brief the conclusion arrived at on the basis of the analysis of the section 15(7), its language, the underlying legislative history of that statutory provision, prior cases by the agency dealing with suspension situations, and in that analysis

very summarily, Your Honors, we point out the essential linkage between suspension and section 6(3) of the Act which requires 30-day notice being filed before any changes in rates, and it is the essence of our position that section 15(7) is limited to changes in rates or tariffs or practices affecting rates.

QUESTION: Of course, 15(7) mentions new rates, doesn't it?

MR. KILCARR: It does, and that is the language of the Act, Your Honor.

QUESTION: Your point is that that very language, the phrase "new rates" implies the existence of old rates?

MR. KILCARR: That is correct, Your Honor. That is exactly our position, that the existence of a prior rate is what allows the continuity of service, the maintenance of status quo, when a suspension takes place and the proposed change or the new rate, literally the new rate is examined for reasonableness by the agency.

QUESTION: Are you familiar with the last sentence of section 15(7), without having to refer to it, the sentence beginning with "Any hearing involving a change in a rate, fare, charge, or classification"?

MR. KILCARR: Yes, sir.

QUESTION: Is it your position that when that sentence refers to a hearing involving a change in a rate, fare, charge or classification, it is in effect defining what a new

rate means?

MR. KILCARR: And we so argue, Your Honor, that when that language came into the Act in 1920, it was brought in to make the change synonymous with the earlier use of new rate, and that as we characterize it constituted an authoritative gloss upon the statute as originally enacted in 1910 by Congress known as the Mann-Elkins Act.

QUESTION: Well, if new initially included initially, then you are suggesting that the fiction which my Brother Rehnquist referred to qualified or modified or narrows the word "new"?

MR. KILCARR: Your Honor, the word "initial" as the word --

QUESTION: Actually, initial rate can be a new rate, can't it?

MR. KILCARR: It could, and we so contend, Your Honor. The word initial is really misleading, because it tends to suggest exclusively synonymous with the word "original," and that is not the way the agency uses the word "initial." The word "initial" can be an initial filing and the filing of an initial schedule, that can contain the old rate, and that is why we further contend that the other statutes within the Interstate Commerce Act --

QUESTION: You don't think the word "new" can include original rates?

MR. KILCARR: No, sir, I do not. I do not. I think there is an ambiguity there.

QUESTION: Well, I would think you would.

QUESTION: That's your whole case.

MR. KILCARR: You are absolutely correct.

QUESTION: I don't know, it doesn't have to be, if you look at the rest of the section.

MR. KILCARR: I suggest and the petitioners suggest, Your Honor, that the concept of original rate, the first rate for a new service on a new entity was beyond the whole ambit of this act.

QUESTION: A new rate, a new service, the rate for a new service could never be a new rate?

MR. KILCARR: No, Your Honor, it could never be a new rate in the statutory sense of the word "new." It would always be an original rate, and the very purpose of the statute we suggest was to maintain the status quo, and the suspension of an original rate on a new service and a new entity would result in no service for a period of seven months, and that particularly in the context of this case would have been contrary to the national interest, and the ICC itself so found that that could not be permitted, and thus in exercising their alleged authority or their punitive authority, they had to do something, and that is where we get the interim rate coming into the context of this case, and the interim rate we

suggest stands or falls here only if the suspension authority is valid, because without suspension authority, this rate and these were rates, make no mistake about it -- these rates were found absolutely in disregard of section 15(1), which is the rate-making provision of the Act.

QUESTION: Well, what would be the effect on the type of business that you are talking about if the ICC had the power or the FERC had the power to suspend rates but not to fix interim rates?

MR. KILCARR: Well, in this case, Your Honor, it would seem to me if that were true, that the line would be shut down for seven months.

QUESTION: The rate filed would be suspended and unless the carrier came in and filed a new rate that was not suspended, there would be no tariff he was permitted to charge?

MR. KILCARR: That's right, because he cannot achieve common carrier status until his filed rate is approved. So there could be the situation of repetitive filings, but in a suspension proceeding there is to be no prejudgment as to the reasonableness of a rate, thus you would have no roadmap, if I might use that expression, no roadmap as to what kind of rate to file.

QUESTION: The Commission here gave you one.

MR. KILCARR: Well, they did more, respectfully, Your Honor. They went well beyond that and they set the rates.

QUESTION: Well, they set the rate at which you could file that would not be suspended.

MR. KILCARR: That's correct, Your Honor, and in doing so --

QUESTION: They gave you a roadmap, in your words.

MR. KILCARR: -- in doing so, they also prejudged the very investigation that they had ordered, and this --

QUESTION: Well, how did they prejudge it when they left the matter open with the impoundment procedure?

MR. KILCARR: Because, Your Honor, we --

QUESTION: You can't go up or down after that.

MR. KILCARR: But in the context of this particular case, and looking at the order that they did issue on June 28, we suggest that it is an absolute prejudgemnt. There was no opportunity for us to realistically make the kinds of defense of the rate that we were entitled to. We have a record that goes down to an administrative law judge who is going to try the rate proceeding, and in that record he is being told explicitly by his appellate authority, if you will, that we were 23 percent higher than we should have been when we filed that rate. And I suggest respectfully that that is prejudgment, and it is serious prejudgment, and it is what is not supposed to occur in rate-making proceedings before administrative agencies.

QUESTION: And you say that that doesn't occur, I take it, where the FERC or ICC suspends a changed rate because

there is already a rate in effect which has either been found to be reasonable or which at least has not been suspended?

MR. KILCARR: That is presumptively reasonable, Your Honor, and that is exactly our position, that it is a naked suspension of a proposal, and that proposal then is subjected to adjudicative investigation and a determination is made as to its reasonableness, without any prejudgment. Meantime everything contimues as it was before, except the carrier is not allowed to have the benefit of the increase in rates.

QUESTION: So it is really the fixing of the interim rate, rather than the suspension that would constitute the prejudgment, isn't it?

MR. KILCARR: That's correct, Your Honor. But suspension was unauthorized and unlawful, quite apart from the rate-making aspects, simply becuase of the -- well, on the basis of the construction of the legislative history --

QUESTION: It was beyond the Commission statutory power is what you are saying?

MR. KILCARR: That's right, exactly, Your Honor. And also the fact that the status quo was bound to be not in the public interest.

QUESTION: Mr. Kilcarr, on the question of whether new includes initial, do you agree that in the Motor Carrier Act it does?

MR. KILCARR: Your Honor, it does and it includes

initial even in 15(7). Our point of continuing, if you will, confusion is with this word "initial." We recognize --

QUESTION: That is as contrasted with original?

MR. KILCARR: That's correct.

QUESTION: Would you explain that --

MR. KILCARR: Yes.

QUESTION: -- at least for my benefit?

MR. KILCARR: Your Honor, initial rates can be filed in any number of circumstances. For example, in the Motor Carrier Act, in -- I assume it was 1935, when they were bringing thousands of motor carriers into the regulatory regimen, they were filing for the first time rates, those were initial rates.

We can have mergers of various parties and the formation of a new rate because of a new entity, that is an initial filing. We can have what were formerly joint rates put together as single composite rate and refile, that is an initial filing. But none of these equate to the situation before Your Honors today.

QUESTION: Well, could each one of the two be called original?

MR. KILCARR: Pardon me?

QUESTION: Couldn't each one of the two be called original?

MR. KILCARR: No, no, not -- whether you call it

original or not, it is the conceptual stand-alone identity in a regulatory sense that these kinds of rates have, and it is this situation, regardless of waiver, Your Honor, that the Commission is not authorized to suspend because suspension is contrary to the essence of the statute which is --

QUESTION: Let me ask the question in a different form then. Do you contend that if a new motor carrier went into business and had never been in business before, and filed a tariff, could the Commission suspend that tariff?

MR. KILCARR: The Motor Carrier Act is a different regulatory system, but --

QUESTION: But it uses the same language is the problem.

MR. KILCARR: It is the same as 15(7) and if it is a start-up business, a new route, new filing, it is comparable to and identical to the situation here.

QUESTION: And is the answer no? What is your answer to my question?

MR. KILCARR: The answer is no suspension.

QUESTION: They cannot suspend as to a motor carrier?

MR. KILCARR: As to the motor carrier.

QUESTION: But a motor carrier has to get a certificate to operate, without regard to its tariff, doesn't it?

MR. KILCARR: The situation in the Motor Carrier Act, as we find in Water Carrier and some of the other Acts, is this

certification process, and here in those Acts you do have the requirement that a certificate of public convenience and necessity. The rate is part of the submission or can be filed within 90 days, the filing of the original rate can be filed after the certificate has been applied for. And the agency, the ICC would then have the option, whether in fact they do it or not, and there is some debate in the briefs whether they do it or not, but would have the option of withholding the certificate of public convenience and necessity.

QUESTION: But the question is whether they would have the power to grant the certificate, say we will do thse things one step at a time, we will grant the certificate, we will suspend your rate. Can they do that? You say now, I guess.

MR. KILCARR: Well, it is not --

QUESTION: Do you say no?

MR. KILCARR: No, Your Honor, it isn't. What we have contended is that, although there may be question as to whether they can suspend or not, in the Motor Carrier Act the certification process is such a part of it that they can withhold the certificate if they disapprove the rate.

QUESTION: Yes, they can do that, but that is just turning the question around. Do they have statutory powers to grant the certificate and then suspend the rate, say we will let you know, we are going to give the certificate, we just

don't think your rate is right.

MR. KILCARR: Probably not, Your Honor, probably not in those terms.

QUESTION: Well, what about the Federal Power Commission, there is a new pipeline starting up and they file rates.

MR. KILCARR: There the situation is absolutely clear, Your Honor. Under the Federal Power Act and under the Natural Gas Act, for the last thirty years the Federal Power Commission has held by regulation that they don't have --

QUESTION: But that is just a construction of the statute, isn't it?

MR. KILCARR: Yes, but what is there --

QUESTION: But it is the same sort of statute.

MR. KILCARR: It is the same sort of statute, Your Honor, but to the extent that it has a certification situation built into it that the courts as well as the Commission have consistently recognized that since this is going to be a contract for a long period of time, we will be very cautious about issuing the certificate until we know what the sale price or the rate is going to be, and there you have in basic relief form the situation as contrasted to the Motor Carrier Act and what we are looking at in this situation on oil pipelines.

QUESTION: Mr. Kilcarr, in section 15(7) of 49 U.S.C., I see the language "new rate" used, and I see the language

"change in a rate" used. It is a long section, I glaned over it, I don't see the word "original" or "initial" used in it.

MR. KILCARR: That's correct.

QUESTION: Are those words of art or do they come from some other section?

MR. KILCARR: They are regulatory words of art, Your Honor, and I tried to make that point earlier. You don't see this language in the Act, and when you bring it in to describe what the character of the rate is, it tends to be misleading, and that is particularly true as to the word "initial," because initial is not synonymous with "original." Initial can be a schedule filed that contains an old rate.

QUESTION: Initial is just one of many at any stage of the proceeding?

MR. KILCARR: It could, Your Honor. You could certainly. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Flynn.

ORAL ARGUMENT OF RICHARD J. FLYNN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The points that I would like to address myself to are independent of your decision on suspension power. Like Judge Roney, I will assume for purposes of my argument that the Commission did have power to suspend the rates. It is our

position that the order is still unlawful because of the prescription of rates and the imposition of the refund provisions.

We start off I think with less disagreement on certain fundamental parts of the law among the parties. Our opponents concede that you cannot prescribe a rate under 15(7) or 15(1) without a hearing. They argue that there was no prescription.

The court below held expressly that its imposition of refund conditions did not arise under the power of 15(7) but is expressly limited to increases in rates. They found both the power to state the interim rate and the power to impose refund conditions not only on the interim rate but on the originally filed rates to arise as valid corollaries of the suspension power, and our opponents here not only support that but say if they ha-e the suspension power, that is the end of the case, you can't look at what they did under those valid corollaries.

We submit that there is plenty of law in this Court and elsewhere that you cannot review a refusal of the Commission to suspend, because, as this Court has held, courts have been deprived of injunctive power in that area. But I find no case which says you can't review an exercise of suspension power, and I think the statute makes it clear because it says if the Commission refuses to suspend, it doesn't have to say anything. But if it decides to suspend, it has to state the reasons therefore, and to me that is consistent with review.

Now, here the Commission itself has said when it set the interim rates, they didn't set them with regard to anything that was going to happen, and the only period which they could apply, the interim period -- when we went back for reconsideration, they said, well, we know these rates are going to be right for the interim period, we knew that when we did it, and we know it even more strongly now that Pump Station 8 is off and you won't have any thru-put, but that doesn't matter. And yet our opponents say you can't review that kind of an interim rate.

Now, even if they had had a decent rate, that would be unlawful. The sole reliance for the power to prescribe, the power to impose refunds is on the Chesapeake & Ohio decision. The court below and our opponents interpret that decision as saying you can impose any kind of a condition you want when you refuse to exercise a suspension power.

Well, of course, we start off there, they didn't refuse to exercise the suspension power, they exercised it, as they say. But certainly this Court did not give the Interstate Commerce Commission or its successor, the Federal Energy Regulatory Commission, that kind of a license. The Chessie case has got to be one of the narrowest decisions that has come from this Court. And all that you did was the obvious thing of -- the railroads came in and asked for a 10 percent increase in rates, and admitted they could only justify 3 percent of it on

the basis of cost, and they wanted the other 7 percent to catch up under deferred maintenance, it was all left to the Commission, that if they were going to get the money, they could spend it for whatever they wanted it for. That certainly is not a rate-setting decision. The carriers set the rates themselves. The Commission did not alter the rates, they accepted them.

I think the difference between that case and what we have here is made clear by reference to a couple of other decions, one of this Court. In SCRAP I, the appellants were attempting or the respondents were attempting to convert the carrier-made rates there into Commission made rates by arguing that the Commission had imposed a condition on the rate. Now, in that case there was another general rate increase, they asked for an emergency 2.5 percent increase until they could get around to filing selective rates, and the Commission attached to that a condition that they include an expiration date so that those rates would expire when the selective rate increases came in, and this Court said that was perfectly reasonable and did not convert those carrier-made rates into Commission made rates.

In a decision of the Court of Appeals for the District of Columbia that came out on March 13th, No. 75-2143, the Federal Energy Regulatory Commission was dealing with a request that they impose a condition on a rate that they had a right to

set, was a rate for voluntary wheeling of electricity, moving electricity from one system to another. And Richmond Power Co. said that's great, but hold that rate to be unreasonable unless the carriers agree to continue wheeling even involuntarily, and the Commission looked at the statute and looked at the history and said Congress expressly declined to give us the power to impose involuntary wheeling, and therefore that kind of a condition is unlawful.

That is what we have here. Congress expressly denied the Interstate Commerce Commission and the Federal Energy Regulatory Commission the power to set a rate without a hearing, and it expressly refused to give them the power to establish refund conditions except in the case of increased rates, and these are wholly beyond their power and you cannot, at this Court has said so many times, do indirectly through conditions which are expressly prohibited from doing directly.

QUESTION: But, Mr. Flynn, going back to Chessie for a minute, Congress did not give the Commission power to require the railroads to spend money under deferred maintenance, did it?

MR. FLYNN: But they did not withhold that power, they did not have a contrary provision in the statute.

QUESTION: I see. The difference between an express prohibition and an absence of power.

MR. FLYNN: I don't think that I would stand here and

contend that the Interstate Commerce Commission has no power to impose any conditions, regardless of what they are, on the exercise of one of its other powers. All I ask you to find, as you have done before, is if the statute says you've got to have a hearing to set a rate, then they can't set rates without a hearing as a condition of their suspension power. And if the statute says you can only fix refund conditions on increased rates, then you cannot impose refund conditions on rates that are not increased rates as a condition of the exercise of the suspension power.

QUESTION: Is that another form of the argument your colleague made about new or original --

MR. FLYNN: No, it is not. I am referring to the language of 15(7) which says in the case of an increased rate, the Commission may require the carriers to keep account and make refunds.

QUESTION: You are assuming for the purposes of your argument the power to suspend?

MR. FLYNN: Yes, I share Mr. Kilcarr's view that they didn't have the power to suspend in the first place.

QUESTION: You are assuming arguendo?

MR. FLYNN: That's right. If he is right, I don't have to make these arguments because these two actions collapse of their own weight.

The other case that I guess we rely on is the Moss

case from the D.C. Circuit, which is remarkably similar to this except that nobody alleges that what this Commission did was done in consultation with the industry or was for the benefit of the industry. In that case, just as in this, the Commission had a suspension procedure, which was summary and required evidence. They held an argument. They issued an order, and they suspended the rates that had been filed and they spelled out in detail a whole rate plan and announced that they would not suspend it.

Now, the evil found there by the Court was that under that act, that insulated those rates from judicial review, that the rates were not suspended, they went into effect and there was no order of the CAB which would be reviewable.

Here the Commission held an argument, suspended the rates, then announced that it would not suspend precise rates in a rate scheme, and the contention here is that you can't review that. That was the intention, was to get a rate in, a lower rate for a seven-month period, and to insulate it from your review.

The Court in Moss found that was a prescription of a rate, it wasn't advice, the court below here did not find that but clearly in my mind it should have. There was nothing more coercive than this rate. You had a $9 billion pipeline sitting there, you had oil starting to run in it, you had a congressional mandate to get the oil to the lower 48 as fast as you

could, and you have this on-going energy crisis in this country, and the Commission knew, as Judge Roney said, that there wasn't any doubt that they put up that interim rate, that the carriers would have to file it. That is a prescription of a rate.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Before turning to the question of statutory construction and the details of legislative history that are the centerpiece of this case, I want to address two themes of petitioners' argument. These themes run through and a-pear to be the foundation for almost all of petitioners' particular contentions.

The first theme is that petitioners have been treated unfairly by the Commission, and that there must be some remedy for unfair treatment. The second theme is that the only legitimate use of the suspension power is to preserve the status quo. The suspension here did not preserve the status quo, petitioners say, and so there must be something wrong with it.

The arguments based on unfairness fail, we believe, at the outset, because the Court does not have any authority to review suspension orders. That was the holding of Arrow Transportation Co. and the holding of SCRAP I. Congress

entrusted to the Commission the decision whether to suspend, and the only question that may be raised here is not whether the suspension was fair or not but whether there was statutory authority to suspend original or initial rates.

QUESTION: As I understood your brother, he said that while the Court may not have authority to review suspension orders, it may -- rather an order declining to suspend, it may have authority to review suspension orders. Did SCRAP and Arrow both involve suspension orders?

MR. EASTERBROOK: They both involved decisions not to suspend.

QUESTION: Not to suspend, did they not?

MR. EASTERBROOK: They did. Arrow said --

QUESTION: And they then stand for the proposition that the Court has no power to deal with a suspension order. They don't, do they?

MR. EASTERBROOK: The Court indicated in Arrow, at page 570 of Volume 372, that similar principles would apply in the case of a decision to suspend.

QUESTION: And neither of those cases involved a suspension order?

MR. EASTERBROOK: Neither involved a suspension order, and the direct holdings of them do not support that. I would, however, point to a case in the Second Circuit, Port of New York Authority, 451 Fd 2d, 783, which says that that principle

logically follows from Arrow, and that decision was, by the way, cited by the Court with approval in SCRAP I.

But I needn't maintain the broad decision about reviewability in order to demonstrate the difficulty with petitioners' arguments. The suspension here is no more unfair to petitioners than the suspension of an increase in rates. In either case, the carriers lose the difference between what they want to charge and what the Commission by exercising their suspension power allows them to charge. That difference in this case would be approximately 20 percent of the rates that the carriers wanted to charge.

Many times established carriers seek to increase their rates by 20 percent, and that increase is suspended, and the difference between what the carriers want and what the carriers are allowed to receive is the same, whether we are talking about initial rates or whether we are talking about increased rates.

QUESTION: Mr. Easterbrook, you are not arguing that just because it is not unfair, the Commission must have the power, are you?

MR. EASTERBROOK: No, I'm not, Mr. Justice Rehnquist, not at all. I am simply responding to the argument that because it is unfair, the Commission must not have the power, which is something of a different argument.

QUESTION: Well, there is a difference, too -- isn't

it true that where there is an existing tariff in effect, the suspension couldn't be conditioned on reducing the existing rate? Say they asked for 10 percent increase, they couldn't say, no, we will suspend the 10 percent increase, we want you to reduce it by 23 percent.

MR. EASTERBROOK: They could not say that, Mr. Justice Stevens.

QUESTION: So there is a little broader power in this situation than in --

MR. EASTERBROOK: It is at least in the case where that type of thing might otherwise occur. But I think I can go a little farther than that, too. Suspension proceedings in their nature involve a balance of considerations. Somebody loses in a suspension case, no matter what happens. The shippers and the public may lose, perhaps irreparably, if rates are too high and are allowed to go into effect. Congress' perception that shippers and the public would often lose was the reason why it gave the Commission the suspension power.

On the other hand, the carriers may lose if rates are unnecessarily or improvidently suspended. Nothing can avoid the fact that someone is hurt, whether rates are suspended or not.

The Attorney General of Alaska will discuss at greater length how high rates hurt Alaska and why the suepension power for initial rates is necessary. But my point is that

petitioners' contention that they were aggrieved by the suspension is just one-half of the balance and is therefore not a sufficient reason to study it in great detail.

Finally, it is hard to see how the Commission acted unfairly here. The Commission accepted all of the carriers' data about the costs that they invested in building the pipelie, even though those data are subject to very sharp dispute. It accepted the carriers' contention that the appropriate period of depreciation is 25 years, even though 35 years is the Commission's ordinary period of computed depreciation of oil pipelines.

The Commission accepted the carriers' disputed contentions about income tax considerations, and it afforded the carriers a 10 percent return on valuation, even though the Commission's standard practice with respect to pipelines is 8 percent.

QUESTION: With all deference, this isn't an equity case where we are evaluating whether or not the issuance of an injunction was fair or unfair. This is a matter of statutory construction, isn't it?

MR. EASTERBROOK: I agree entirely.

QUESTION: Then what has fairness got to do with it?

MR. EASTERBROOK: My point is that the carriers are claiming that they have been treated unfairly and that there must be a remedy for that. My observation is that that is far

from obvious.

QUESTION: I didn't understand that to be their argument.

MR. EASTERBROOK: The other half of my opening observation is that petitioners' argument that the suepension power exists only for the purpose of preserving the status quo confuses ends with means. The suspension of rates, the temporary freezing of the status quo is a means to an end, not a purpose in itself. It would be pointless to preserve the status quo just for the purpose of preservation.

The reason why Congress gave the Commission the power to suspend rates is because it may appear that the rates that have been proposed are too high and that some persons may be harmed by rates that are too high. Shippers and the public need protection, at least for the short term before rate-making proceedings can occur while the Commission conducts a more thorough investigation.

A suspension of rates offers the public that protection.

QUESTION: You are saying that that is a preservation of the status quo or that it is something bigger and better than that?

MR. EASTERBROOK: My argument here is that preservation of the status quo is not an end but a means.

QUESTION: Well, how would simple suspension of the

rates here in this particular case without any interim rates preserve the status quo?

QUESTION: No oil?

MR. EASTERBROOK: No oil. The status quo would be exactly what it was before, no one is shipping any oil through the pipeline before and no one is shipping it --

QUESTION: So the thing is simply delayed for seven months?

MR. EASTERBROOK: It delays it for seven months. Everything is left exactly the way it was before. But the reason why the Commission suspends rates is not because it doesn't want to see oil flowing through a pipeline, it is not because it doesn't believe that a particular transportation service should be offered. It is because it believes that the rates that have been proposed for those transportation services appear to be too high.

If we keep in mind that distinction between ends and means, the end being the protection of the public during an interim period from rates that appear to be too high, and the means being the suspension, petitioners' argument we believe falls apart. Preservation of the status quo loses the status as a shiboleth that petitioners would give it. The process really is dynamic, and it works like this.

The carriers propose a rate and if the Commission believes in the short time available to it that the rate appears

to be too high, it suspends the rate. The suspension freezes the status quo but only for a while. The suspension doesn' believe that the Commission thinks the old rate or in this case no rate is the best rate. The suspension means only that the proposed rate seems to be too high. The carriers then can return to the Commission, as section 6 of the Interstate Commerce Act allows, with another rate proposal. If the second rate proposal also appears to be too high, the Commission will suspend the second rate proposal. If it does not appear to be too high, it will allow it to go into effect. The process can be repeated until the carriers hit upon a rate proposal that the Commission does not appear, does not think appears to be too high and the Commission allows that to go into effect.

Meanwhile, the investigation of rates triggered by the initial suspension is proceeding, and at the conclusion of the investigation the Commission will set a rate under section 15(1) after the full hearings that are possible only give an adequate time.

QUESTION: What would be the time span involved, approximately?

MR. EASTERBROOK: In many cases, the time span is a year or less. In this case, the time span, Mr. Chief Justice, is a good deal longer.

QUESTION: They often exceed seven months?

MR. EASTERBROOK: They often exceed seven months.

QUESTION: I mean typically it does, doesn't it?

MR. EASTERBROOK: Yes. The Mann-Elkins Act in 1910, by the way, authorized the suspension to run for longer than seven months. It authorized it to run for ten months. The length of the suspension represents more a political compromise and a balance of the interest than any measure of how long the Commission's investigation takes. The process, the suspension process then is one that moderates carriers' rate proposals in order to give it that --

QUESTION: What happens at the end of -- suppose you are right, there is a suspension power and the Commission suspends for seven months, the carriers do not in the meantime propose a rate that satisfies the Commission, at the end of the seven-month period does the rate originally filed go into effect?

MR. EASTERBROOK: They can put the original rate into effect and the Commission can do nothing about it.

QUESTION: It isn't a rollover type of thing like the SEC claimed in the earlier case?

MR. EASTERBROOK: The Commission does not claim the authority to have successive seven-month suspensions, certainly not 37 of them.

[Laughter]

The process by which proposals are moderated to take into account the observation that rates appear to be too high

explains why in the Chessie case. The Court approved the decision of the Commission to suspend particular rates at the same time they announced to the railroads that if they proposed other rates with a particular condition it would not suspend them. In Chessie, the Commission used its suspension power to alter the status quo in an important way, and to do so permanently, and this Court approved it, because what the Commission had done ultimately reflected only its judgment about the reasonableness of rates. If the Court agrees with that point, the rest of my argument follows, I believe, almost inexorably.

Petitioners say that the Commission cannot suspend initial or original rates, because initial rates for new services are not new rates within the meaning of section 15(7). But the reasons for having a suspension power for original rates apply in the same way to those rates as they apply to changed rates. Either an initial rate or a changed rate may appear to be too high. The suspension in either case allows the agency additional time to study things before the rate takes effect, thus protecting the public. And the carriers can always propose other lower rates until the Commission decides not to suspend.

QUESTION: But a changed rate represents a departure from a rate that has presumably been found reasonable before, doesn't it? Doesn't it have more against it than a new rate

which has never been found either reasonable or unreasonable?

MR. EASTERBROOK: In many cases, Mr. Justice Rehnquist, a proposal to change a rate is simply a proposal to change a carrier-made rate. That is, a carrier may propose a rate and it is not suspended or set aside; two years later the carrier proposes to increase the rate. There is no greater or less presumption of reasonableness attached to that rate which has been in effect for two years only because the carriers made it.

QUESTION: But don't we assume that if it had been unreasonable, the ICC would have suspended it or caused an investigation to be made into it?

MR. EASTERBROOK: If shippers or members of the public had protested, the chances of an unreasonable rate being set aside or investigated are considerably greater than if no one protests. But in either event, Mr. Justice Rehnquist, the point is that it was a carrier-made rate to begin with and entitled to whatever presumption of reasonableness the carrier's own rate proposals take with them.

But if fine gradations can be made in line of presumptions of reasonableness, a responsive argument might be that rates that have never been in effect aren't entitled to a presumption of reasonableness, and that is all the more reason for the Commission to suspend them while it studies them.

QUESTION: Mr. Easterbrook, on the question of whether

new includes initial or original, those petitioners rely on Sunray, 364, and you don't mention it in your brief. You don't find it troublesome?

MR. EASTERBROOK: We don't find it troublesome. In fact, we couldn't figure out what proposition they were citing it for.

QUESTION: Well, they quote from it, "when a producer commences interstate sales from a particular field...there are by definition no existing rates, and accordingly [the suspension provisions], which are bottomed on delaying the effectiveness of, and suspending, changes, are not relevant."

MR. EASTERBROOK: Mr. Justice Brennan, that was the same proposition that this Court made in the APCO case, Atlantic Refining v. Public Service Commission, and it depends entirely on peculiarities in the statutory language concerning the Power Act, which I will -- well, the Power Act provides -- in the portion that was discussed in APCO and in that case -- provides that regulated companies must file schedules "plainly stating the change or changes to be made in schedules then in force." And it then gives the Power Commission, now the Energy Regulatory Commission, the authority to suspend "such new schedules."

QUESTION: So your answer is that this --

MR. EASTERBROOK: It is a very different situation.

QUESTION: -- in its terms deals only with changes?

MR. EASTERBROOK: Yes, Mr. Justice Brennan.

QUESTION: And makes that clear, where that is not the case with --

MR. EASTERBROOK: In the context of the Power Act, the reference is to change or changes in schedules then in force.

QUESTION: But 4(e) starts out "when any new schedule is filed," and you would put a gloss on the word "new" as you have?

MR. EASTERBROOK: I would not put a gloss on the word "new," Mr. Justice White. I would emphasize the word "such," because the "such" refers back to the things foregoing. I might point out, by the way, that the statement in the portion of the opinion that Mr. Justice Brennan read and the statement in APCO simply reflected what the Power Commissin's practice had been. The Federal Regulatory Commission has not decided whether it agrees with the Power Commission's interpretation of that authority. I don't want to in any way foreclose their reconsideration of it, but I think it is important that the statutes are very different statutes.

There are, however, some statutes that look exactly like section 15(7). Those statutes are in the Motor Carrier and Water Acts and the Federal Communications Act. Those statutes that look exactly like 15(7) talk about the suspension of new rates, but they unmistakably give the Commerce Commission and the Communications Commission the authority to suspend

original rates, even though they use exactly the language of 15(7). Those statutes are discussed at pages 28 --

QUESTION: Original or initial?

MR. EASTERBROOK: Original rates.

QUESTION: Do you think there is a difference?

MR. EASTERBROOK: The difference appears nowhere in the statute.

QUESTION: Well, neither word appears anywhere in the statute.

MR. EASTERBROOK: The only word that appears in the statute is "new" rates.

QUESTION: Right.

MR. EASTERBROOK: We have argued that any rate that does not represent a rate already in effect is a new rate. It can be new because it is an increase, it can be new because it has never been used before. The word "new" stands in that statute in opposition to "old." These rates are as new as new can be. It is very hard to find any --

QUESTION: Well, if it stands in opposition to "old," then isn't there an implication that there must have been an old rate? There is an implication that there must have been an old rate if it stands as an antonym to "old."

MR. EASTERBROOK: Or the fact that there simply was no old rate. These rates, whatever else they may be, are not old rates, and if they aren't old rates, then they are new.

QUESTION: My question -- perhaps you misapprehended my question. Doesn't the use of the word "new" imply the existence of something that is old?

MR. EASTERBROOK: We do not believe that it does. I can refer to the popular usage of that. When someone introduces a new product, it doesn't mean that it is replacing some old product. It might be something quite new, it has never been used before. A color television was new, not because it replaced something old but because it was new.

QUESTION: It replaced non-color television.

MR. EASTERBROOK: Let me try black-and-white television.

[Laughter]

QUESTION: Or what about a new baby in the home when there hasn't been one there before?

MR. EASTERBROOK: Also, Mr. Justice Blackmun, I can refer to an analogy to the Federal Power Commission practice, one in which this Court is familiar, and that is the definition of new gas. The Federal Power Commission treats as new gas gas that flows from wells that have just been dug. In fact, it has two categories of new gas. One is gas from new flowing wells, and another is increased flows over flows in existing wells. They are both new gas. That is the same kind of thing that is happening here, an increase in existing rate or a brand new rate are both thought of as new rates. But the

argument --

QUESTION: Mr. Easterbrook, on whom is the burden of proof with respect to the suspension of a new rate under 15(7)?

MR. EASTERBROOK: The Commission must find that the new rate appears to be unreasonable, and it is required by the statute to state reasons for its decision. That implies at least that the Commission has to make a finding. There is no explicit allocation in the statute of a burden of proof.

QUESTION: Well, what is the difference between the way the Commission proceeds under the last sentence of 15(7) where you are talking about a change in a rate, fare or classification, and the way it proceeds when it is talking about what you describe as a new rate and which you say is different and broader than that?

MR. EASTERBROOK: The Commission understands that to state the circumstances under which it can as a matter of a straight order require refunds. That sentence entered the Act in 1920, in the Transportation Act, and that same sentence --

QUESTION: Are you speaking of the last sentence?

MR. EASTERBROOK: The last sentence of section 15(7).

QUESTION: All the Transportation Act did was change the date. I thought the last sentence of the Mann Act --

QUESTION: I think my Brother Rehnquist means the next to the last sentence, "At any hearing involving a change in a rate, fare, charge, or classification, the burden of proof

shall be upon the carrier." Isn't that the sentence?

QUESTION: I thought that was the last sentence.

QUESTION: It is the next to the last sentence.

QUESTION: But the sentence beginning "At any hearing" and so on.

MR. EASTERBROOK: Now I am afraid I have lost the thread of your question.

QUESTION: Well, how does the Commission proceed differently, as I take it under your analysis it would have to, if a change in a rate or fare is a much narrower category of thing than the filing of a new rate? How does it proceed differently when it is going about suspending a changed rate than a new rate?

MR. EASTERBROOK: Mr. Justice Rehnquist, as far as the suspension power is concerned, the Commission's position is that that sentence does not provide that a changed rate receives different suspension treatment than an original rate, and that is so for a number of reasons. One is that that same sentence appears in the Motor Carrier Act, section 316, in which it is perfectly clear that Congress intended to give the Commission authority to suspend initial rates.

QUESTION: Which was passed 25 years later?

MR. EASTERBROOK: But it adopted the language of section 15(7) because Congress thought that that is what that language meant. To that extent, Mr. Justice Rehnquist, Congress

has spoken authoritatively on the meaning of that language and has adopted it and used it for a particular purpose, indicating what it thinks that purpose is.

My second answer is that the Commission's view is that change for the purpose of that sentence refers not only to a change from a rate to a higher rate, but a change from no rate to some rate, and is sufficiently broad, and it is necessary to read it that way in order to make sense in the Motor Carrier Act.

QUESTION: Well, then it means the same thing as a new rate, doesn't it, under your definition?

MR. EASTERBROOK: We believe it does.

QUESTION: Well, why in the Mann Act did they use the word "new" in one sentence and "changed rate" in another sentence of the same section?

MR. EASTERBROOK: I still believe that that sentence came in 1920, and it is the basis for petitioners' claim of authoritative gloss, that Congress has placed an authoritative gloss on the word "new" by placing that sentence in the statute.

My response as to why the language is different is that Congress in 1920 simply doesn't appear to have thought about the differences in the language, but that it does not appear to have used them in different ways in light of the way it treated that same language in the Motor Carrier Act. The

language came in without --

QUESTION: Well, what about the sentence before, at the expiration of the seven-month period when the rate goes into effect, that there is a power in the Commission to require records and a refund? It says, "but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account" -- now, if there is an original rate, there never has been a rate, and the rate is suspended, as you say the Commissioner has the power to do, and seven months goes by and the rates go into effect. Does the Commission have power under this language to require record-keeping and refunds?

MR. EASTERBROOK: The Commission has not interpreted that, although it did require record-keeping, it entered a record-keeping provision here and the carriers have not contested that, although --

QUESTION: But I take it you don't -- did it purport to exercise this power?

MR. EASTERBROOK: It did not purport to exercise that refund power in this case.

QUESTION: This was a condition, an ancillary to your other argument, I suppose?

MR. EASTERBROOK: It did set a condition. It did not purport to exercise that power to set the refund conditions.

QUESTION: So you say that this language remains uninterpreted?

MR. EASTERBROOK: The Commission's full attention has not yet been devoted to that language.

QUESTION: How about yours?

[Laughter]

MR. EASTERBROOK: Our position, Mr. Justice White, is that we need not devote full attention to it here because the Commission's order can be sustained quite fully on the grounds that it gave. But my submission so far as dealt with the problem of the suspension of the initial rates. If the Commission can suspend rates, and we think that it follows then it can announce some lower rate that it will not suspend.

The purpose of suspension, as I said, is to prevent the charging of a price which appears to be too high. It is not at all to stop the carriers from offering a service. In order to determine what is too high, the Commission must have at least a tentative view of how to distinguish excessive rates from permissible rates. In stating reasons for suspension, the Commission may decide and announce how it made that decision, how it established a tentative line.

It revealed here that the rates appeared to be too high because the carriers had used an improper method of computing the rate of return on investment. If it had stopped there, petitioners could have figured out for themselves what

rates they could have charged that were low enough that the Commission would not suspend them. The Commission performed that chore for the carriers.

The petitioners seem to think that the Commission did too good a job of thinking through why their rates appeared to be too high and announcing its reasons. But it would be bizarre if the Commission could proceed within the law only by concealing the reasons for its decisions. Its statement of reasons should not expose it to a charge of illegal conduct.

The petitioners say though that this is rate-making without the formal hearings required for rate-making. If the Commission's having a good reason for believing that particular rates are too high is rate-making, then I suppose this is rate-making, but that does not carry petitioners very far. It is more a play on words than an argument.

Congress authorized the Commission to suspend rates and required that they have reasons for doing so. The Commission complied fully with the statutory requirement of having reasons. Petitioners' attempt to hang a phrase on that decision does not do anything to impeach them. But we do not, however, agree that this is rate-making as that word is understood within the meaning of section 15(1). The Commission has opened a full investigation into petitioners' rates. The rates will be made after full hearings that are now in progress before the FERC. They will then be subject to full

judicial review.

This case concerns only the rates that were to be charged during the first seven months, months now gone by. And Congress clearly created in the suspension power a special sort of control that could be exercised during those seven months without regard to the more formal proceedings in section 15(1) which Congress knew consumer more than seven months to carry out.

The entire reason for having a suspension power is that rate-making cannot be completed in seven months, and certainly can't be completed before rates go into effect in the first instance.

Petitioners' argument that their rates during the first seven months were influenced by the suspension power and by the fact that the Commission announced what made it think that the rates were too high is nothing but a resurrection in another guise of their assault on the suspension power itself. If, as we argue, the Commission can suspend initial rates altogether, it can relax that suspension by stating reasons and allow lower rates during the first seven months.

The final argument here concerns the refund condition. This condition we think should be sustained for the same reason that the Court upheld the Commission's decision in Chessie. The condition is intimately related to the reasonableness of the rates during the seven-month period. The

Commission was willing to take the carriers' assertions about investment, depreciation and the like at face value only if it could be sure that any error in the carriers' favor allowing the collection of excessive rates would eventually be corrected.

The Commission was concerned about the level of the rates, and if a refund condition were unavailable, the Commission might well have been unwilling to approve rates even as high as those that are allowed to go into effect without suspension.

This Court has held that the Federal Power Commission, which lacks a general power to order refunds, may condition the grant of the certificate of public convenience and necessity on the carrier's willingness to make refunds. A case in which it did that is United Gas Improvement Co. v. Callery Properties, 382 U.S. The Court said indeed that a refund condition was essential to protect the public, and that it could be made a condition even though Congress had been unwilling to provide the Commission affirmatively with that power.

This Court itself imposed a refund condition when it allowed petitioners to collect the rates that the Commission had suspended. The principle is really the same here. The Commission could have suspended outright, and it can protect the public by conditioning non-suspension on the carriers' agreement to refund rates later determined to be excessive.

In sum, the Commission has used its suspension power for the purpose it was created to serve, to protect the public from rates that appear to be excessive, and to do so during the seven months before a more thorough study can be completed. This purpose applies to the suspension of original rates in just the same way as it applies to the suspension of any other rate. This purpose explains why the Commission can allow lower rates to go into effect once rates that have not been too high have been proposed, and it demonstrates why the Commission legitimately may request the carriers to agree to refund rates determined to be excessive.

The same purpose underlying the suspension power explains everything the Commission did here, and its decision is therefore correct.

Thank you.

MR. CHIEF JUSTICE BURGER: We will not ask the Attorney General of Alaska to fragment his argument. We will resume at 1:00 o'clock.

[Whereupon, at 11:58 o'clock a.m., the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Attorney General, you may proceed when you are ready.

ORAL ARGUMENT OF AVRUM M. GROSS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GROSS: Thank you, Mr. Chief Justice. Mr. Chief Justice and Associate Justices, and may it please the Court:

The Court has already spent a great deal of time on discussing whether or not section 15(7) which applies to new rates only really applies to changed rates. I had intended to spend my time primarily on the rate question and the refund provision which attended the ICC's suspension of rates in this case. However, before leaving the question of statutory interpretation, I would like to make one very simple what I think important point.

Section 15(7) on its face is clear. The language says that you may suspend a new rate, and I think under any common interpretation of the word "new," this is a new rate. The discussion of this Court has focused primarily on other portions of the statute or other portions of other statutes -- Congress enacting an amendment in 1920, Congress adopting legislation in 1940, the Federal Power Commission Act.

Now, in my capacity, I work with the state legislature a good deal,and it is asking I think a good deal for a legislature to be internally consistent within a lengthy Act

all by itself. It is asking even more when you ask that subsequent legislatures ten or twenty years later approaching the question from different points of view and in different statutes to be equally as consistent.

Now, you can probably prove a lot or nothing through reference to subsequent statutes. And if the interpretation of this statute on its face, 15(7), if new rates meaning new rates led to some sort of illogical or strange results, it would seem to me that that interpretive process would be a very valuable one.

But here the statute makes eminent sense as it was originally written. If you interpret "new" as only meaning changed, what you are really ending up with is a statute which protects the public for a substantial amount of its business and leaves the public absolutely defenseless for the filing of initial rates or new rates, absolutely defenseless. Certainly the public needs suspension, the suspension power in the ICC, and this case so clearly demonstrates certainly as much for new rates as it does for changed rates. And the carriers are in no worse condition when new rates are suspended than when changed rates are suspended, for when a carrier files a changed rate, by definition it is asserting that the rate which it is changing is unreasonable and is leading it not to make a reasonable profit. The suspending of changed rates leaves the carriers in no worse position than they claim they are

here today.

What I am suggesting is simply taking the sentence as it is written, interpreting it in its normal fashion will lead to an extremely sound and logical result. If you stretch and reach for an unusual result, you will rob a system which leaves a whole area of regulation open.

For the remainder of my argument, I would like to focus on the suspension power. I am going to assume that the Court will hold that there is a suspension power over newly filed rates, and focus on whether the interim rate procedure as used in this case and the refund provision adopted by the Commission to file interim rates was a valid exercise of the ICC's power.

The question simply stated is whether the Commission's actions were directly related to its power to recess the reasonableness of rates filed before it and to their power to suspend rates pending an investigation.

To anaylze that relationship, you have to understand a little bit more about the background of these proceedings, because if you do it not only shows the soundness of the statutory interpretation which was urged earlier by Mr. Easterbrook but also that both of the procedures used by the ICC when it suspended rates and suggested a level of interim rates which it would accept and required a refund provision are not only rationally related to their review function, but absolutely

necessary to the exercise of that power.

I am here, of course, as a representative of the people of Alaska who for the last three or four years have undergone what we in Alaska laughingly refer to as "pipeline impact." "Pipeline impact" roughly defined is inflation, increased crime, housing shortages, crowded classrooms. These are caused by a rapid infusion of people into a state with no facilities to handle them.

QUESTION: Something like an occupying army?

MR. GROSS: Something like that, Mr. Chief Justice. That is very close.

The Arctic Slope Native Corporation, which is not here today but representated in part by myself, had it even worse. They suffered not only because of the things I spoke about but they suffered cultural dislocation on the North Slope, the Eskimo community on the North Slope.

Now, traditionally that type of impact is met by social action of one sort or another, and to do that in Alaska we need money, and the money comes from the oil and thereby lies the problem. The money that comes to the Alaska from the production of oil comes from its royalty and its severance tax, both of which are based on the wellhead value of the oil. The wellhead value is inversely related to the cost to transport the oil to market, so the higher the tariff the less the State of Alaska receives. Specifically, for each penny that the

tariff is too high, the State of Alaska receives a million dollars less a year. Two dollars equal $200 million, and in a state whose budget has never exceeded a billion dollars, that is an exceptionally large amount of money.

When these tariffs were filed, in our view they were initially too high, something between $2.00 and $2.50 too high, and we alleged before the ICC that the tariffs were outrageous, for a number of viewpoints; first, that the depreciation wasn't properly calculated, that the costs of building the pipeline had been vastly overblown, taxes hadn't been treated properly, a whole host of things. We pointed out before the Commission that we believed -- and there are calculations -- that the companies would receive a return on their equity of something approaching 46 percent, and the oil companies responded to us or the oil shippers responded to us, the pipeline companies, by saying there is no real problem, wait for your money, there is a situation, you can get reparations; if the Commission ultimately decides that the rates are too high, you can always go through the judicial proceedings required to obtain reparations. And we replied before the Commission that that was totally unsatisfactory, for two reasons. The first one was that it was simply our money and not their's, and we had a right to receive it. But the second reason was the most important. We had an immediate need for the money. We had suffered impact for years, we had

children who were crowded in classrooms, we had serious social conditions which we were trying to alleviate, and we needed the money to do it.

As the counsel for the North Slope pointed out before the ICC so eloquently, it was small solace to an Eskimo child to be told that sometime down the road there would be money for a school. That didn't do much for his education. So we felt that reparations would be an inadequate and a risky remedy. Legally, it is extremely risky. Traditionally, in reparations cases, of course, the shippers seek the reparations, but here, as the Court has undoubtedly noticed, there does not seem to be much of an outrage from the shippers for the costs of shipping this oil down the pipeline, which is not terribly surprising since the people who own the oil who are shipping it own the subsidiaries who operate the pipeline.

QUESTION: Isn't it also true that the price of the oil at the end of the pipeline isn't really much affected by the rate?

MR. GROSS: That's correct.

QUESTION: And that is because?

MR. GROSS: That is because the price of oil in the West Coast market is primarily set by competition with Saudi Arabian crude, and whatever these transportation rates are, the oil can't go above that.

QUESTION: Right.

MR. GROSS: That is the competitive basis.

QUESTION: And even at the original or initial rates, the --

MR. GROSS: New.

[Laughter]

QUESTION: -- the cost of the oil could be competitive with the --

MR. GROSS: Yes, that's correct.

QUESTION: -- with the imported oil?

MR. GROSS: That's correct.

QUESTION: Are there not some independent producers up there not tied into the pipeline?

MR. GROSS: Yes, but they are extremely minimal. I mean their interests are minimal, and I suggest that to take on the major oil companies over an issue of whether the tariff should be a dollar higher or fifty cents higher is an impractical situation.

We sought the suspension rate before the Interstate Commerce Commission because we wanted to receive our royalty and our severance tax now. The ICC reviewed the rates and it balanced a whole host of needs. It balanced the state's needs for the money now, it balanced the North Slope's needs for its money, it considered the availability of reparations, the likelihood of the tariff scheme eventually approved and if so at what level, the fact that the shippers were owners of the

pipeline companies themselves and therefore the damage if any would be minimal, and the fact that a suspension would only be in effect for seven months. And they concluded after all of that that they would accept the companies' data, though it was severely challenged by the petitioners, that it would refuse to accept one aspect of their methodology, in essence the law of the case, and would approve interim rates filed at any level which used the appropriate methodology as spelled out by the ICC, and the companies' numbers, saying the numbers can be challenged in the investigation. It essence, it was very much like a summary judgment, where the facts were accepted and the ICC in essence said you are mistaken as to the methodology you should use.

The ICC accepted interim rates which in its view would have resulted in a more than satisfactory return on equity but would have resulted in $1.37 less per barrel. That would have been about $70 million for the State of Alaska. Now, the ICC could have played what I can only consider games. It could have turned the rates down, it could have said it is your guess as how to get to the right number, you try and figure out what we just said, the companies could have come in with a new number, the ICC could have thrown that one out, and they could have gone back and forth. But the ICC did something different.

It said here is what we mean. Your rates don't

qualify because you are using the wrong methodology, here is the right methodology, and here is what it will produce; now, anything up to that level we will approve, providing that you also impose a refund condition, that you also assure us that if we allow you to collect this tariff during the seven-month period, which is based on numbers which are severely under challenge and which we frankly anticipate that the final tariff will be substantially lower, that you require, that you set up a system to refund the excess to the State of Alaska and the Arctic Slope which needs this money quickly.

QUESTION: Mr. Attorney General, may I ask, on that refund provision.

MR. GROSS: Yes.

QUESTION: We have a refund provision in our stay order.

MR. GROSS: Yes?

QUESTION: Our stay order includes a refund provision. Does that supersede the ICC refund order?

MR. GROSS: Oh, yes, I would assume so.

QUESTION: Well, if it does, one of the questions presented by the petitioners is the validity of that refund provision in the ICC order.

MR. GROSS: Well, as I understand it --

QUESTION: Is that before us or is that superseded by our refund provision?

MR. GROSS: Well, as I understand it, the ICC stay order required the companies to keep the monies isolated that would be collected between their interim tariff and the tariff which was ultimately approved. And what you did is you stayed the ICC's order requiring the interim tariff or setting at the level of the interim tariff. You permitted the companies to collect the tariff that they had originally filed and required that they keep an accounting between this higher tariff and the interim tariff, and that money supposedly is in a fund and if the Court --

QUESTION: Well, that is the greater, isn't it?

MR. GROSS: Sir?

QUESTION: That's the greater?

MR. GROSS: Yes, as a matter of fact.

QUESTION: Well, does that swallow up the lesser?

MR. GROSS: It would -- well, in any event --

QUESTION: You are --

MR. GROSS: -- if you rule in our favor, the money will come back to us through one vehicle or another.

QUESTION: Well, isn't it a bit like a dependent relative revocation, if one is involved the other one takes over?

MR. GROSS: Something like that, yes, Mr. Chief Justice.

QUESTION: You don't have the same time period though.

If we would decide, make a decision as to the top branch, it would leave the other still in effect, you would still need the reparations, the continuing proceedings before the Commission, wouldn't you?

MR. GROSS: That's correct. Within the time frame of seven months, the court order protects us as well as the ICC order. Beyond the seven months, it is only the ICC order.

QUESTION: So we must decide the validity of the reparations provision in the Commission's interim order?

MR. GROSS: Yes, sir.

QUESTION: So if we agreed with the petitioners that the refund provision were invalid in the ICC order, if that issue is still before us --

MR. GROSS: Right.

QUESTION: -- that is not victory for them as long as our refund order remains.

MR. GROSS: Well, as I read it, the order was somewhat contingent upon the validity of the ICC's suspension order. And were you to say that they have no power to suspend, I would assume that your order would not operate in that case.

I only want to say in the last word that I think it is important to realize that if these refund provisions were not in the order of the ICC, the ICC order, I think it is very reasonable to assume that the ICC level of interim rate would have been substantially less than was ultimately adopted and

therefore the two are intimately related.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Kilcarr.

ORAL ARGUMENT OF ANDREW J. KILCARR, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. KILCARR: May I say --

QUESTION: This question first, and perhaps it has already been covered. Suppose instead of the rate that was asked for, you had asked for four times that rate, would you think there would be no remedy? What would you think the ICC power would have been?

MR. KILCARR: Your Honor, that very question intrigued the Commissioners and intrigued all three of the Justices on the Fifth Circuit panel that we argued before, and our position then and our position now is suggesting respecting respectfully that the question is not commercially, does not make commercial sense. But assuming for purposes of this argument, our position would be that the ICC could not suspend that rate even though it was at an outrageously high figure.

QUESTION: Could they impose an impoundment requirement or does that standard fall with the suspension?

MR. KILCARR: Impoundment in terms of a refund order?

QUESTION: Could there be any remedy absent a

suspension? Would there be any other remedy that they could deal with a rate which you concede for these purposes is four times too high?

MR. KILCARR: In a very literal sense and on the basis of statutory interpretation, the answer there would be no also.

QUESTION: There would be a right to reparations, wouldn't they?

MR. KILCARR: That is the critical element in all of this, Your Honor, correctly so, that the statutory plan, the congressional plan calls for reparations. And I would like to come back to the Chief Justice's question because what has intrigued us every time that question has been asked is the other side of the question.

If you assume suspension power, as our opponents do, could the Commission set a rate for the transport of that oil at, say, a dollar? And the answer in these circumstances -- and they have answered that question affirmatively before the Fifth Circuit -- yes, they could.

Now, where does the balancing come in? I suggest respectfully that the balancing comes in when we are dealing with a rate established in the first instance or an original rate, that the agency does not have authority to suspend that rate, and to the extent that the hearing which does take place after it is filed, to the extent that the hearing finds

that the rate is excessive, then the shipper has the right of reparations.

If, on the other hand -- and what destroys this delicate balance -- if, on the other hand, the agency asserts authority and suspends and then finds that interestingly the rate that was filed was a correct rate within the zone of reason, the carrier has no way to recover the monies lost as a result of that suspension, as a result of that interim rate being set so low, and that we consider to be the balance.

Now, the Attorney General has made what is essentially an equity argument, talking about the need for money now in the State of Alaska and not wanting to wait until a reparations determination has been made. But the situation for the carriers, Your Honors, is that if we were right -- and we believe we were right and we did not overreach when we prepared and filed those original tariffs for the period July 31st through October 20th, when the stay of this Court was entered, we will never recover that money, and that is tens upon millions of dollars.

QUESTION: When you decide the question of the equities, whether they are relevant or not, there is a certain lack of parallel. In the one case the ICC is presumably neutral, and I think neutral, whereas in the first instance those fixing the rates are not neutral by definition, not neutral on the subject. I don't mean that in any pejorative

sense. They are very interested in the economics of it.

MR. KILCARR: May I quickly respond, Mr. Chief Justice, by pointing out that although not neutral in that sense, the carriers when they sat down to calculate their rate had a formulation that existed for thirty-five years in the industry, that literally thousands upon thousands of pipeline rates had been calculated on the basis of and that this agency had never questioned in those thirty-five years, never questioned that formulation, and it is a formulation that was exposed to this Court and found to be a reasonable interpretation of the consent decree that was entered in 1941. So it wasn't -- we weren't completely alone and unfettered when those rates were calculated.

QUESTION: Suppose we disagreed with you on your reading of prior Commission cases in terms of how it has construed this statute down through the years, say, from 1920 on, we just disagreed with you, that the Commission has always asserted that -- read the statute as permitting it to suspend rates whether they are new, initial or original, what would be your response then?

MR. KILCARR: I would say it would have weight but not controlling weight, Mr. Justice White. And I would say further that what this Court should look at for purposes of this question of statutory construction and interpretation is what the Commissioners in 1910 sought from the Congress and

what they said to the Congress about the authority that they sought.

QUESTION: But you don't give any special -- it doesn't especially worry you that the amendment which was made with respect to changed rates and the burden of proof in 15(7)?

MR. KILCARR: It does not worry us, Your Honor. Indeed, we view that as a complimentary act on the part of the Congress. We view the Cummins amendment in 1920 as using language believed to be synonymous with the new rate language used in 1910, and we don't see it as a divergence or as supportive of some limitation on the original language.

QUESTION: Well, who has got the burden of proving the reasonablenss of an original rate, as you say, as you call it?

MR. KILCARR: In a hearing, Your Honor?

QUESTION: Yes.

MR. KILCARR: In a hearing, we would have that burden.

QUESTION: And who has got the burden of establishing the unreasonableness of a changed rate?

MR. KILCARR: I misspoke.

QUESTION: I thought you did.

MR. KILCARR: I'm terribly sorry. In a hearing -- and we already have an order on this, to this effect -- the protestants have the burden.

QUESTION: Now, who has got the burden of proving the reasonablen-ss of a changed rate?

MR. KILCARR: The carrier in the hearing, and that is what that provision speaks to, that last provision that was entered at the end of 15(7).

QUESTION: That shows some awareness by the Congress of a difference between a changed rate and an initial rate, because the burden of proof is different.

MR. KILCARR: It is reflective, I suggest, Your Honor, of the agency practice that had grown up up to that point, where the concept of an original -- strike that -- an initial rate --

QUESTION: A Freudian slip.

MR. KILCARR: -- achieved a life of its own. But we have suggested that the life of an initial rate is not so broad as to encompass this rate established in the first instance, this first rate for a new entity, this original rate, regardless of the label. And the label has been confusing, Mr. Justice White, and that is why having to at least to our satisfaction analyzed the legislative history and looked at those ICC old and new cases.

QUESTION: Do you see any statutory difference between the Motor Carrier Act and the Interstate Commerce Commission Act for this purpose, for 15(7)?

MR. KILCARR: I do not believe it is clear, Your

Honor, that under the Motor Carrier Act, an original rate such as this could be sustained.

QUESTION: So you take the same position with respect to the Motor Act, the Motor Carrier Act, as you do here?

MR. KILCARR: I think that is a responsible position, but there is something even more important in the Motor Carrier Act, and most of the other -- indeed all of the other statutes cited for purposes of suggesting this pattern of congressional activity, and the difference is that they are all licensing statutes, and 15(7) is not a licensing statute, and the licensing authority can withhold the license if the rate, the original rate is unacceptable. So it doesn't have to get in a very material sense to the question of suspension, it simply withholds the license.

QUESTION: Mr. Kilcarr, is there any reason that you know of other than tradition which would prevent the ICC or the FERC from proceeding -- in a 15(1) proceeding from holding it on an expedited basis and having witnesses and findings in a period of weeks?

MR. KILCARR: I know of none, Your Honor, and we suggested just that alternative in the oral argument before the Commission on June 27th, that it could have been done on an expedited basis.

QUESTION: Mr. Kilcarr, as a matter of curiosity, has the term "common carrier" as a matter of statutory definition

included a pipeline company since 1887, since the inception of the Act?

MR. KILCARR: I believe it came into the Act later, Your Honor, and I can't give you the precise date that the pipelines did come in, and I think under the Hepburn Act in 1906, but I am not sure, that --

QUESTION: I didn't know that pipelines really existed until about the late 1930's or so.

MR. KILCARR: Oh, no, they did. They were part of the Standard Oil cartel case that was decided by this Court in 1906, and that was the essence of that litigation.

QUESTION: Interstate pipeline?

MR. KILCARR: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:25 o'clock p.m., the case in the above-entitled matter was submitted.]

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