

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1725

TITLE UNITED STATES, Petitioner V. CITY OF FULTON, ET AL.

PLACE Washington, D. C.

DATE January 21, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
V. : No. 84-1725
CITY OF FULTON, ET AL. :
- - - - - :

Washington, D.C.

Tuesday, January 21, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:08 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.
on behalf of Petitioner.

CHARLES F. WHEATLEY, JR., ESQ., Washington, D.C., on
behalf of Respondent.

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on behalf of Petitioner.	
CHARLES F. WHEATLEY, JR., ESQ.	19
on behalf of Respondent.	

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: The Court will hear
3 arguments first this morning in United States v. the
4 city of Fulton.

5 Mr. Pincus, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.
8 ON BEHALF OF PETITIONER

9 MR. PINCUS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The Federal government operates over 100
12 hydroelectric dams on the nation's waterways that
13 generate electric power. This case concerns the scope
14 of the Secretary of Energy's authority to set the rates
15 at which this power is sold to the public.
16 Specifically, the question presented here is whether the
17 Secretary may place a rate increase into effect on an
18 interim basis pending a final determination regarding
19 the propriety of the new rate.

20 In April 1978, the Southwestern Power
21 Administration, the entity whose rates are in dispute,
22 issued a public notice of a proposed rate increase. The
23 notice stated that the SWPA was running a deficit of
24 approximately \$20 million and proposed a tentative 42
25 percent rate increase to enable the SWPA's revenues to

1 cover its costs. The notice solicited written comments
2 and the SWPA subsequently held public meetings to inform
3 interested parties about the proposed rate increase and
4 to obtain oral comments concerning the proposal.

5 After considering the public comments, the
6 SWPA reduced the rate increase to 33 percent and
7 submitted it to the Assistant Secretary of Energy for
8 his approval. The Assistant Secretary reviewed the
9 public comments and observed that this was the first
10 rate increase in the SWPA's general rates in over 20
11 years.

12 He concluded that the rate increase satisfied
13 the applicable statutory standard because it would
14 generate revenues that would equal but not exceed the
15 SWPA's costs of generating the power. The Assistant
16 Secretary therefore issued an order confirming and
17 approving the rates and placing them into effect on an
18 interim basis pending final action by the Federal Energy
19 Regulatory Commission.

20 The Assistant Secretary's order specified that
21 customers who paid the interim rates would receive a
22 refund with interest if a lower rate eventually was
23 placed into effect by the FERC.

24 The FERC again solicited public comments
25 regarding the rates and at first issued a decision

1 disapproving the rates because they were too low. It
2 founds that the rates in fact would not generate
3 revenues equal to the SWPA's costs of producing the
4 electricity. After reviewing additional data that was
5 subsequently submitted in support of the rates, the FERC
6 reversed itself and approved the new rates in January
7 1982, 33 months after the rates had been placed into
8 effect on an interim basis by the Assistant Secretary.

9 Respondents commenced this action in the Court
10 of Claims seeking to recover the money paid pursuant to
11 the rate increase. They did not -- do not challenge the
12 amount of the rate increase. They argue only that the
13 Assistant Secretary cannot place rates into effect on an
14 interim basis.

15 The Court of Claims held that the Secretary
16 lacked the statutory authority to place interim rates
17 into effect and that Respondents' contracts with the
18 United States also barred the interim rate increase.
19 Following a remand to it for the calculation of damages,
20 the Court of Appeals for the Federal Circuit reached the
21 same conclusion.

22 QUESTION: Mr. Pincus, what exactly do you
23 mean by the term "interim rate increase," one that
24 hasn't been finally approved by FERC?

25 MR. PINCUS: Yes, the rates -- the rates are

1 proposed by the SWPA or the other -- any other power
2 marketing administration. They are examined by the
3 Assistant Secretary who issues an order directing the
4 customers to pay the rate increase, but providing that
5 the rate, that those amounts are subject to refund if
6 the FERC, which then considers the rate increase,
7 determines that it is too high and substitutes a lower
8 rate increase.

9 QUESTION: What the Assistant Secretary was
10 asking for is the pattern that was familiar with the
11 Interstate Commerce Commission when tariffs were filed,
12 was it not? The tariff would take effect immediately
13 until the Commission set it aside, but you say that's
14 not permitted here?

15 MR. PINCUS: Well, this case, this case is --
16 in the Interstate Commerce Commission example, and
17 indeed, in private utility regulation, the utility
18 typically files a rate which will take effect but is
19 subject to suspension by the relevant regulatory body.

20 QUESTION: Subject to refunds. They segregate
21 it, impound it?

22 MR. PINCUS: I don't believe that it's
23 impounded. I think that the utility is under, simply
24 under an obligation to repay the money if it is
25 eventually found that the rate increase is too high.

1 Here the rate before it is placed into effect is
2 actually measured by the government, by the Assistant
3 Secretary of Energy, against the applicable statutory
4 standard here, the standard that rates should be set at
5 a level that recoup revenues but don't provide any
6 provide to the government. So here customers are
7 actually in a better position than they are in typical
8 regulation because the rates already have been assessed
9 for their propriety by the government. So it is
10 especially peculiar that in this context, where the
11 rates already have been evaluated, even before they go
12 into effect on an interim basis, the courts below found
13 that the Secretary doesn't have this interim
14 rate-setting authority.

15 QUESTION: Mr. Pincus, do you think that the
16 statute and the contract in question would permit a
17 retroactive rate increase? Has the government ever
18 taken that position under the language of the contract?

19 MR. PINCUS: We haven't taken that position,
20 and that question isn't presented in this case.

21 QUESTION: I notice that, I notice that the
22 language of the contract says that there can be a change
23 in the rates to increase, decrease, modify or change
24 them, and they will become effective on the date
25 specified in the order, and I just wondered if the

1 government had ever taken the position that that would
2 permit a retroactive increase.

3 MR. PINCUS: Not to my knowledge, Your Honor,
4 and that's not what we're contending here. Here the
5 date of the Assistant, that the Assistant Secretary
6 issued his order in March 1979, and the interim rate
7 took effect on April 1, 1979. So we are not contending
8 for any retroactive authority here. The rates, the
9 Respondents were permitted to comment on the rates
10 before the Assistant Secretary reached his decision.
11 The Assistant Secretary reached his decision, and only
12 then did the rates take effect. So this case does not
13 involve any retroactive rate increases.

14 QUESTION: You say it took 33 months between
15 the time of the promulgation of the tentative rate or
16 the interim, and the final approval?

17 MR. PINCUS: Yes, Your Honor, and that long
18 delay is the problem that the Secretary faces in trying
19 to recoup the cost of electricity for that what
20 Respondents -- the result that for which Respondents
21 contend would have deprived the government of the
22 incremental revenue for that entire 33 month period and
23 essentially given them a windfall of paying rates that
24 had already been determined to be below cost for that
25 entire period of time.

1 QUESTION: Are delays of that length, is that
2 the usual?

3 MR. PINCUS: I understand from the Department
4 of Energy, Your Honor, that the process has been speeded
5 up somewhat --

6 QUESTION: To what?

7 MR. PINCUS: -- since these early days.

8 QUESTION: How much have they cut it back?

9 MR. PINCUS: I don't have the specific amount
10 of time, but I gather that it no longer takes
11 approximately three years to place rates into effect,
12 but the delay still can be substantial, and there's no
13 reason why interim rates can't be placed in effect since
14 Respondents essentially suffer no harm because if the
15 rate is subsequently found to be too high, they are
16 entitled to a refund. Since interim rates are such a
17 typical feature of conventional ratemaking, there's no
18 reason for the Secretary to be deprived of that
19 authority here.

20 QUESTION: Well of course, if you are right on
21 your interpretation of the Energy Act, in that the
22 Secretary has -- in that you claim the Act gives the
23 Secretary complete ratemaking power.

24 MR. PINCUS: Yes, Your Honor, we contend --

25 QUESTION: And he's created his own problem by

1 giving final approval to the FERC.

2 MR. PINCUS: Well, Your Honor, we don't think
3 it's a problem because we don't think that --

4 QUESTION: Well, it is, it is if, it is if you
5 say that, if there's a long delay. The Secretary
6 doesn't need to delay anything.

7 MR. PINCUS: Well, that's true, Your Honor,
8 but what the additional review does is impose safeguards
9 for taxpayers' rights to revenues that recoup costs and
10 also safeguards respondents' rights by giving them an
11 additional review to ensure that rates aren't too high.
12 So we don't -- there's no prejudice to anyone here.

13 QUESTION: And here the FERC raised the rates,
14 didn't it?

15 MR. PINCUS: The FERC at first thought that
16 the Assistant Secretary was wrong and that the rates
17 were too low, and it subsequently was convinced, upon
18 getting some more information, that the rates were
19 appropriate.

20 QUESTION: Is there any doubt about the FERC's
21 authority to raise as well as to lower the proposed
22 rate?

23 MR. PINCUS: Your Honor, the FERC cannot --
24 can only approve or disapprove a rate. It cannot change
25 the rate under the -- under the scheme that the

1 Secretary has set up in the delegation order. What
2 would happen if the FERC in this case, for example, had
3 adhered to its view that the rate was too low, that it
4 would send the matter back to the Assistant Secretary
5 who would then have to devise another rate that met the
6 FERC's objection.

7 QUESTION: The -- do you contend that the
8 language of the contract goes no further than the
9 language of the statute itself?

10 MR. PINCUS: Exactly, Your Honor. We think
11 that the contract provisions simply say that the
12 Secretary may exercise the full extent of his statutory
13 ratemaking authority.

14 QUESTION: Because the language is a bit
15 different. The statute says the rate schedules to
16 become effective upon confirmation and approval by the
17 Federal Power Commission.

18 Now, do you interpret the statute after the
19 new creation of the Department of Energy as substituting
20 the Secretary of Energy for the Federal Power
21 Commission, or do you conceive that FERC stands in the
22 shoes of the Federal Power Commission under that
23 language?

24 MR. PINCUS: Of the contracts, Your Honor?

25 QUESTION: No, of the statute which I read to

1 you.

2 MR. PINCUS: We believe, we believe that the
3 Secretary of Energy is substituted for the Federal Power
4 Commission in the statute, that the Department of Energy
5 Organization Act provides that except for authority,
6 that with respect to authority previously possessed by
7 the Federal Power Commission, it's basically divided
8 into two parts. The Act specifically designates certain
9 authority that is transferred to the FERC, and it
10 provides that all the rest of the Federal Power
11 Commission's authority shall be transferred to the
12 Secretary, and since this authority under Section 5 of
13 the Flood Control Act is not specifically set forth in
14 the Department of Energy Organization Act as one of
15 those bits of authority that is transferred to the FERC,
16 it clearly is transferred to the Secretary of Energy by
17 that statute, and that is set out in our brief and also
18 in the Fifth Circuit's opinion in the Tex-La case, and
19 we think the Court of Claims simply made a mistake in
20 reading the statute to transfer that authority to the
21 FERC.

22 QUESTION: And the FERC's in the Act at all,
23 you claim, just by the will of the Secretary.

24 MR. PINCUS: Exactly, Your Honor, and I should
25 point out that Respondents in their brief do not take a

1 different position. They agree that the Secretary could
2 change the delegation order and provide that he alone
3 exercises authority to confirm and approve rates and
4 eliminate the FERC completely from the process, and that
5 would be permissible under the statute.

6 QUESTION: I gather the Fifth Circuit agreed
7 with your position, did it not?

8 MR. PINCUS: Yes, the Fifth Circuit --

9 QUESTION: And expressly disagreed with the
10 Court of Claims' holding in this case.

11 MR. PINCUS: Yes, Justice Brennan. The Fifth
12 Circuit said, in fact, that in its view the Court of
13 Claims had simply misread the statute, and it pointed
14 out the reasons that it was clear from the statute that
15 the Federal Power Commission's authority had been
16 transferred to the Secretary of Energy.

17 The Court of Claims invalidated the rest of
18 its decision invalidating the rates on three bases, most
19 of which we've talked about. First, it found that the
20 interim rate increases were barred under the contracts,
21 but as I've discussed, the contract provisions simply
22 provide that the Secretary of Energy may exercise his
23 full statutory authority. So really there is no
24 separate contract question in this case. The contract
25 question is the same as the statutory question, whether

1 the Secretary has the statutory authority to impose
2 interim rates.

3 The second ground relied upon by the Court of
4 Claims is its view that Congress did not transfer the
5 Federal Power Commission's authority to the FERC.
6 However, as the Fifth Circuit pointed out and as we
7 demonstrate in our briefs, it's quite clear that the
8 Department of Energy Organization Act expressly
9 transfers that authority to the Secretary of Energy, and
10 that the FERC's involvement in this process is solely by
11 virtue of the fact that the Secretary determined that
12 review by the FERC was appropriate in his delegation
13 order.

14 So the only issue really in this case is
15 whether the Secretary has the authority to place rates
16 into effect on an interim basis, and we think that that
17 authority is supported on two separate grounds: first
18 of all, on the basis of Section 5 of the Flood Control
19 Act which broadly empowered the Secretary of the
20 Interior to sell electricity at the lowest possible
21 rates to consumers, consistent with sound business
22 principles, and in using such a general term to describe
23 the scope of the Secretary's authority, Congress plainly
24 intended to give the Secretary substantial leeway in
25 selecting the manner in which to administer this.

1 program.

2 Basically Congress -- this is a proprietary
3 program selling Federal property, and Congress has
4 directed the Secretary to dispose of it in whatever
5 manner he thought appropriate consistent with the way a
6 business would dispose of a similar asset. And
7 Respondents have presented no reason that interim rate
8 increases should be excluded from this broad grant of
9 authority. And in fact, interim rate increases are a
10 typical conventional ratemaking procedure, and rate
11 regulation schemes governing private utilities typically
12 provide that rates may be placed into effect on an
13 interim basis pending the final regulatory
14 determination.

15 And the reason for that rule is very simple.
16 The judgment has been made that the regulated utilities
17 should not be required to bear the burden of
18 financial -- of the loss of revenues due to regulatory
19 delay. And interim rates allow the utility to obtain
20 the revenue that it needs and at the same time safeguard
21 the customer's rights because the customer is entitled
22 generally to a refund with interest if the regulatory
23 body later finds that a lower rate is appropriate.

24 The Federal Power Act, for example, permits
25 private utilities to file their rates and permits the

1 rates to go into effect on an interim basis, subject to
2 a refund if the lower rate is adopted by the FERC. We
3 think it would be anomalous to construe Section 5 in a
4 manner that deprived the Federal Government of this
5 ratesetting technique.

6 QUESTION: Mr. Pincus, what evidence is there
7 that under the old scheme, before there was a Department
8 of Energy, that the Federal Power Authority interpreted
9 the Act as giving it the power to set interim rates?

10 MR. PINCUS: Your Honor, there are three
11 examples, three cases in which the Federal Power
12 Commission did set rates into effect on an interim
13 basis, one example under this statute, one example under
14 the very similar language of the statutes governing the
15 Bonneville power projects. I think that those
16 interpretations of the statute by the administrative
17 entity that administered it are entitled to deference
18 and show that the position for which we contend is the
19 appropriate interpretation of the statute.

20 And Respondents make much of the fact that
21 those are the only examples, but this Court has held
22 several time that the mere fact that an agency has not
23 exercised its power does not mean that the power doesn't
24 exist, and we think that is all that is true of the
25 situation cited by Respondents here.

1 Respondents' basic argument that Section 5 does
2 not confer interim rate authority is their claim that
3 the statutory provision, the statute bars the rates by
4 providing that rate schedules become effective upon
5 confirmation and approval by the Federal Power
6 Commission, but we think this language simply has
7 nothing to do with any prohibition of interim rates.
8 All the statute -- the statute does not require complete
9 administrative action before the rates are placed into
10 effect. It simply requires a decision by the Federal
11 Power Commission or the entity that exercises the
12 Federal Power Commission's confirmation and approval
13 authority here, the Assistant Secretary, and here the
14 Assistant Secretary did specifically that. Before the
15 interim rates went into effect, he issued an order
16 discussing whether the rates met the statutory standard
17 and expressly confirming and approving the rates on an
18 interim basis, and we think that is all that the statute
19 requires. There simply is no requirement that all
20 administrative action be completed before the rates are
21 placed into effect.

22 In addition, it's clear that Congress' purpose
23 in requiring the Federal Power Commission to act is not
24 at all furthered by requiring final approval of rates.
25 All that Congress wanted was the Federal Power

1 Commission to apply its expertise in evaluating a rate
2 before the rate was placed into effect, and that's
3 exactly what happens under our interpretation of the
4 statute. Before an interim rate is placed into effect
5 the rate is evaluated under the statutory standard by
6 the government entity that possesses that authority.

7 I would also like to briefly address our
8 second argument, that independent of Section 5 of the
9 Flood Control Act, the Secretary's now plenary authority
10 over the rates under the Department of Energy
11 Organization Act also permits the Secretary to use
12 interim rates.

13 We think that this Court has recognized that
14 this type of plenary authority carries with it the
15 authority place rates into effect on an interim basis
16 when that is necessary to serve the public interest, and
17 we think that that is the situation here. Interim rates
18 serve the public interest, especially in this case where
19 the SWPA's revenues had fallen so far behind in
20 recouping its costs, and do not harm consumers because
21 the consumers, first of all, have the right to comment
22 on the rates before they go into effect, have the review
23 of the rates by the Assistant Secretary, again before
24 the rates go into effect, and have the final level of
25 review by the Federal Energy Regulatory Commission and a

1 refund if the FERC decides that the interim rate was too
2 high.

3 In that situation, we think there's simply no
4 reason to deprive the government of the right to place
5 interim rates into effect.

6 Unless the Court has any questions, I'd like
7 to reserve the balance of my time.

8 QUESTION: Very well.

9 Mr. Wheatley.

10 ORAL ARGUMENT OF CHARLES F. WHEATLEY, JR., ESQ.

11 ON BEHALF OF RESPONDENTS

12 MR. WHEATLEY: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 In view of the argument that the government
15 has made, we think there are three main issues that are
16 before this Court relating to the question of whether or
17 not the Department of Energy could impose an interim
18 rate structure on the rates. The first question is
19 whether or not the contracts the government entered with
20 these three cities, by their terms, do not allow an
21 interim rate but require the final rate, approved by the
22 Federal Energy Regulatory Commission.

23 QUESTION: Mr. Wheatley --

24 MR. WHEATLEY: Yes.

25 QUESTION: -- do you think the contract

1 provisions have independent significance apart from the
2 statute, or does the contract permit what the statute
3 permits?

4 MR. WHEATLEY: Justice O'Connor, I believe
5 that the contracts have independent validity because
6 when you read the language of those contracts, they are
7 more explicit and more definitive than in fact the
8 language of the statute.

9 QUESTION: Well, as I read the contract, it
10 would even allow a retroactive increase.

11 MR. WHEATLEY: Well, the language of the --

12 QUESTION: So the language of the contract, if
13 that's what you are relying on, may be more generous
14 than the government even urges.

15 MR. WHEATLEY: Well, I don't see how the
16 language of the contract could reach a retroactive
17 result because it says the new rates shall thereupon
18 become effective in accordance with and on the
19 effective --

20 QUESTION: On the effective date specified.

21 MR. WHEATLEY: -- date specified in the
22 order.

23 Now, it says "thereupon." In other words, the
24 FERC and its predecessor, the Federal Power Commission,
25 would have to confirm and approve the increase, and they

1 cannot approve the increase and confirm it until they do
2 that in a final order.

3 Now, the words "approve" have been interpreted
4 a number of times by the Federal Power Commission itself
5 in a number of cases, and in those cases the Federal
6 Power Commission has said that the word "approved,"
7 where contract language requires approval by the FPC,
8 that refers to the final approval process, so that you
9 need -- the Commission would have to be making its final
10 approval.

11 A case directly in point on that is New York
12 State Electric & Gas v. FERC at 712 F.2d 762 or 768.
13 The FPC -- neither the FPC nor the FERC nor anyone
14 involved in these rates since they have been in effect
15 have ever sought to put them into effect on a
16 retroactive basis, and I think it comes from the
17 language in the contract and also from the language of
18 the Flood Control Act which says that the rate increases
19 cannot be put into effect until a confirmation and
20 approval, which by the legislative history of the
21 statute means final approval.

22 So the Commission could not after final
23 approval attempt to backdate the contract. That issue
24 hasn't come up, but the language certainly is clear
25 regardless of the question of retroactivity, that the

1 language of the contract is more explicit and more
2 detailed than the language of the statute.

3 QUESTION: But you take the position that in
4 any event, it wouldn't be allowed under the statute
5 either, is that right?

6 MR. WHEATLEY: We say that, first, if you read
7 the contracts, the plain language of the contracts and
8 the consistent practice under those contracts, and up to
9 this case as well as the interpretation of the words in
10 the contract by other courts and by the Federal Power
11 Commission, those kinds of words in the whole group of
12 Sierra-Mobile cases, if you take that whole --

13 QUESTION: But what if all you had was the
14 language of the statute and the history of its
15 application by the Federal Power Commission? Could it
16 establish interim rates?

17 MR. WHEATLEY: If you put -- no, clearly not.
18 If you put aside the clear language of the contracts
19 which go beyond the language of the statutory in being
20 explicit that you need a final order and that interim
21 rates are not permitted, you still have the language of
22 the Flood Control Act which, as it was construed in the
23 legislative history, required a final order by the FPC,
24 and under the administrative practice, consistent
25 administrative practice under the Flood Control Act up

1 until this case, that Act was consistently construed as
2 requiring the final approval by the Federal Power
3 Commission, and even as we read -- every court that
4 considered this, it was three district courts and the
5 Court of Claims, the Federal Circuit Court and the Fifth
6 Circuit, all six of those courts, to our opinion, in
7 construing Section 5 of the Flood Control Act, have
8 construed that that act required a final decision by the
9 Federal Power Commission or the Federal Energy
10 Regulatory Commission.

11 The Fifth Circuit opinion --

12 QUESTION: Well, that is certainly true, but
13 your question is whether, whether you needed a final
14 order before any rates could go into effect.

15 MR. WHEATLEY: That's correct. That's what we
16 think the Section 5 of the Flood Control Act, Justice
17 White, requires, and the Fifth Circuit in its
18 construction of Section 5 of the Flood Control Act, if
19 you read the opinion closely, seemed to reach the same
20 conclusion. They got a different result, not under
21 Section 5 of the Flood Control Act but by saying the
22 Department of Energy Act modified and amended Section 5
23 of the Flood Control Act. So it is the Fifth Circuit
24 which alone of all the courts that considered this, have
25 said interim rates are possible, has reached that result

1 on the basis of the decision of Congress in their minds
2 in the DOE Act, but when you track through the exact
3 provisions of the DOE Act, as it was only a transfer,
4 the legislative history was quite clear that it was not
5 to be an amendment of the prior laws, the prior
6 statutes, and each of the exact provisions of the DOE
7 Act, we think that the Federal Circuit reached a better
8 opinion.

9 QUESTION: Do you think the FERC inherited
10 power to approve rates directly from the FPC?

11 MR. WHEATLEY: No. I think what happened was
12 that --

13 QUESTION: You think that FERC derives its
14 power from a delegation of the Secretary.

15 MR. WHEATLEY: I think it does arise from a
16 delegation.

17 QUESTION: And the Secretary would have had
18 the -- could have kept the entire power himself.

19 MR. WHEATLEY: He could have kept that power,
20 but he could have kept only the power that was granted
21 by Section 5 of the Flood Control Act, and that power
22 was limited by Congress. When you read the legislative
23 history of Section 5, they did not intend to give
24 plenary authority to the Federal Power Commission in the
25 approval of rates. It was a very limited authority. It

1 could only be directed to approve or confirm the rates.

2 So --

3 QUESTION: With the Secretary proposing them.

4 MR. WHEATLEY: Yes, what they propose. It
5 could either act -- veto it -- just, Mr. Ickes in his
6 apperance before the Committee when the Section 5 was
7 being debated in its predecessor Act, the Bonneville
8 Act, said quite expressly that it was a veto power. It
9 required final action by the Federal Power Commission,
10 but it was a limited authority to affirm. It was not a
11 plenary grant of authority like the Interstate Commerce
12 Commission has or like the Federal Power Commission has
13 under their express statutes.

14 Now, had Congress in 1944 in passing Section 5
15 of the Flood Control Act intended to grant the power to
16 either the Secretary or to the Federal Power Commission
17 to grant interim rates, it could have used the language
18 that it had before it in the earlier Natural Gas Act of
19 1938 or the Federal Power Act of 1935, also the
20 Interstate Commerce Act had express provisions in it
21 that allow for interim rates and authorize interim
22 rates.

23 Section 5 of the Flood Control Act did not
24 intend to do that, and I think the reasons for it are
25 set forth in the analysis that the Fifth Circuit made of

1 Section 5 wherein I think the Fifth Circuit came up with
2 the conclusion that there wasn't any authority in the
3 Flood Control Act of 1944 to permit interim rates.

4 QUESTION: It is rather extraordinary, though,
5 isn't it, Mr. Wheatley, for a utility, public or
6 private, not to have any ability to set new rates in
7 force short of a 33 month delay.

8 MR. WHEATLEY: Well, I think that the delay,
9 Mr. Rehnquist, was a result of procedures which the
10 Secretary of Energy and the FERC, he could have
11 increased, shortened that time considerably, and they
12 have shortened it since that time.

13 Furthermore, in the long history after the
14 Flood Control Act was enacted, in '44, in all of the
15 dealings with the cities under the SWPA, over that
16 entire period of time up to the instance in this case,
17 at no time did SWPA ever sought to issue an interim
18 rate. That's up to '73. After the Court of Claims
19 decision in this case in '82, SWPA went back to its old
20 practice of not issuing interim rates, and in 1983 they
21 issued a rate that was not an interim rate, and if the
22 Court can take judicial notice of SWPA's annual report
23 for 1984, they have done very well indeed since they've
24 been following the practice. The report states -- this
25 is the annual report for '84 -- I'm pleased to report

1 the Southwestern Power Administration was financially
2 healthy when the books were closed at the end of fiscal
3 1984. We received record revenues of \$100.5 million, of
4 which \$93.2 million was deposited with the U.S.
5 Treasury, assisting in reduction of the federal
6 deficit. This may be compared to the \$52 million ion
7 funds appropriated by Congress for operation of the
8 Southwestern Power system. Of this revenue, \$21.8
9 million was available for debt retirement, which also,
10 is also a record. Our previous accumulated debt
11 retirement was \$39.9 million. These records were
12 achieved in a year of slightly less than average
13 electric energy generation.

14 So I think this report which was baed on rates
15 that were issued without violating the express language
16 of the contracts of the cities, shows that SWPA through
17 the Department of Energy and utilizing a procedure
18 without interim rates, can operate to keep its books in
19 balance and to do well.

20 Now, the question of the contract itself, this
21 case is one of the first cases to reach this Court from
22 the new Federal Circuit, and Congress has set up that
23 Court to have expertise in matters such as this dealing
24 with the meaning of federal contracts. We have the
25 result of both the Court of Claims before it was

1 abolished and the Federal Circuit Court of appeals
2 construing the language of the contract in this case as
3 on its claimed language precluding a rate increase to
4 these cities until such time as there have been a final
5 confirmation and approval by the FERC.

6 Now, that contract construction where the
7 Court subsequently went into the course of conduct
8 between the parties over the long period of time that
9 the contracts had been in effect I think is entitled to
10 great deference. The findings that both the Court of
11 Claims and the Federal Circuit reached on the meaning of
12 these contracts and the plain language and the course of
13 conduct is within their scope of expertise to review and
14 consider federal contracts.

15 The Fifth Circuit in its opinion really didn't
16 analyze the contracts. It really simply analyzed the
17 statutory, and just assumed that the contracts would
18 follow its construction of the subsequent statutes. We
19 think that the Fifth Circuit was in error. There was a
20 long pattern of conduct that started after the Flood
21 Control Act was issued, where no interim rates were
22 issued by SWPA. We have listed the cases at pages 36
23 and 37 from 1947 on up to the '70s. Throughout all of
24 those cases until the present case, SWPA never sought an
25 interim rate.

1 QUESTION: Of course, an interim rate isn't so
2 important unless you've got a period of heavy inflation.

3 MR. WHEATLEY: Well, the interim rate is I
4 think a question of what -- it could be important in an
5 inflationary period, yes, but on the other hand, the
6 contracts by their express language and their course of
7 conduct, there was never any permission of an interim
8 rate under that scheme.

9 QUESTION: Well, all I'm suggesting --

10 MR. WHEATLEY: Yes.

11 QUESTION: -- is, you know, this doesn't
12 affect the argument based on the language of the
13 contract or the language of the statute, but when you
14 are arguing past practice, it may be that the regulators
15 saw a need for an interim rate only in a time of heavy
16 inflation.

17 MR. WHEATLEY: Well, it could be that is so,
18 but certainly when the Power Act and the Gas Act were
19 enacted in 1935, Congress put in express interim rate
20 authority, and it seems strange that in 1944, which is
21 a few years after that, they didn't put the same
22 authority in there if they thought it was important and
23 necessary.

24 And I think the reason they thought it wasn't
25 necessary was -- goes back to Secretary Ickes' concept

1 in his sponsorship of the bill. He wanted a bifurcated
2 system to review, but he wanted the Federal Power
3 Commission review to be quite limited, and they would
4 only have the limited function of approving, and they
5 did not have any broad plenary functions like the
6 Federal Power Commission would have or the Interstate
7 Commerce Commission would have. And he wanted them
8 also -- he was very explicit about this, that they had
9 to have the final say, that the rate could not go into
10 effect, and we've cited his comments on this in our
11 brief, until there was a final order by the Federal
12 Power Commission, and that one ingredient is missing
13 here even after the DOE Act. The Secretary of Energy,
14 in his wisdom, decided that he wanted to delegate the
15 function of confirmation and approval back to the FERC
16 which was the successor agency to the Federal Power
17 Commission. So he delegated that in his order, and at
18 that point you come back to the express language of the
19 contracts and the Flood Control Act.

20 QUESTION: But you take the position that even
21 had there been no delegation to FERC, no interim rate
22 would be possible, is that right?

23 MR. WHEATLEY: I think that that is true
24 because the Department of Energy Act, when it was
25 enacted, simply transferred the situation as it existed

1 under Section 5 of the Flood Control Act, to the
2 Secretary of the Energy, and it's true that at that
3 point the Secretary of the Energy had the power, the
4 limited review and confirmation power of the FPC plus
5 the power that the Secretary of Interior had under the
6 Flood Control Act. He had both those powers, but those
7 powers were never plenary under the Flood Control Act.
8 The power to confirm rates was not changed
9 substantively, and all Congress did in the DOE Act was
10 transfer. They simply transferred what existed
11 previously and didn't augment and increase it. And the
12 Court reports and the Chairman of the bill, when it was
13 enacted, made it quite clear they were not creating any
14 new substantive power and authority in the Secretary of
15 Energy.

16 Well, the further sections relating to the DOE
17 Act is 301(b) and 302(a)(1), both of those simply
18 transferred functions, and as the Federal Circuit
19 recognized, the meaning of the word "transfer" is clear,
20 and it does not permit a definition that permits the
21 augmentation of the prior powers.

22 Now, nothing in the transfer gave any
23 additional authority in addition to the Section 5
24 language, and also, there was a Section 501(a) of the
25 DOE Act which expressly provided that any procedural

1 requirements under any prior law that were transferred
2 that were in addition to that which the DOE had itself
3 were to remain intact and in place. This clearly
4 brought with it the limitations that were implied or
5 were expressed in the 1944 Act requiring final
6 confirmation and approval by the Secretary or -- and his
7 delegate, the Federal Energy Regulatory Commission.

8 I mentioned earlier the legislative history of
9 the DOE Act also where Chairman Brooks, who was the
10 floor manager, said the Secretary would not have any
11 powers not already created by Congress, and that's cited
12 at page 40 of our brief. And Chairman Dunham of the
13 Federal Power Commission in the Senate hearings relating
14 to the DOE Act said he could separate reorganization
15 from substantive authority and he looked and construed
16 the DOE Act as simply a reorganization act and not as an
17 act investing the DOE with any additional authorities
18 other than that which it had under the transferred
19 acts.

20 Now, the government's position that the
21 consolidation of the Flood Control Act and the DOE Act
22 gives plenary authority over rate increases and interim
23 rate authority we think is patently wrong. And the
24 decision by the Federal Circuit below adopted a District
25 Court opinion in the Sam Rayburn Dam case, where that

1 issue was gone over very carefully and clearly shows and
2 demonstrates that the DOE Act did not intend to augment
3 any powers that were previously involved.

4 But regardless of the legislative history, I
5 think there's one bottom line that comes out. That is
6 that when the Secretary delegated his authority for the
7 final approval and confirmation, he was at that point,
8 to the FERC, at that point until that final approval and
9 confirmation took place, there was no completion of the
10 exact event which the statutory language in the Flood
11 Control Act, which is still valid, had taken, had
12 occurred, it would take place.

13 Well, I think that that completes my
14 argument. Unless there are further questions, I will
15 just relinquish the rest of my time.

16 CHIEF JUSTICE BURGER: Thank you, Counsel.

17 Do you have anything further, Mr. Pincus?

18 MR. PINCUS: Not unless the Court has any
19 questions, Your Honor.

20 CHIEF JUSTICE BURGER: Apparently none.

21 Thank you, gentlemen.

22 The case is submitted.

23 We will hear arguments next in United States
24 v. American College of Physicians.

25 (Whereupon, at 10:50 o'clock a.m., the case in

1 the above-entitled matter was submitted.)

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CERTIFICATION

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

84-1725 - UNITED STATES, Petitioner V. City of Fulton, Et Al.

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

BY Paul A. Richardson

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