ORIGINAL

In the

Supreme Court of the United States

UNITED GAS PIPE LINE COMPANY, Petitioner, v. BILLY J. McCOMBS, et al., Respondents; and FEDERAL ENERGY REGULATORY COMMISSION, Petitioner, v. BILLY J. McCOMBS, et al., Respondents.	)	No. 78-17 No. 78-249 (Consolidated)

Washington, D. C.
February 22, 1979

Pages 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED GAS PIPE LINE COMPANY, Petitioner,	:	
v.	:	No. 78-17
BILLY J. McCOMBS ET AL., Respondents;	:	and No. 78-249
and	:	(Consolidated)
FEDERAL ENERGY REGULATORY COMMISSION, Petitioner,	:	
v.	:	
BILLY J. McCOMBS ET AL, Respondents.	:	

Washington, D. C.
Thursday, February 22, 1979

The above-entitled matter came on for argument at 11:30 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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 PAUL STEVENS, Associate Justice

APPEARANCES:

RICHARD A. ALLEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, on behalf of Petitioner in No. 78-249.

APPEARANCES (Cont'd):

KNOX BEMIS, ESQ., 1054 Thirty-first Street, N.W., Washington, D. C. 20007, on behalf of Petitioner in No. 78-17.

STANLEY L. CUNNINGHAM, ESQ., Fifth Floor, 100 Park Avenue, Oklahoma City, Oklahoma 73102, on behalf of Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 78-17 and 78-249, consolidated, United Gas Pipe Line Company and Federal Energy Regulatory Commission against Billy J. McCombs et al.

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

ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.

ON BEHALF OF PETITIONER IN NO. 78-249

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

The issue in this case is whether the Court of Appeals was correct in the holding that Respondents and their predecessors in interest had lawfully abandoned the service of delivering natural gas in interstate commerce, even though the Federal Energy Regulatory Commission had never authorized abandonment under Section 7(b) of the Natural Gas Act.

Section 7(b) of the Act provides that no natural gas company may abandon the service within the Commission's jurisdiction, quote, "without permission and approval of the Commission first had and obtained after due hearing and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuation of service is unwarranted or that the present or future public convenience or necessity permits abandonment."

To summarize the pertinent facts, in 1948 a W. R.

Quin acquired an oil and gas lease of a tract of land in Texas known as the Butler B tract. In 1953, his widow and successor in interest, Bee Quin, entered into a gas sales contract with United Gas Pipe Line Company under which Mrs. Quin undertook to sell to United all merchantable natural gas produced from, quote, "all wells now or hereafter drilled during the term of the contract" on a number of tracts, including Butler B. In 1954, Mrs. Quin applied for and received from the Commission a certificate of public convenience and necessity, authorizing the sales of gas as provided for in the contract.

Subsequently, the lease was assigned several times. One subsequent assignee amended the certificate and amended the contract with United to extend its term to 1981 and obtained a certificate from the Commission that authorized the service as proposed in the amended contract and replacing the certificate that was originally issued to Mrs. Quin.

Before 1966, one well on Butler B produced natural gas that was delivered to United under the contract. In 1966, the then assignee of the lease informed United that the well was not producing any more gas and that no further gas would be available at that time.

No gas was produced on the property for five years and during that time no one applied to the Commission for authority to abandon service under Section 7(b).

In 1971, the assignee Haring assigned part of his

interest in the Butler B tract to the Respondents, who drilled a deeper well on Butler B, discovered more gas and entered into a contract to sell that gas to a duPont plant in Texas, that is in intrastate commerce.

In 1973, United asserted a right to that gas under its 1953 contract as amended. Respondents denied that United had any right to the gas and United filed a complaint with the Commission, which commenced this proceeding.

In the proceeding before the Commission, Respondents' principal claim was that the contracts with United and the certificates from the Commission dedicated only the gas that was produced in the first well that was drilled on the property, that is the well that was drilled before 1966, but not gas produced from the well that they had subsequently drilled.

Respondents also suggested to the Commission that even if the gas they were currently producing was dedicated to interstate commerce, the Commission should grant them abandonment authority nunc pro tunc, or retroactively, to 1966 when production from the first well had ceased.

The Commission held that the certificate issued to Respondents' predecessors dedicated all the gas produced from the Butler B tract and thus imposed upon Respondents an obligation under the Natural Gas Act to continue supplying that gas in interstate commerce to United.

In view of the fact that the supply of gas under

Butler B was concededly not depleted, the Commission also denied Respondents' suggestion that they grant abandonment nunc pro tunc to 1966.

The Court of Appeals reversed on the ground that the facts of this case established abandonment as a matter of law, even though the Commission had never granted abandonment. Particularly, the Court of Appeals relied on the fact that production had ceased during the period from 1966 to 1971, that the parties during that period seemed to believe that there was no more gas on the property, and that the Commission probably would have granted an abandonment application if one had been filed in that period.

Those facts, the Court concluded, made it unnecessary for Respondents to comply with the requirements of Section 7(b) which forbids abandonment without obtaining approval from the Commission and until the Commission finds appropriate facts in an appropriate hearing and proceeding.

In the court's view, the facts believed to be true in 1966 --

QUESTION: Mr. Allen, is there a routine hearing when an abandonment application is filed?

MR. ALLEN: There is not routinely a hearing. The statute, Mr. Justice Stevens, provides for a due hearing. Where there is an abandonment application and all of the interested parties are notified and the application itself demonstrates

depletion of supply and the interested parties concur in that there is usually not a hearing, but where there is some dispute there will be a hearing.

QUESTION: I got the impression from the briefs that normally there is not a hearing.

MR. ALLEN: Normally, there is not a hearing.

In any event, in the Court of Appeals' view the facts that were believed to be true in 1966 made the Commission's participation in the abandonment process unnecessary.

Our position is that the Court of Appeals' holding is contrary to the plain terms of Section 7(b). In this case, the Commission never approved abandonment and never made any of the findings that abandonment would be warranted and, indeed, no one ever sought the Commission's approval for abandonment at the time that those findings might have been made.

The court's holding, thus violates the plain language of Section 7(b), and it also violates the general principle of administrative law that a court is not empowered to make findings of fact or engage in functions that a statute entrusts exclusively to an administrative agency.

The court's holding that the facts of this case established abandonment also violates the specific objectives of Section 7(b) in at least three respects. First, Section 7(b) serves to insure that the Commission and all of their interested parties will have an opportunity at the relevant

time to examine the facts bearing on abandonment. The court's holding would deprive them of that opportunity because the court found abandonment on the basis of facts that appeared to be true in 1966, but they were never examined by the Commission, by United or any other interested party in the kind of proceeding that Section 7(b) requires.

Second, Congress in Section 7(b) entrusted to the Commission, as the expert agency, the task of making the determinations of facts pertaining to abandonment, such as the alleged depletion of gas supplies.

The court's holding, on the other hand, would authorize courts to examine those facts and to determine those facts wholly independently of the Commission. For example, it would authorize courts, in this kind of case, to determine whether the geological evidence known or available or discoverable in 1966 supported Respondents' predecessors' assertion that the gas supply was depleted.

Third, Section 7(b) provides necessary certainty in the entire regulatory system. By providing that only the Commission can grant lawful abandonment, producers, pipe lines, purchasers and other interested parties have some way of knowing whether gas from acreage that was once dedicated to interstate commerce remains dedicated to interstate commerce.

Under the Court of Appeals' holding, such persons would have no way of knowing whether that gas remains dedicated

to interstate commerce, because some court in the future might find that some previous state of facts established a lawful abandonment, notwithstanding the absence of any Commission action.

Now, the holding of the Court of Appeals that the facts established lawful abandonment appears to have been based in part on its view that if an application had been filed with the Commission in 1966 the Commission probably would have granted it. And the Respondents emphasize that notion in their brief to this Court by arguing primarily that because the Commission would have granted an abandonment application in 1966 the Commission erred as a matter of law in failing to grant abandonment nunc pro tunc in 1975, nunc pro tunc to 1966.

There are two answers to that contention. First, it has no basis in fact. No one knows what the Commission would have done if an abandonment application had been filed in 1966. No application was filed and, therefore, no one had any occasion or reason to examine the facts --

QUESTION: And the Commission is different.

MR. ALLEN: And the Commission is different. That's absolutely correct.

But, in any event, no one had any opportunity to examine the facts in the kind of proceeding that Section 7(b) contemplates. Moreover, we know now that the supply of gas was, in fact, not depleted. And it seems very strange to assume that

the Commission would have made a finding that we now know to be false.

QUESTION: Mr. Allen, I think your position is, if I'm not mistaken, even if they did demonstrate -- put the Commission on the stand -- "Yes, we would have granted it." -- You'd still say they didn't have statutory authority.

MR. ALLEN: Absolutely. That would be our second and principal argument.

The notion that the Commission would have granted -- Respondents' contention that the Commission would have granted abandonment in 1966 is totally irrelevant. In fact, it reflects a rather startling proposition of law that few regulatory agencies could operate under. In effect, it would mean that any time a statute requires agency authorization for an action, such as a certificate to operate an air line, or license to sell alcoholic beverages, a person who was charged with failing to obtain that authorization would have a defense, a legal defense that if he had applied to the agency at some previous and proper time the agency probably would have given him the authority. In essence, that's what Respondents' position boils down to.

QUESTION: Do you think that might put a premium on having some lawyers go around pursuing Mr. Justice Marshall's suggestion and get affidavits from the former members of the Commission, as some lawyers do, going around to

jurors after a trial.

MR. ALLEN: It would put a tremendous premium on such activity, Your Honor.

Respondents try to butress this argument by arguing that Haring's failure to apply for an abandonment application was in, quote, "good faith." It is hard to see on this record what they mean by good faith, because the fact of the matter is that the Secretary of the Commission,during this period of non-production, twice wrote letters to Respondents' predecessors and once to Haring, saying that "if no further sales are contemplated from this property, it is going to be necessary for you to file an abandonment application. Furthermore, it is going to be necessary for you to submit a statement of United with respect to its position on abandonment."

Haring, nevertheless, conceded in his testimony in this proceeding that he, nevertheless, made the determination that it wasn't necessary and he didn't do it.

In conclusion, I'd like to stress what this Court has recognized in a number of cases, namely, that Section 7(b) is of key importance to the Commission's regulatory responsibilities under the Natural Gas Act. Although the Commission makes every effort to do so -- to monitor service obligations under the Act -- there is no way that it can keep track of the performance of every gas sales contract that it certificates under the Act. In some cases, deliveries under such contracts may

fluctuate from day to day or even from year to year, and in some cases production may cease and resume several times for any number of reasons. But unless somebody complains to the Commission, the Commission -- absolute enforcement and assurance that the service obligations will be complied with is extremely difficult if not impossible.

Section 7(b) is critical to the Commission's enforcement powers because, as this Court recognized in Sunray Mid-Continent Oil Co., it insures that the Commission keeps legal control over service obligations even though physical facts may be beyond its physical control. Thus, for example, if it discovers that a producer is selling gas in intrastate commerce for sometime that it was dedicated to interstate commerce, it may -- and the producer claims that, "Well, at some prior period there had been a cessation of production, and I thought my obligation had lapsed," the Commission can say, "If you thought the supply of gas was depleted at some prior time, you should have come to us then to prove it, but, since you didn't, your service obligation, your legal service obligation remains." That's essential to the Commission's responsibilities under the Act.

In large measure, we submit, the Court of Appeals' decision would undermine that regulatory authority.

With respect to the other points made by Respondents in their brief, I'd like to rely on our reply brief and reserve

the balance of my time for rebuttal.

QUESTION: Mr. Allen, let me ask you one very trivial question.

Assume the property really had been exhausted and they never found any gas and somebody doesn't file an abandoned application. Is there any practical adverse consequence for his failure to do so? Or is the only adverse consequence that you have this problem if you do later discover gas?

MR. ALLEN: As far as I can see, this is the only significant adverse consequence.

QUESTION: This is a significant consequence in itself. I just wonder if there is anything else.

MR. ALLEN: There might be to the Commission's ability to monitor reserves in natural gas. The Commission may have some particular reasons to enforce --

QUESTION: I can see how the Commission might want to clean up to keep its files current, or something of that nature.

MR. ALLEN: Well, that's right, and if somebody --

QUESTION: If somebody -- any sanction on the operator?

MR. ALLEN: Well, if an operator wilfully refused to file an abandonment application, as he was required to, the Commission might have some regulatory reasons to take sanctions against him, even though his supply had depleted.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Bemis.

ORAL ARGUMENT OF KNOX BEMIS, ESQ.,

ON BEHALF OF PETITIONER IN NO. 78-17

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

Mr. Justice Stevens, you were asking of practical consequences.

The only one that I can cite for you is the producer has to continue to file reports on the particular acreage. That, in fact, is apparently how the Commission knew to send the letters to the producer involved here asking him to file for abandonment.

I intend to speak primarily of the reasons why a pipe line and its customers need the safeguards of Section 7(b) of the Natural Gas Act, and why these safeguards would be undercut by the holding of the Tenth Circuit and the position of the McCombs group here.

I also intend to speak of the practical problems and uncertainties that would arise, either from the holding of the court below or the position of the McCombs group.

One of the statutory purposes of Section 7(b), as indicated in the due hearing language in that section, is that interested parties be afforded the opportunity to be heard when a producer or any other natural gas company files for abandonment.

Indeed, it is the Commission's policy and practice to issue notices of the filing of such applications, such notices giving any interested party the chance to come in and state any objections. That opportunity is afforded whether or not a formal hearing is actually held.

Now, of course, in this case, there was no such hearing. There was no such notice. Indeed, there was no informal notice even. The producer never asked United either to agree to abandonment of the certificate or to release the producer from his contract obligations.

Now, it is asserted by the McCombs group and, apparently, assumed by the court below that abandonment would have been routinely granted if it had been sought. That, however, is by no means clear.

First of all, it is by no means clear in this circumstance that United, having a contract that it regarded as still being in effect with the user, would have agreed, would have consented or would have agreed not to object, if you will.

Second, we have here the question of whether the reserves were, in fact, depleted in 1966.

Now, a lot of the routine abandonment cases, I believe, involve a situation where you have no indication whatsoever of continuing production. We know that on the Butler B lease in 1966, despite the cessation of the natural gas production, there was production from an oil well. In other

words, you have continuing hydrocarbon productions all the way through the period. Furthermore, the record does not show the extent, if any, to which there were deeper tests in areas adjoining or close by the Butler B lease, when the producer asserts abandonment would have been routinely granted.

So, I think, it is --

QUESTION: This is happening with coal mines. After the coal mines have been -- not regulated as these are -- have been abandoned and when the price of steel -- I should have said iron mines. When the price of steel went up, it became economic to operate what had previously been an abandoned mine, abandoned because it was not economic to operate it.

MR. BEMIS: That's exactly right.

QUESTION: Exactly the situation you would have here, could have here.

MR. BEMIS: Yes, that's very close to this situation. I believe what happened here was they drove for deeper reserves. That is, of course, related to the economics of the situation.

QUESTION: New equipment is developed over a period of time.

MR. BEMIS: That is correct too.

And, indeed, this is not an uncommon situation. The fact that production ceased at one time in the past is by no means in itself indicative of there being no future gas production, of the supplies being exhausted, within the meaning of

Section 7(b) of the Natural Gas Act.

So, we really do not know what would have happened, even though, as the McCombs group points out, there were a number of routine abandonment applications granted during that period.

That, incidentally, is not so more recently. In fact, there is a recent decision of the Commission, a proceeding involving Texaco, where the Commission declined to grant them on essentially the same facts as would have appeared here in the period 1966 through 1971.

The right of the interstate pipe line and its customers has been cut off by the decision of the Tenth Circuit and would be cut off by the position adopted by the McCombs group here.

In its brief, the McCombs group argued that the hearing in this proceeding is an adequate substitute for the hearing that should have been held on the abandonment application they should have filed in 1966. That clearly cannot be maintained. The hearing in this case involved the question of retroactive abandonment, of course. It also has as its basis, as its starting point, the knowledge that the central fact that the producer would have been trying to establish then, i.e. depletion of reserves, is false. In other words, it is very difficult to have a due hearing about whether the reserves have been depleted when you know that they have not been depleted and

you are trying to speculate as to what the parties would have thought about depletion if the hearing had been held at some date inthe past.

So, clearly, the hearing in this proceeding cannot substitute for what was the party's right under Section 7(b) at the earlier date.

I would like to speak also to the practical problems and uncertainties that would stem from the decision of the court below or the position of the McCombs group.

The abandonment order is at present a definitive, reliable and public document telling you whether the acreage is still dedicated. There would be substituted for that, under the decision of the court below, a determination by the parties, I suppose, whether at some point in the past people would reasonably have thought the reserves to have been depleted. Moreover the court below speaks about the length of time -- five years -- between the less production and the new production. If that is a factor, how long did it have to be?

Simarly, on the position of the McCombs group, you have to determine not only those factors, but also whether there is good faith involved.

The McCombs group also makes the point that the abandonment orders themselves may not be recordable, and argue that that's the reason for not requiring abandonment. However, the problem there is not whether you can record the abandonment

orders. The real problem and the real goal is to put the producers on notice, or to put subsequent lesees on notice, that there is a gas purchase contract, an obligation in that respect. That was on record here. United had filed in the land records the evidence of its contract, and it did, indeed, turn up in one of the title opinions that the producers got.

It is easy to find out, if you are on notice of the contract, whether the property has been certificated and whether an abandonment has been granted. You can get it from the pipe line, if nowhere else.

Finally, I would like to mention this. At one point in McCombs' brief, page 19, there is a quotation from the testimony of a United witness, Mr. Alban, that suggests that United thought and took the position that the certificate obligation terminated when the property ceased to produce in 1966. That is not correct and that's not the implication of his testimony. It is not just the implication of his testimony, he says something very different in the record.

The record will show that what he was talking about was United's right, as it construed it, to remove a metering station because it was a gathering facility, not because any certificate obligation terminated. United never took any action here that indicated that it felt that either the certificate obligation or the contract obligation had terminated.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Cunningham.

ORAL ARGUMENT OF STANLEY L. CUNNINGHAM, ESQ.,

ON BEHALF OF RESPONDENTS

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

There is a threshold issue in this case about what the Court of Appeals held. The Commission and United read the Court of Appeals' opinion as engaging in prohibited judicial fact finding and as bypassing the Commission's functions.

We, on the other hand, make no such reading of the Court of Appeals' opinion. And, as I present my argument this morning, I will point out the relevant passages of the Court of Appeals' opinion which we believe support our reading thereof.

In Opinion Number 740, the Commission took two actions which form the basis of the issues before the Court. First, the Commission failed to grant McCombs' request to retroactively apply the Act as if Haring had applied for abandonment and had filed the proper papers in 1966.

Second, the court ordered McCombs to deliver gas to United on the grounds that the words "service rendered," as used in Section 7(b) are not to be accorded their plain meaning.

On judicial review, McCombs argued to the Court of Appeals that both of these holdings constituted error. We believe that a proper reading of the Court of Appeals' opinion

indicates that the court agreed with us on the first issue and, therefore, found it unnecessary to discuss the second.

The first issue depends on the application on an equitable principle which had been worked out between the courts and the Commission for a period of nearly 40 years and which does not involve the interpretation of any federal statute. This principle and the principle which was urged to the Court of Appeals was that where a party is in good faith in failing to file the proper papers with the Commission at the proper time, the Commission should retroactively apply the Act as if the party had complied with the Act at the proper time.

This principle is supported by four decisions of the Courts of Appeals cited in our brief. I would point out that the Courts of Appeals have required the Commission to apply the principles uniformly, regardless of whether it benefited or burdened the party failing to file.

Thus, in the Niagara Mohawk case cited in our brief, the application of the principle burdened the party, for the reason that it obtained a hydroelectric license for a shorter duration than it would otherwise have received.

However, in the Highland case, also cited in our brief, the party failing to file was benefited because it achieved higher rates than it would otherwise have been permitted.

Similarly, in Plaquemines and Ellwood, cited in our

brief, the party failing to file was benefited for the reason that they were not required to make refunds --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 noon the Court recessed to reconvene at 1:00 o'clock the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

ORAL ARGUMENT OF STANLEY L. CUNNINGHAM, ESQ.,

ON BEHALF OF RESPONDENTS (Resumed)

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

Before the luncheon recess, I was discussing the equitable principle in this case that where a party is in good faith in failing to file the proper papers with the Commission at the proper time, that the Commission should retroactively apply the Act as if the party had complied therewith.

I pointed out that this principle has been required by the courts to be applied in situations where it both benefits and burdens the party failing to file.

The application of the principle involves asking the present Commission to, in the language of the Plaquemines case, reconstruct the past to reflect compliance with the Act, and does not, therefore, involve the obtaining of affidavits or sworn statements from past Commissions as to what they might have done with the situation.

Moreover, the principle applies to Section 7(b) of the Natural Gas Act, as demonstrated by the Commission's own order in the Hewitt and Dougherty case, which is cited in our brief. In that case, the reserves were depleted before this

Court's decision in the Phillips case.

QUESTION: Mr. Cunningham, how far back does your nunc pro tunc rule run?

MR. CUNNINGHAM: It has a history of about forty years, Your Honor.

QUESTION: Would it go back that long?

MR. CUNNINGHAM: You mean the --

QUESTION: Would you say let's consider something that happened forty years ago as having been done?

MR. CUNNINGHAM: Your Honor, the principle, I think, would be applicable, regardless of the time span between the date the filing should have been made and the date the filing was actually made. In some of these cases, the time span runs from five to ten years. I don't recall a case that has had a time span which is longer than ten years, for example.

QUESTION: Under your theory, should not the Commission have been directed to hold the hearing that was never held because he didn't file at the right time? And that's not what the Court of Appeals ordered.

MR. CUNNINGHAM: Your Honor, there was a hearing before the Commission.

QUESTION: But they didn't make all these findings. They didn't find that they would have granted the abandonment if the petition had been filed in time, did they?

MR. CUNNINGHAM: They refused to apply the Act

retroactively, not on the grounds that if they had applied the Act retroactively that they would have found in 1966 that the reserves were totally exhausted.

QUESTION: What I am saying is that if your theory were correctly applied by the Court of Appeals, should not the Court of Appeals have remanded the matter to the Commission with directions to hold a hearing and decide what it would have decided in 1966, if a timely application had been filed?

MR. CUNNINGHAM: No, Your Honor, because the evidence in 1966 was that of Haring who was a petroleum geologist who testified that at the time his reserves were depleted in 1966 that neither he, nor United nor anyone else knew of any further reserves.

Now, in the light of that testimony, the Commission could only have made one finding concerning the situation as it existed in 1966; and that finding was, as required by the statute, that the available supply of natural gas was depleted.

Now, that finding --

QUESTION: You are saying that the Court of Appeals has found as a fact that this is true and it is so clear that we know that the Commission would have come to the same conclusion if they had had a hearing?

MR. CUNNINGHAM: The evidence in the record is uncontroverted. If the Commission had found the other way, concerning the facts in 1966, that would have been reversible as

being contrary to the evidence.

QUESTION: That's not the standard of review, of course, just contrary to the evidence. It would have to be no substantial evidence supporting a finding --

MR. CUNNINGHAM: There would have been no substantial evidence which would have supported a finding that the reserves were not depleted in 1966.

In the Hewitt and Dougherty case, which shows that this principle is applicable to Section 7(b), the reserves were depleted before this Court's decision in the Phillips case. And the Commission then applied the Act as if Hewitt and Dougherty had complied with Section 7(b).

United and the Commission seek to distinguish these cases on the grounds that they arose out of previously unannounced points of law. Yet, in the Plaquermines case, the filing should have been made after the Commission announced that it had jurisdiction under the Lobaka case. Simarly, in Ellwood a part of the refunds, and a substantial part of the refunds, were incurred after the Commission asserted jurisdiction in what ultimately became the Colten case before this Court.

In Highland, the party failing to file was simply relying on Commission regulations. And here, the Court of Appeals observed that there were no cases which dealt with similar factual circumstances.

So the common thread of all these cases is that the

party failing to file was in good faith. And once you have made that finding, then you proceed to retroactively apply the Act as if the party had complied with the provisions of the Act at the proper time.

Concerning the issue of good faith, the courts have required more than mere ignorance of the law or mere inadvertence in filing. In each case cited in our brief and in this case, the party failing to file was aware of the filing requirement, but there were facts and circumstances in each case which made the party believe in good faith that those filing requirements were inapplicable.

The Court of Appeals' opinion first stressed extensively the facts relating to Haring's good faith and why he felt it was unnecessary to file. Thus, in 1966, when Haring acquired the Butler B lease, there was one well on that lease which was not producing. Haring attempted to restore production by diligent efforts but was unsuccessful. Both the buyer and the seller recognized that there could be no more gas produced and this was contrary to their wishes. United removed its equipment and Haring believed that the contract was at an end. Haring was a petroleum geologist and, as I've stated, testified that in 1966 neither he nor anyone else knew of any further gas reserve.

Haring believed it was unnecessary to file the papers which the court observed could, in view of the facts, have only

been for the purpose of tidying up the record. Since Haring believed the 1953 contract had been ended, he did not inform McCombs about it. McCombs acquired his interest in the Butler B lease, relying on a 1967 title opinion which failed to mention the 1953 contract. McCombs was, therefore, unaware that Haring had not filed with the Commission until the hearings before the Commission in this case.

QUESTION: Isn't that episode one of the good indications why these abandonments should always be a matter of record, so that the title examiner can know what the situation is?

MR. CUNNINGHAM: I think they should be a matter of record, Your Honor, but in most states the abandonment orders of the Commission are unrecordable, and indeed inquiry to the Commission would prove useless for the reason that the Commission records are not kept so that the --

QUESTION: When you say they are unrecordable, under state law you mean?

MR. CUNNINGHAM: Yes.

QUESTION: Well, a careful examiner when he is dealing with this kind of property isn't going to rely just on the register of deeds or the registrar, whatever it may be. He is going to communicate with the Commission, isn't he?

MR. CUNNINGHAM: That was my point, Your Honor. Inquiry to the Commission would be fruitless for the reason

that the Commission's records are not kept in a manner so that it can be determined whether abandonment has been granted with respect to any particular tract. And, indeed, the record in this case in the Commission's opinion below indicates that the Commission has destroyed its records of a certain vintage, as of 1964, so that nothing can be told about records of that vintage.

As evidence of Haring's good faith and belief that he did not have to file, we pointed out in our brief that United also did not believe it had to file, although this Court in the United case decided in the same year, 1966, had said that Section 7(b) is equally applicable to the purchaser. Thus, the United witness testified that he didn't believe that it was necessary.

QUESTION: How much in United States dollars and cents would it approximately cost to have carried through abandonment proceedings in the 1960s?

MR. CUNNINGHAM: At the time, Your Honor, the cost would not have been great.

QUESTION: Why in the world do we have to bend all the law around to protect a company with counsel who deliberately didn't file under the law?

MR. CUNNINGHAM: Your Honor, Haring's failure to file --

QUESTION: I was willing to give you a break there -- it would cost you so much money -- but you can't even help me with that, can you?

MR. CUNNINGHAM: It would not have been costly at that time to file, Your Honor, for the reason that the Commission routinely processed the abandonment papers and did not hold a formal hearing -- an evidentiary hearing on it.

The Court of Appeals' observations were based on the statement of facts which were contained in Opinion 740. The Commission, however, did more than state facts concerning good faith. It made an express finding in Paragraph 71 that McCombs and Haring were nonwillful. In view of Haring's testimony that he was not merely ignorant of the requirement but that he consulted his lawyer and both of them thought it was unnecessary to file, I think that this holding is another way of saying that the Respondents before the Commission were in good faith. Moreover, the Administrative Law Judge made his own findings of innocence and good faith, which were not accepted to and in view of the Commission's regs --

QUESTION: What happens if you, in complete innocence and in good faith, fail to file your petition for certiorari in this Court on time? What happens to you?

MR. CUNNINGHAM: Well, Your Honor --

QUESTION: In all the good faith in the world. What happens?

MR. CUNNINGHAM: Your Honor, you are out of court, of course, but that's not the situation in this case.

QUESTION: And I don't want to bend it over there,

either.

MR. CUNNINGHAM: Well, we would ask Your Honor to consider that Haring was in good faith in failing to file and reasonably believed that it was not necessary to file. Whereas, in Your Honor's situation, no one would believe --

QUESTION: No. Mine is that you thought you had 91 days and you only had 90.

MR. CUNNINGHAM: Well, the statute very clearly sets forth that you have 90 days, Your Honor.

QUESTION: Misread the statute. I've got to give you all that good faith.

MR. CUNNINGHAM: I don't think, Your Honor -- and I pointed out that the doctrine is not applicable to mere inadvertence or ignorance, but rather it is applicable to a situation where the party reasonably believed that he didn't have to file.

In this connection, if there is any doubt about what the Administrative Law Judge thought about the subject, it may be laid to rest by his statement on the record at the conclusion of the proceedings, when speaking of the McCombs group he said, "It is clear to me that there are equities involved in this proceeding and that there are parties involved in good faith and who proceeded in good faith, without knowledge and without notice of the claim of United, until after they had taken certain steps and actions and made various commitments

and entered into various contractual arrangements."

We, therefore, submit that the findings of the Commission and of the Administrative Law Judge on the issue of good faith are clear and are supported by substantial evidence.

QUESTION: That said "without notice of United's claim," but does that say they didn't know what the statute said, or that they didn't get a form that said you have to file a petition of this kind?

MR. CUNNINGHAM: Without notice that United was claiming rights under its contract, yes, Your Honor, which it did not do until after the negotiations with United were over and until a year after McCombs had entered into its contract with duPont.

QUESTION: Isn't the statutory language pretty clear in this case? Isn't that the big problem?

MR. CUNNINGHAM: No, Your Honor, I don't think it is clear, because if you examine the law at the time, you had two cases which said -- that's the Hunt and the Harper cases before the Fifth and Tenth Circuits, respectively -- that the requirement to continue deliveries continues down to the exhaustian of the reserves, or so long as production continues.

In light of that, I think that Haring could reasonably have felt that he didn't have to file after it was clear to him that there were no further reserves, and that the reserves which he had tried to produce were totally exhausted.

The second part of the two-part analysis of this equitable doctrine is: What would have been the result had the proper papers been filed at the proper time, i.e., when Haring's reserves were depleted? The Court of Appeals had no doubt on this because it observed that "in the light of the facts in 1966 the filing could only have been for the purpose of tidying up the Commission's records." The Commission, on the other hand, refused to apply the Act retroactively, not because of the facts as they existed in 1966, but rather because of the facts as they existed in 1975 when the Commission issued its order. These facts were that in 1971 McCombs had discovered the McKaskel(?) field which lay at depths of approximately a mile deeper than the South Porter field from which Haring had attempted to produce.

This is not like the situation in which an iron mine which has known deposits becomes uneconomic because of price fluctuations, but rather these were separate and unknown reserves.

The Court of Appeals held that the Commission erred in this respect as a matter of law, that is, the Commission addressed the wrong evidence in applying the Act retroactively. The Court was correct in this because the required finding under Section 7(b) is that the available supply is depleted. And the facts are uncontradicted, as I mentioned, in 1966, that the available supply of natural gas was depleted. This finding was

correct in 1966 and is not erroneous today as the Commission would suggest, with the benefit of hindsight. For it remains true today that in 1966, when the finding was required to be made and the papers should have been filed, the available supply of natural gas was depleted.

Therefore, we believe the court's opinion, properly understood, holds that the Commission erred in failing retroactively to apply the Act. This holding does not, as the Commission and United suggest, bypass the Commission's processes or deny interested parties the right to be heard.

As reflected in the Administrative Law Judge's opinion, the Commission issued a notice of complaint on October 18, 1973, inviting any party desiring to be heard to file a petition to intervene or to protest. McCombs raised the issue of retroactive abandonment in its first admitted answer filed at a date long before the hearings in this case, in this language: "This Commission must treat that which should have been done as having been done and should therefore issue an order permitting Lewis H. Haring, et al. to abandon their sale to United as of the exhaustion of reserves in 1966."

QUESTION: You may have already said this, but do you know of any case where the Commission actually has permitted abandonment nunc pro tunc on its own or under mandate of a court?

MR. CUNNINGHAM: In the Hewitt and Dougherty case,

Your Honor, the Commission applied the Act as if Hewitt and Dougherty had complied with the Act in 1954 before the Phillips case was decided.

Now, in view of McCombs' answer, at the hearings all parties had opportunities to present evidence on this issue, and yet the only evidence in the record was that of Haring and McCombs that they were in good faith and that in 1966 the available supply of natural gas was depleted. Nor has this bypassed the Commission's functions, for the reason that the Commission was asked to exercise its powers under Section 7(b) and failed to do so.

The Commission and United suggest that they have had less than a full opportunity to cross-examine the evidence on this issue. And in response to this, I would point to the record which contains extensive cross-examination of McCombs' and Haring's witnesses before the Commission and the presentation by United of its own witnesses.

QUESTION: I've got another hypothetical, Mr. Cunningham.

We've got a Commission in existence now that everybody knows would not give an abandonment to anybody under certain conditions. So, wouldn't it be better not to apply and wait for another Commission?

MR. CUNNINGHAM: No, Your Honor, because --

QUESTION: Why not?

MR. CUNNINGHAM: -- the application of this doctrine requires the producer to come to the Commission and to ask the Commission to exercise its statutory function under Section 7(b), as of the date the papers should have been filed. Now, in order to do that, the producer has to show that he was in good faith. Now, if the producer is conspiring to avoid --

QUESTION: If I would do what I suggest that I would do, I wouldn't tell anybody that was the reason I was doing it, would I?

MR. CUNNINGHAM: I would suggest that in that case, Your Honor, the producer could not meet the required showing of good faith and, therefore, the doctrine would not be applicable.

QUESTION: Suppose ten years later I put on a lawyer that said, "We just didn't think you needed abandonment," lawyers that said exactly what the lawyers said in this case; would that be good?

MR. CUNNINGHAM: Your Honor, it is a question of good faith in each case.

QUESTION: I said that the lawyers said exactly what these lawyers said. Wouldn't the Law Judge say exactly what this Law Judge said, but not "You're wrong."

MR. CUNNINGHAM: That the parties were innocent, that is, and were in good faith?

QUESTION: Yes.

MR. CUNNINGHAM: It would depend on the facts and

circumstances of that case.

QUESTION: Well, the only -- They should have applied but they didn't.

MR. CUNNINGHAM: I don't think that would meet the required showing of good faith.

QUESTION: What other requirements do you have here?

MR. CUNNINGHAM: Haring entered a 1966 --

QUESTION: All I heard you say was that the lawyers said it wasn't necessary to file this piece of paper.

MR. CUNNINGHAM: No, Your Honor, that was not the only reason. I think that supports Haring's good faith, but Haring's good faith was based on the fact that he -- when he acquired the Butler B lease, there was only one well on it which was not producing. He undertook extensive operations in order to restore production which ended in failure.

QUESTION: What about the fact that you can shop around for Commissions? Is that right? Can't you wait until you get a Commission that likes McComb?

MR. CUNNINGHAM: Well, Your Honor, the required finding is whether the available supply was exhausted as of the time --

QUESTION: Haven't there been cases where they have held up on Trade Commission cases until the whole Commission changed, by delaying tactics?

MR. CUNNINGHAM: I am not familiar with those cases,

Your Honor.

QUESTION: Why in the world do you think they have passed a rule that you have to file for this, if you didn't have to?

MR. CUNNINGHAM: It's the same as in any filing requirement. It's the same as in the Plaquemines case where there was a filing requirement but the party was in good faith by not making -- when he failed to make the required filing. It is an equitable doctrine which excuses those filings where it would be inequitable to enforce the requirements of the Act against the party who is in good faith.

Further, I would point out that in this case the application of the doctrine would impose the devastating consequences of Haring's good faith failure upon McCombs, who was totally innocent.

The Commission also, Your Honors, indicates that something could have been added to these proceedings by the filing of an abandonment application at the time of the hearings below.

I believe this is unnecessary in view of the clear answer which McCombs filed raising this issue. And I would further point to the Commission's regulations which contain the information required to be set forth in an abandonment application. This is 250.7 of the Commission's regulations. Ten items: name of seller, name authorized in docket number, name

of purchaser, and the like, all of which were in the record in the proceedings below and all of which every party had an opportunity to cross-examine.

In summary on this point, Your Honors, the critical issue is whether the equities permit the devastating consequences of Haring's good faith failure to file to be visited on a totally innocent third party, that is to say, McCombs.

The answer to this must be no. The Court should permit the application of the equitable doctrine which we have urged here which is designed to prevent these inequities from happening. This application will not upset any regulatory scheme or statutory function of the Commission, but rather it is a matter of equitable principles addressed to these particular facts.

Your Honors, we also urge an issue which does include statutory interpretation, that is to say that the words "service rendered," as set forth in Section 7(b) of the Natural Gas Act, are to be accorded their plain meaning. That is to say a service is rendered when deliveries of natural gas are made in interstate commerce and the public has thereby relied on the reserves which support those deliveries.

We submit that reliance is at the heart of Section 7(b), and therefore when Haring commenced deliveries from his reserve the public relied on the reserves supporting those deliveries and those deliveries were, therefore, within the

scope of Section 7(b). However, McCombs' reserves which were almost a mile deeper and which were discovered at a later time were not relied upon by the public and are therefore not within the scope of Section 7(b).

We submit that the decisions of the Court show that neither the certificate nor the contract nor the oil and gas lease is a proper measure of service rendered under Section 7(b).

And we would point out -- and this is not pointed out in our brief -- that the Natural Gas Act when it was first enacted contained Section 7(b) in tact, but it did not contain a certificate provision except in very limited circumstances where a natural gas company wanted to serve another market which was already being served by another natural gas company.

So that, in our view, Congress did not intend the certificate to be the measure of Section 7(b) because in the original version of the Natural Gas Act there was no certificate provision except for very limited circumstances.

We believe, Your Honors, that the pipe line companies' right to purchase unknown reserves upon which the public has not relied was, therefore, intended by Congress to be left to the gas purchase contract under state law.

That concludes my argument.

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

Do you have anything further, Mr. Allen?

REBUTTAL ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.,

ON BEHALF OF PETITIONER IN NO. 78-249

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

There is no basis whatever in law or in fact for Respondents' claim that their alleged, quote, "good faith" requires the Commission to grant them nunc pro tunc abandonment. Their claim of, quote, "good faith" comes down, even if you accept it to be true, simply to an ordinary mistake of law. As Justice Marshall pointed out, if your lawyer tells you you don't have to file a petition for certiorari on time or you don't have to get a driver's license, or you don't have to do anything else that statutes require you to do, that is no excuse for not doing it. The statutory requirements remain in force.

Furthermore, there is no basis for Respondents' suggestion that it is difficult for producers to find out whether the Commission has certificated particular gas sales contracts. As Mr. Bemis has pointed out, the contracts are typically recorded in the Recorder of Deeds Office and any person searching a title will find the contract and have no difficulty going to the pipe line to determine or to the Commission to determine whether there is a certificate authorizing that service and whether there has been an abandonment order issued with respect to it.

QUESTION: You said recorded in Recorder of Deeds Office. You mean county by county?

MR. ALLEN: I believe that's correct, yes.

QUESTION: Under what heading?

MR. ALLEN: They are filed with the lease. The lease must be filed and typically a gas sales contract will be filed together with the lease to reflect an encumbrance on the lease.

The cases that Respondents rely on for their alleged good faith argument --

QUESTION: I didn't understand him to say the court had to buy his argument. His argument was that the court could buy it.

MR. ALLEN: His argument is, as I understand it, the Commission is required, as a matter of law, and was required in this case.

QUESTION: But he says the court can do that.

MR. ALLEN: The court can require the Commission.

QUESTION: I think it is a little different than saying the court has to.

MR. ALLEN: Well, it is not entirely clear what his position is, but if he says that's the law, then presumably the court would have to.

The cases on which he relies are completely distinguishable. They involve either of two situations. The first situation is where somebody has failed to comply with

statutory requirements and in order to make sure he doesn't get away with evading his statutory obligations, the Commission has to make an assumption that what he did -- he did, in fact, what he should have done.

The other situation is where a person does not do something in a reasonable reliance on the existence of the state of law at that time and then subsequently there is a change in the state of law. For example, in 1954 when this Court first determined and held that producer contracts were subject to the Natural Gas Act -- producer activities.

If there are no further questions, Your Honors --

QUESTION: Is Hewitt and Dougherty in that latter category?

MR. ALLEN: That is in that latter category where there had been a cessation of production before 1954, and, of course, the person didn't file for an abandonment application because nobody thought he was subject to the Act.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:32 o'clock, p.m., the case was submitted.)