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## From the Ashes of Wyoming v. Oklahoma Arises the PUC Phoenix: Can Wyoming Combat Economic Protectionism in the Age of the Clean Air Act Amendments

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## Comment

### **From the Ashes of Wyoming v. Oklahoma Arises the PUC Phoenix: Can Wyoming Combat Economic Protectionism in the Age of the Clean Air Act Amendments?**

#### INTRODUCTION

In January of 1992, the United States Supreme Court declared unconstitutional an Oklahoma statute that required Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least ten percent Oklahoma mined coal.<sup>1</sup> The Supreme Court invoked its original jurisdiction to hear the case and declared that the Oklahoma statute was clearly protectionist in nature and therefore violated the commerce clause.<sup>2</sup> In the majority opinion, Justice White reiterated the Court's long-standing disapproval of protectionist legislation by stating, "[w]hen a state statute clearly discriminates against interstate commerce, it will be struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."<sup>3</sup>

Unfortunately, since *Wyoming v. Oklahoma* was decided, the legal landscape has changed almost beyond recognition and Wyoming now finds itself in a world controlled not by Constitutional law but by the agency law of the very states it must oppose if it wishes to preserve its own coal interests. Wyoming, and other low-sulfur coal producing western states such as Colorado and Montana, face unconstitutional legislation produced by high-sulfur coal producing eastern states such as Ohio, Illinois, Indiana, and Pennsylvania which, while clearly designed to protect local coal interests, is creative, complex and diffi-

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1. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 792 (1992).

2. The Commerce Clause states:

[1] The Congress shall have the Power to lay and collect Taxes, Duties, Imports and Excises, to Pay the Debts and Provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . . [3]To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. I, § 8, cl. 3.

3. *Wyoming v. Oklahoma*, 112 S.Ct. at 800.

cult to contest. This legislation comes in the form of preapproval statutes that require public utility commissions to approve of the manner in which electrical utilities plan to comply with the Clean Air Act Amendments [CAAA] of 1990.<sup>4</sup> These preapproval statutes direct the public utility commissions [PUCs] to disapprove of compliance strategies that include switching to low-sulfur western coal as an alternative method of CAAA compliance.<sup>5</sup>

This comment examines the protectionist aspects of the preapproval statutes enacted in Ohio, Illinois, Indiana and Pennsylvania. It then explains why Wyoming may not be able to meet the criteria necessary to gain standing to invoke Supreme Court Jurisdiction under Article III, § 2 of the Constitution to contest these statutes. It also points out that the existence of an alternative forum may preclude the invoking of Supreme Court original jurisdiction. This comment then examines this alternative forum: the PUC agency hearing processes of the very states in which the preapproval statutes were enacted.

#### BACKGROUND

In *Wyoming v. Oklahoma*, the objective for Wyoming was clear: defeat the legislation enacted by the Oklahoma legislature that forced Oklahoma utilities to reduce the amount of coal they purchased from Wyoming.<sup>6</sup> From 1981 to 1986 Wyoming provided virtually one hundred percent of the coal purchased by Oklahoma utilities.<sup>7</sup> However, in 1987 and 1988, following enactment of the Oklahoma legislation, Oklahoma utilities purchased Oklahoma coal to conform to the statute.<sup>8</sup> That resulted in a corresponding and verifiable reduction in the amount of coal purchased from Wyoming, and significant losses to Wyoming in severance taxes.<sup>9</sup> The Oklahoma attorneys argued that losses directly attributable to the Act amounted to only one percent of the total severance taxes collected by Wyoming during 1987, 1988 and the first four months of 1989; therefore, the Supreme Court should not have granted original jurisdiction under Article III, §2 because the injury to Wyoming was "*de minimis*."<sup>10</sup> This argument was based on the Court's

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4. 42 U.S.C. §§ 7651a-7651o (1993).

5. See *infra* notes 34-64 and accompanying text.

6. *Wyoming v. Oklahoma*, 112 S.Ct. at 795.

7. *Id.* at 795.

8. *Id.*

9. *Id.*

10. *Id.* at 799.

earlier ruling in *New York v. New Jersey*, in which it was stated that, "before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."<sup>11</sup>

The Supreme Court belied Oklahoma's contention that Wyoming's losses were *de minimis* by stating that it would decline any invitation to key the exercise of its original jurisdiction on the amount in controversy.<sup>12</sup> Not only did charts from the Special Master's report illustrate clear and convincing evidence that Oklahoma utilities reduced their purchases of Wyoming coal with the passing of the Oklahoma Act,<sup>13</sup> but evidence of the severance tax losses to Wyoming went un rebutted.<sup>14</sup> In addition, the Court rejected Oklahoma's contention that Wyoming's losses were insignificant by repeating a paraphrased quote from Wyoming's own brief in footnote 11, "a half a million dollars here and a half a million dollars there and pretty soon real money is involved."<sup>15</sup>

Oklahoma's statute represented a prime example of economic protectionism prohibited by the Commerce Clause.<sup>16</sup> The losses suffered by Wyoming were demonstrable, and constitutional authority enabled the Supreme Court to exercise its original jurisdiction.<sup>17</sup> However, the preapproval statutes now being enacted by several eastern

11. *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

12. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 799 (1992).

13. *Id.* at 795.

14. *Id.*

15. *Id.* at 799 n.11 (citing reply brief for Wyoming at 5, n.3).

16. The seminal case analyzing a state's attempt to isolate state producers from competitive interstate commerce commodities is *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Baldwin*, New York established minimum milk prices paid to milk producers by milk dealers. To protect local milk producers the New York law contained a provision whereby the minimum prices were also paid for milk coming from other producers in neighboring states. This meant that New York dealers could not sell their milk unless they paid the milk producer, no matter what state the producer was from, the minimum price they paid to a New York producer. The effect of the New York law amounted to a tariff on out of state milk.

In formulating its economic protectionism analysis, the Supreme Court reasoned that it was the established doctrine of Supreme Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. The Court also stated that,

[o]ne state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

*Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 527 (1935).

17. See *infra* notes 73-79 and accompanying text.

states to deal with the CAAA create a new and unique set of problems that makes the test for invocation of original jurisdiction difficult to meet. The inability to invoke the original jurisdiction of the Court has the ultimate effect of leaving western low-sulfur coal producing states at the mercy of other forums: the agency hearing processes of the very states which have enacted preapproval statutes.

### *The Clean Air Act Amendments*

The catalyst that brought about this turn of events is the CAAA — the Clean Air Act Amendments of 1990.<sup>18</sup> Title IV of the CAAA requires a phased reduction in sulfur dioxide emissions coming from electric utility sources.<sup>19</sup> The purpose of the Act is to reduce the negative effects of sulfuric acid deposition (acid rain) through a phased reduction in the annual emissions of sulfur dioxide from electricity producing utilities.<sup>20</sup> Phase I of the Act is slated to go into effect on January 1st of 1995.<sup>21</sup> Phase II, which goes into effect on January 1,

18. 42 U.S.C. §§ 7651a-7651o (1993).

19. James E. Norris, *Extension Reserve Allowances and Clean Air Act Compliance*, 129 No. 2 PUBLIC UTILITIES FORTNIGHTLY 32, 32 (January 15, 1992).

20. Section 7651(b) of the the Clean Air Act Amendments states:

The purpose of this subchapter is to reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide of ten million tons from 1980 emission levels, and, in combination with other provisions of this chapter, of nitrogen oxides emissions of approximately two million tons from 1980 emission levels, in the forty-eight contiguous States and the District of Columbia. It is the intent of this subchapter to effectuate such reductions by requiring compliance by affected sources with prescribed emission limitations by specified deadlines, which limitations may be met through alternative methods of compliance provided by an emission allocation and transfer system. It is also the purpose of this subchapter to encourage energy conservation, use of renewable and clean alternative technologies, and pollution prevention as a long-range strategy, consistent with the provisions of this subchapter, for reducing air pollution and other adverse impacts of energy production and use.

42 U.S.C. § 7651(b) (1993).

21. Section 7651c(a)(1) of the CAAA states:

(1) After January 1, 1995, each source that includes one or more affected units listed in table A is an affected source under this section. After January 1, 1995, it shall be unlawful for any affected unit (other than an eligible phase I unit under section 7651c(d)(2) of this title) to emit sulfur dioxide in excess of the tonnage limitation stated as a total number of allowances in table A for phase I, unless (A) the emissions reduction requirements applicable to such unit have been achieved pursuant to subsection (b) or (d) of this section, or (B) the owner or operator of such unit holds allowances to emit not less than the unit's total annual emissions, except that, after January 1, 2000, the emissions limitations established in this section shall be superseded by those established in section 7651d of this title. The owner or operator of any unit in violation of this section shall be fully liable for such violation including, but not limited to, liability for fulfilling the obligations specified in section 7651j of this title.

42 U.S.C. § 7651c(a)(1) (1993).

2000, will require an even further reduction in sulfur dioxide emissions.<sup>22</sup>

The ultimate effect of the CAAA is that electrical utilities that burn coal will be expected to keep their sulfur dioxide emissions under strictly prescribed limits, and most will be forced to drastically reduce their sulfur dioxide emissions by either one or a combination of methods, or face stiff penalties.<sup>23</sup> A number of methods exist by which electrical utilities may accomplish these reductions in sulfur dioxide emissions: co-firing with natural gas,<sup>24</sup> wet or dry scrubbing,<sup>25</sup> least emissions dispatching,<sup>26</sup> reduction of off system sales, conservation,

22. Section 7651d(a)(1) states:

(1) After January 1, 2000, each existing utility unit as provided below is subject to the limitations or requirements of this section. Each utility unit subject to an annual sulfur dioxide tonnage emission limitation under this section is an affected unit under this subchapter. Each source that includes one or more affected units is an affected source. In the case of an existing unit that was not in operation during calendar year 1985, the emission rate for a calendar year after 1985, as determined by the Administrator, shall be used in lieu of the 1985 rate. The owner or operator of any unit operated in violation of this section shall be fully liable under this chapter for fulfilling the obligations specified in section 7651(e) of this title.

42 U.S.C. § 7651d(a)(1) (1993).

23. Section 7651j(a) states:

(a) The owner or operator of any unit or process source subject to the requirements of sections 7651b, 7651c, 7651d, 7651e, 7651f or 7651h of this title, or designated under section 7651i of this title, that emits sulfur dioxide or nitrogen oxides for any calendar year in excess of the unit's emissions limitation requirement or, in the case of sulfur dioxide, of the allowances the owner or operator holds for use for the unit for that calendar year shall be liable for the payment of an excess emissions penalty, except where such emissions were authorized pursuant to section 7401(f) of this title. That penalty shall be calculated on the basis of the number of tons emitted in excess of the unit's emissions limitation requirement or, in the case of sulfur dioxide, of the allowances the operator holds for use for the unit for that year, multiplied by \$2,000. Any such penalty shall be due and payable without demand to the Administrator as provided in regulations to be issued by the Administrator by no later than eighteen months after November 15, 1990. Any such payment shall be deposited in the United States Treasury pursuant to the Miscellaneous Receipts Act. Any penalty due and payable under this section shall not diminish the liability of the unit's owner or operator for any fine, penalty or assessment against the unit for the same violation under any other section of this chapter.

42 U.S.C. § 7651j(a) (1993).

24. This means that natural gas is used as a companion fuel to coal. Telephone interview with Barry Cunningham, Plant Manager, Pacific Power & Light Company, Jim Bridger Power Facility, in Rock Springs, Wyoming (November 18, 1993) [hereinafter *Cunningham interview*].

25. Scrubbing takes place as follows:

As exhaust gases flow up a power plant smokestack, they are either exposed to a micronized lime powder or a limestone solution that is sprayed in their path. Sulfur dioxide in the gas reacts with the spray and goes into solution, from which it is later removed, dewatered, and extruded in the form of sludge.

BRUCE A. ACKERMAN AND WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT*, 15-16 (New Haven and London Yale Press, 1981).

26. The primary goal of the dispatching of electricity to the power grid is to prevent exceeding

demand side management,<sup>27</sup> and most importantly for Wyoming, fuel switching.

Fuel switching simply involves switching from burning high-sulfur coal to burning low-sulfur coal. However, while the freedom to switch to low-sulfur coal would seem to be at least part of the answer to the many problems presented by the CAAA, such as how compliance costs will be met and what strategies will be used to effectuate compliance,<sup>28</sup> fuel switching presents tremendous social and economic problems to the eastern states that produce high-sulfur coal. The greatest among these problems is the displacement of coal related jobs and the economic ramifications of a declining coal industry.<sup>29</sup> It is for

compliance levels. *See supra* note 24, *Cunningham Interview*.

27. Demand side management is described in this way:

DSM (demand side management) activities are designed to influence electricity demand for the mutual benefit of the utility and the customer. The utility benefits by inducing changes in the time pattern and magnitude of electricity demand, which maximizes the productive and cost-effective use of the utility's resources. The customer benefits by being better able to control their total energy costs and usage.

Clark W. Gellings, *DEMAND SIDE MANAGEMENT: CONCEPTS AND METHODS* 4 (The Fairmont Press 2d Ed. 1993).

28. Joseph Dowd, Senior Vice President of American Electric Power, told the Senate Subcommittee on mining and natural resources:

From the perspective of coal, the critical issue appears to be whether mandated scrubbing should be required in the hope of protecting the high sulfur coal industry and UMW jobs or whether freedom of choice, i.e., flexibility in compliance, should be employed in order to achieve the overall lowest cost to society. There seems to be a general agreement that the scrubber retrofit scenario is a very high cost approach to the problem.

As an illustration, I would point out that ICF, a Washington-based economic consulting firm, which evaluated for U.S. EPA last fall's Mitchell-UMW acid rain proposal, concluded that that proposal would be twice as expensive in the first phase and 50% more expensive in its second phase than the "freedom of choice" scenario that was incorporated in last year's Cooper bill (H.R. 5211). Some in our industry feel that the differential is much greater than that. In some cases, it might be somewhat less. In any event, I think it would be worthwhile to examine more closely this cost differential between mandated scrubber retrofits and freedom of choice.

*Potential Impacts on Coal Production and Marketing Under Proposed Acid Rain Controls: Hearings on Pub.L. 101-549 Before the Subcomm. on Mining and Natural Resources, Comm. on Interior and Insular Affairs*, 101st Congress 2nd sess. 88-90 (1989) [hereinafter *Potential Impact Hearings*] (statement of Joseph Dowd, Senior Vice President and General Counsel of American Electric Power Service Corporation, Columbus, Ohio).

29. United Mine Worker representative Michael Buckner told the committee that: When and how we achieve emissions reductions are critically important to coal miners. If the wrong approach is taken, we could experience widespread fuel switching that will disrupt coal markets throughout northern Appalachia and the midwest. Should this occur, not only will working miners lose their income and their ability to feed their families, but retired miners may find their pension and health care benefits in jeopardy . . . . The economic costs to miners' families would be staggering. In addition to over one billion dollars in direct income lost by miners, coal field economies would be hit by an additional loss of over \$2.5 billion from industries that provide support services and retail sales to the local

these reasons some eastern states have developed CAAA compliance preapproval legislation.

Utilizing the preapproval statutes, the PUCs of four eastern states, Ohio, Illinois, Pennsylvania, and Indiana, maintain tight reins on the manner in which the electrical utilities they regulate plan to comply with the CAAA. Ohio and Illinois are the most aggressive with their legislation, empowering their PUCs to directly approve or disapprove a utility's plan for CAAA compliance. Because of the effect these preapproval statutes will have on western coal states, a group of western senators representing western coal producing states has charged the four eastern state's PUCs with enacting protectionist statutes that prevent the importation of low-sulfur western coal.<sup>30</sup> Senators Max Baucus, D-Mont., Conrad Burns, R-Mont., Alan Simpson, R-Wyo., Malcolm Wallop, R-Wyo., and Hank Brown, R-Colo., drafted a letter to Environmental Protection Agency (EPA) administrator William K. Reilly alleging that recently enacted laws in Illinois, Indiana, Ohio, and Pennsylvania "effectively preclude fuel switching, demand side management and the purchase of emission allowances."<sup>31</sup> The senators also allege that these recently enacted laws will undoubtedly lead ratepayers in those four states to pay more for electricity as a result of the restriction electrical utilities face in the methods they may use to comply with the CAAA.<sup>32</sup> An examination of this preapproval legislation is necessary to understand the concern of the western politicians.

### THE PREAPPROVAL STATUTES

#### *Ohio*

In the summer of 1991, the Ohio General Assembly passed Senate Bill 143 to help guide Ohio utilities toward CAAA compliance.<sup>33</sup> This law provides a procedure for the Ohio Public Utilities Commission [OPUC] to follow in preapproving CAAA compliance plans and directs that these plans ensure that Ohio coal is used to the maximum

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work force.

*Potential Impact Hearings* (statement of Michael Buckner, United Mine Workers of America).

30. John Simpson, *Senators Allege Dodge of Clean Air Act by State PUC's*, 131 No.1 PUBLIC UTILITIES FORTNIGHTLY 9, 9 (January 1, 1993).

31. *Id.* at 9.

32. *Id.*

33. James E. Norris, *Clean Air Act Compliance: State Regulators Respond*, 129 No.7 PUBLIC UTILITIES FORTNIGHTLY 31, 32 (April 1, 1992).



extent possible. Senate Bill 143 became part of Title 49 of the Ohio Revised Code and is highly indicative of the new generation of preapproval statutes.<sup>34</sup> The Ohio statute empowers the OPUC to examine the prudence of a company's CAAA compliance strategy making the use of Ohio Coal an important factor in considering such prudence.<sup>35</sup> Going even further is another section of the Ohio statutes which directs that among the findings necessary for OPUC approval of a voluntarily submitted compliance plan is that the plan calls for the use of Ohio coal to the "maximum extent" possible.<sup>36</sup>

34. The Ohio statute reads:

(A) If an electric light company that is a public utility and has one or more generating units that are affected by the Phase I acid rain control requirements under Title IV of the "Clean Air Act Amendments of 1990," 104 Stat. 2584, 42 U.S.C.A. 7651, has not submitted and obtained approval of an environmental compliance plan under Chapter 4913. of the Revised Code, the public utilities commission may examine and consider within the context of a proceeding held under section 4905.301 [4905.30.1] of the Revised Code the prudence of the company's strategy for compliance with the Phase I acid rain control requirements when the fuel costs for compliance facilities are included in that proceeding. If the company has not submitted and obtained approval of such a plan under Chapter 4913. of the Revised Code, or if the commission has not examined and considered the prudence of the company's strategy in a proceeding held under section 4905.301 [4905.30.1] of the Revised Code, *the commission, in fixing and determining just and reasonable rates to be observed and charged for service by the company under section 4909.15 of the Revised Code when the valuation of investment undertaken, or operation, maintenance, and other expenses incurred, by the company in connection with compliance with the Phase I acid rain control requirements are under consideration, shall examine and consider the prudence of the company's strategy for compliance with the Phase I acid rain control requirements.* The company shall submit to the commission the same information regarding the compliance strategy as is required to be contained in an environmental compliance plan under division (B) of section 4913.02 of the Revised Code. The company shall bear the burden of proof to establish the prudence of its compliance strategy. The commission shall find a company's compliance strategy to be prudent only if the commission finds that the strategy is adequately documented and makes all of the following findings regarding the strategy:

\* \* \*

(3) *To the maximum extent, the strategy provides for the use of Ohio coal at the company's coal-fired generating units that are affected by the Phase I acid rain control requirements and that any choices of fuel type that result in the displacement or decreased use of Ohio coal represent least-cost.*

OHIO REV. CODE ANN. § 4909.158 (Baldwin 1993) (emphasis added).

35. *Id.*

36. The revised code section calling for voluntarily submitted plans states:

(A) After concluding the hearing required under section 4913.03 of the Revised Code, the public utilities commission shall issue an order approving a proposed environmental compliance plan submitted by an electric light company under section 4913.02 of the Revised Code, and the estimated costs of and schedule for implementing the plan, only if the commission finds that the plan is adequately documented and makes all of the following findings regarding the plan:

\* \* \*

(3) *To the maximum extent, the plan provides for the use of Ohio coal at the company's coal-fired generating units that are affected by the acid rain control*

It is important to note that Ohio utilities are not required by law to comply with Ohio preapproval procedures.<sup>37</sup> However, if utilities choose not to do so the OPUC is still authorized to examine the prudence of the utility's plans for CAAA compliance.<sup>38</sup> If utilities choose to neither endure the preapproval process or provide for the burning of Ohio coal as part of their CAAA compliance plans, they run the risk of not being able to recover their compliance costs.<sup>39</sup> Assurance of compliance cost recovery comes not only by way of rate increase preferences for utilities that use Ohio coal, but through tax incentives designed to encourage the increased burning of Ohio coal.<sup>40</sup> Consequently, it is in the best interests of Ohio utilities to provide for the use of Ohio coal.

The manner in which a state like Ohio can utilize its PUC to protect its coal interests is aptly demonstrated in a matter that came before the OPUC in 1991.<sup>41</sup> In September of that year, the OPUC

*requirements and that any choices of fuel type that result in the displacement or decreased use of Ohio coal represent least-cost.*

\* \* \*

(B) *If the commission does not make all of the findings required under divisions (A)(1) to (7) of this section, the commission shall issue an order disapproving the electric light company's proposed environmental compliance plan.*

OHIO REV. CODE ANN. § 4913.04 (Baldwin 1993) (emphasis added).

37. Section 4913.02 (a) states that "[a]n electric light company that has one or more generating units affected by the acid rain control requirements *may* submit an environmental compliance plan to the public utilities commission for the commission's review and approval under this chapter." OHIO REV. CODE ANN. § 4913.02 (Baldwin 1993) (emphasis added).

38. See OHIO REV. CODE ANN. § 4913.04, *supra* note 36.

39. *Id.*

40. The statute that creates the tax incentives to burn Ohio coal states:

(B) *An electric company shall be allowed a credit against the tax computed under §5727.38 of the Revised Code for using Ohio coal in any of its coal-fired electric generating units. The credit shall be claimed in the company's annual statement required under division (A) of § 5727.31 of the Revised Code at the rate of one dollar per ton of Ohio coal burned, during the same twelve-month period used in determining gross receipts, in a coal-fired electric generating unit under all of the following conditions:*

- (1) The coal-fired electric generating unit is owned by the company claiming the credit or leased by that company under a sale and leaseback transaction;
- (2) A compliance facility is attached to, incorporated in, or used in conjunction with the coal-fired generating unit;
- (3) Either of the following applies:

(a) *In the case of a coal-fired electric generating unit that burns coal in combination with another fuel for the purpose of complying with phase I acid rain control requirements under Title IV of the "Clean Air Act Amendments of 1990," 104 Stat. 2584, 42 U.S.C.A. 7651, at least eighty per cent of the heat input during the period is from Ohio coal;*

(b) *In the case of any other coal-fired electric generating unit, at least ninety per cent of the heat input during the period is from Ohio coal.*

OHIO REV. CODE ANN. § 5727.391 (Baldwin 1991) (emphasis added).

41. In the Matter of the Long Term Forecasting Report of Ohio Power Company, 127 P.U.R.

refused to endorse a preliminary plan by American Electric Power (AEP) to switch from high-sulfur coal mined in the Ohio Valley to low-sulfur coal for use at its General James M. Gavin plant.<sup>42</sup> The Commission indicated that instead of switching to low-sulfur coal, AEP should install scrubbers at the Gavin plant if the company should succeed in obtaining extension reserve allowances from the EPA.<sup>43</sup> The OPUC was wary of approving a compliance plan that proved to be adverse to the state's policy of favoring the use of local coal whenever possible.<sup>44</sup>

The OPUC directed AEP to provide the commission with all reports, studies, analyses, and work papers associated with its compliance strategy for the Gavin plant.<sup>45</sup> AEP's preliminary analysis showed that the fuel switching option had the lowest revenue requirement on a 5-year, 10-year, and net present value basis.<sup>46</sup> The installation of scrubbers, even with the receipt of extension reserve allowances, would result in revenue requirements that would be \$120 million greater than fuel switching during Phase I, \$30 million more a year during the first 10 years, and \$184 million higher on a net present value basis.<sup>47</sup> This meant that AEP had reached the conclusion, based on bids solicited from at least 780 suppliers of coal, transportation, and handling services, that fuel switching provided the least cost means by which AEP could comply with the CAAA at its Gavin plant.<sup>48</sup> Howev-

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4th 329, 343 (1991). It should be noted that American Electric Power did not invoke the new law in submitting its compliance report to the commission. Rather, The Ohio Public Utility Commission used its authority under § 4935.04 of the Ohio Revised Code to initiate a formal inquiry into the compliance options available at the Gavin plant prior to the company's submission of its formal report for Commission preapproval. See James E. Norris, *Clean Air Act Compliance: State Regulators Respond*, 129 No. 7 PUBLIC UTILITIES FORTNIGHTLY 31, 32 (April 1, 1992).

42. James E. Norris, *Clean Air Act Compliance: State Regulators Respond*, 129 No. 7 PUBLIC UTILITIES FORTNIGHTLY 31, 32 (April 1, 1992).

43. Extension reserve allowances have been described in this way:

If electric utilities choose to install scrubbers at an affected generating plant by January 1, 1997, they may request a two-year extension to the compliance deadline. Such utilities would then receive enough extension reserve allowances to provide for uncontrolled emissions during the extension period.

\* \* \*

An emission allowance represents a limited right to emit one ton of SO<sub>2</sub>, during, or after the calendar year for which it is issued.

James E. Norris, *Extension Reserve Allowances and Clean Air Act Compliance*, 129 No.2 PUBLIC UTILITIES FORTNIGHTLY 32, 32 (January 15, 1992).

44. James E. Norris, *Clean Air Act Compliance: State Regulators Respond*, 129 No. 7 PUBLIC UTILITIES FORTNIGHTLY 31, 32 (April 1, 1992).

45. 127 P.U.R. 4th at 343.

46. *Id.* at 346.

47. *Id.*

48. *Id.*

er, while the commission agreed that the use of coal bids provided a fairly accurate basis for projecting future coal prices, it felt that the uncertainty of future demand for low-sulfur coal, the uncertainty over whether those bids could be turned into contracts, and AEP's lack of detailed fuel cost sensitivity analyses made the fuel switch option at Gavin very risky.<sup>49</sup> In addition, the commission concluded that using scrubbers at Gavin would enable AEP to continue to burn higher sulfur coal mined in the Ohio River Valley, and make it less dependent on the use of more distant, low sulfur coal.<sup>50</sup>

### *Illinois*

The preapproval statute enacted in Illinois goes even further than the Ohio statute by specifically directing utilities to achieve compliance with the CAAA by installing scrubbers.<sup>51</sup> The continued use of Illinois

49. *Id.* at 399.

50. *Id.* at 404.

51. The Illinois preapproval statute states:

(a) The General Assembly finds that (i) the health, welfare and prosperity of all Illinois citizens require that Illinois electric utilities, in complying with the provisions of the federal Clean Air Act Amendments of 1990 (P.L. 101-549), and that the Illinois Commerce Commission, in reviewing and approving the plans of such utilities for compliance, take into account the need for utilities to comply in a manner which minimizes to the extent consistent with the other goals and objectives of this Section the impact of compliance on rates for service, *the need to use coal mined in Illinois in an environmentally responsible manner in the production of electricity, and the need to maintain and preserve as a valuable State resource the mining of coal in Illinois*, and that (ii) *the construction of pollution control devices for the control of sulfur dioxide emissions at existing large generating units burning Illinois coal as a fuel source can be an environmentally responsible and cost effective means of compliance when the impact on personal income in this State of changing the fuel used at such generating units so as to displace coal mined in Illinois is taken into account. Consistent with these findings, the General Assembly declares that it is the policy of the State of Illinois that pollution control devices for the control of sulfur dioxide emissions should be installed at four generating units with accredited summer capability greater than 500 megawatts presently burning Illinois coal as a fuel source, as more specifically defined in subsection (e) of this Section, to enable such units to comply with the requirements of the federal Clean Air Act Amendments of 1990 while continuing to use Illinois coal as a fuel source, and that the owners of such generating units should be allowed to recover through rates their prudent costs incurred in designing, acquiring, constructing, installing and testing such facilities or using such facilities where such use is obtained by the company through a service contract.*

\* \* \*

(d) If a public utility elects, or because of action by a federal, state or local government environmental agency is required, to revise a portion of a Clean Air Act compliance plan that has previously been approved by the Commission, or if the Commission or any other party believes a revision to such Clean Air Act compliance plan is necessary, the public utility, *the Commission or any other party may by supplemental petition or complaint filed with the Commission request approval of a revision to its Clean Air Act compliance plan; provided, that the public utility may file only one such supplemental petition for the pur-*

coal is assured by another statutory provision that prohibits an Illinois utility from switching fuel without Illinois Commerce Commission

*pose of seeking an increase in the reasonable cost to design, acquire, construct, install and test the facilities described in subsection (e) of this Section.* The Commission shall hold public hearings for each such supplemental petition or complaint filed by a public utility, the Commission or any other party and shall issue a supplemental order approving, approving as modified, or rejecting such revision to the public utility's Clean Air Act compliance plan within four months following the date the supplemental petition is filed, provided, that the supplemental order shall be issued within 6 months in the case of a supplemental petition seeking a revision in the reasonable cost of the facilities described in subsection (e) of this Section. The public utility shall, if applicable, include in its supplemental petition such information as is required by Section 8-508 with respect to the proposed revision to the Clean Air Act compliance plan, in which case the Commission shall approve or deny the proposed "modification" as part of its order approving, approving as modified or rejecting the public utility's revision. Prior to issuance of the Commission's supplemental order, the public utility shall be entitled to continue the implementation of the Clean Air Act compliance plan previously approved by the Commission.

(e) Any public utility owning an electric generating station at which are located two or more electric generating units each with accredited summer capability greater than 500 megawatts *and using coal mined in Illinois as the primary fuel source shall include in its proposed Clean Air Act compliance plan the installation of pollution control devices for the control of sulfur dioxide emissions at two such units to enable them to continue to burn Illinois coal*, and shall include in its petition or supplemental petition the estimated cost to design, acquire, construct, install and test or the cost for use, pursuant to a service contract, of such facilities. *The Commission shall in its order or supplemental order approve the construction of such facilities and shall state the reasonable cost to design, acquire, construct, install and test, or to use pursuant to a service contract, such facilities*; provided, however, that the obligation to construct such facilities imposed by such order on any utility eligible to receive the grant specified in Section 6 of the Illinois Coal and Energy Development Bond Act [FN3] shall terminate if such grant is not received by such utility by October 1, 1992; and provided further, that *the Commission shall not by supplemental order authorize an increase in the reasonable cost to design, acquire, construct, install and test, or to use pursuant to a service contract, such facilities above the cost approved by the Commission in an order pursuant to subsection (c) of this Section*, except for such increases in costs as it finds are required by changes in law or regulations. Notwithstanding the provisions of any other Section of this Act, such facilities approved in the Commission's order or supplemental order shall, upon being placed into operation on a consistent, sustainable basis by the public utility, be deemed used and useful; and the public utility shall be entitled to have included in its rate base the lesser of (i) its investment in the cost of the facilities as set forth in the Commission's order or supplemental order, or (ii) the public utility's investment in the actual cost of designing, acquiring, constructing, installing and testing such facilities, but no more than the lesser of such amounts. For purposes of this subsection, the public utility's investment shall not include the amount of any state, federal, or other grants provided to the public utility to fund the design, acquisition, construction, installation and testing of pollution control devices for the control of sulfur dioxide emissions. If a utility uses a service contract to comply with these requirements, the utility shall be entitled to recover its prudent costs upon the provision of such service on a consistent and sustainable basis. *Any increase in rates attributable to inclusion in rate base of a public utility's prudent investment in the costs associated with such facilities, or the recovery of prudent costs pursuant to the use of a service contract, shall be allocated among its principal customer rate classifications on the basis of costs of services to such classifications.*

ILL. REV. STAT. ch. 220, para. 5/8-402.1 (Smith-Hurd 1993) (emphasis added).

[ICC] approval if the switch would decrease the use of Illinois coal by more than ten percent.<sup>52</sup>

The ICC recently used the Illinois preapproval statute to approve an initial CAAA compliance plan submitted by Commonwealth Edison Company.<sup>53</sup> Prior to the enactment of the Illinois preapproval statute, Commonwealth Edison performed studies that indicated that the use of low-sulfur western coal would be the most economical way to comply with the CAAA.<sup>54</sup> However, following enactment of the Illinois preapproval statute, Commonwealth Edison performed a new round of compliance strategy analyses that did not include the use of western coal.<sup>55</sup> Based on these subsequent analyses, Commonwealth Edison concluded that the installation of scrubbers would be the lowest cost, most technologically feasible method of complying with the CAAA.<sup>56</sup>

The passing of the Illinois preapproval statute has prompted the Alliance for Clean Coal [ACC], a non-profit Virginia trade association comprised of coal, railroad and transport companies,<sup>57</sup> to file a complaint in United States District Court for the Northeastern District of Illinois.<sup>58</sup> The ACC claims that The Illinois Coal Act discriminates against interstate commerce on its face and in its practical effect, is not justified by any legitimate local purpose, and violates the limits placed

52. The Illinois statute states:

Except as provided in Section 12-306, no public utility shall abandon or discontinue any service or, in the case of an electric utility, make any modification as herein defined, without first having secured the approval of the Commission, . . . "Modification" as used in this Section means any change of fuel type which would result in an annual net systemwide decreased use of 10% or more of coal mined in Illinois.

ILL. REV. STAT. ch. 220, para. 5/8-508 (Smith-Hurd 1993) (emphasis added).

53. In Re Commonwealth Edison Co. no. 93-0027, 1993 WL 343426 (Ill.C.C. 1993).

54. *Id.* at 2.

55. *Id.*

56. *Id.* at 4.

57. Members of the Alliance for Clean Coal include ARCO Coal Company (a division of Atlantic Richfield Company) Nerco Coal Corporation, Burlington Northern Railroad Company, Union Pacific Railroad Company, Chicago and Northwestern Transportation Company, and Southern Pacific Transportation Company. Alliance for Clean Coal v. Craig, U.S. Dist. Ct., No. Dist. of Ill., E. Div. Complaint at 2 (August 16, 1993).

58. In its Amicus Curiae brief, Wyoming charges that the Illinois preapproval statute is designed to guarantee that Illinois coal will continue to be sold to Illinois utilities by directing the utilities to install scrubbers:

The obvious reason for mandating the use of scrubbers is to insure the continued burning of Illinois coal. The Act goes so far as to turn economic considerations into environmental ones. It provides that the construction of units burning Illinois coal is environmentally responsible when the impact of personal income of changing fuel so as to displace Illinois coal is considered.

Amicus Brief for Wyoming at 5, Alliance for Clean Coal v. Craig, (U.S. Dist. Ct., No. Dist. of Ill. E. Div. 1993) (No. 93 C 4391).

by the Constitution on the power of states to discriminate against interstate commerce.<sup>59</sup> The complaint further alleges that the Act was enacted solely for the purpose of benefiting and protecting the economic interests of the Illinois coal mining industry by effectively barring Illinois electric utilities from switching to low-sulfur western coal as a legitimate means of complying with the federal acid rain reduction program.<sup>60</sup> The story, however, does not end here. Two other eastern states have enacted statutes meant to discourage the purchase of coal produced outside of their borders.

### *Indiana and Pennsylvania*

The Indiana preapproval statute requires Indiana electric utilities to analyze the impact that fuel switching would have on Indiana coal interests.<sup>61</sup> Furthermore, another statute conditions commission ap-

59. *Alliance for Clean Coal v. Craig*, U.S. Dist. Ct. No. Dist. of Ill., E. Div., complaint items 17-19, p. 8-9 (August 16, 1993).

60. *Id.* at 8.

61. The Indiana preapproval statute states:

(a) A public utility that has at least one (1) generating unit affected by Section 404 (Phase I) or Section 405 (Phase II) of the Clean Air Act Amendments of 1990 may voluntarily submit a verified environmental compliance plan that sets forth the manner in which the public utility intends to comply with the requirements of the Clean Air Act Amendments of 1990 to the commission for the commission's review and approval under this chapter.

(b) An environmental compliance plan described in subsection (a) must include any information that the commission may reasonably require. The commission shall require a plan described in subsection (a) to include at least the following information:

(1) A description of the requirements of the Clean Air Act Amendments of 1990 applicable to each generating unit owned or operated by the public utility.

(2) A description of the measures the public utility proposes to implement to comply with the requirements.

(3) The schedule under which the public utility proposes to implement the measures.

(4) An estimate of the cost of implementing each of the measures proposed by the public utility.

(5) An analysis of the comparative estimated costs of meeting the applicable requirements of the Clean Air Act Amendments of 1990 through the measures proposed by the public utility and other alternative compliance measures considered by the public utility.

(6) *If an environmental compliance plan proposes a change of fuel type that would result in the displacement or diminished use of Indiana coal, the public utility shall submit the following as part of the environmental compliance plan:*

(A) An analysis of the following:

(i) *The economic and employment effects of the proposed change of fuel type on the regions of Indiana in which the mining of coal provides employment, and on the service territory of the public utility.*

(ii) *The effects of the proposed modification on the preservation of the mining of Indiana coal as a viable source of fuel.* The analyses required under this clause must include a comparison of the effects

proval of compliance plans upon the continued use of Indiana coal.<sup>62</sup> The facially least offensive of the preapproval statutes comes from Pennsylvania.<sup>63</sup> However, the Pennsylvania preapproval statute still

likely to result from the alternative compliance measures identified under subdivision (5).

(B) *Information describing the availability, the reliability, the current costs, and the projected future costs of the fuel type proposed for use in connection with the environmental compliance plan.* [P.L. 76-191 § 1].

IND. CODE ANN. § 8-1-27-6 (Burns 1993) (emphasis added).

62. The Indiana statute conditioning commission approval of a compliance plan states: The commission shall issue an order approving an environmental compliance plan if the commission:

- (1) Finds that the environmental compliance plan:
  - (A) Is reasonably designed to meet or exceed the applicable requirements of the Clean Air Act Amendments of 1990;
  - (B) Constitutes a reasonable and least cost strategy over the life of the investment consistent with providing reliable, efficient, and economical electrical service;
  - (C) Is in the public interest; and
  - (D) Either:
    - (i) *Provides for continued or increased use of Indiana coal in the coal-consuming electric generating units owned or operated by the public utility and affected by the Clean Air Act Amendments of 1990;* or
    - (ii) *If the plan does not provide for continued or increased use of Indiana coal, such nonprovision is justified by economic considerations including the effects in the regions of Indiana in which the mining of coal provides employment and in the service territory of the public utility;* and
- (2) Approves the cost and schedule estimate for developing and implementing the environmental compliance plan. [P.L. 76-191 § 1]

IND. CODE ANN. § 8-1-27-8 (Burns 1991) (emphasis added).

63. The Pennsylvania statute reads:

- (a) Phase I compliance.- On or before February 1, 1993, each public utility shall submit to the commission and may request commission approval of a plan to bring its generating units which use coal to generate electricity into compliance with the Phase I requirements of Title IV of the Clean Air Act (Public Law 95-95, 42 U.S.C. § 7651 et seq.).
- (b) Phase II compliance.- On or before January 1, 1996, each public utility shall submit to the commission and may request commission approval of a plan to bring its generating units which use coal to generate electricity into compliance with the Phase II requirements of Title IV of the Clean Air Act.
- (c) Notice of Plan.- At the same time it submits its plan to the commission, the public utility shall provide a copy of the plan to the Department of Environmental Resources, the Consumer Advocate and the Small Business Advocate. For plans submitted after the effective date of this section, the commission shall cause notice of the utility's filing to be published in the Pennsylvania Bulletin. The public utility shall make available, upon request, a copy of the proposed plan to any coal supplier with which it has a supply contract for more than one year and to any collective bargaining representative for the coal supplier.
- (d) Review by the commission
  - (1) If the utility has requested commission approval of its plan, the commission shall review the proposed plan on an expedited basis to determine if the utility's proposed compliance plan submitted under this section is in the public interest.



requires that a utility's compliance plan include provisions for investment in flue gas desulfurization devices (scrubbers) and other clean coal technologies which allow for the continued burning of high-sulfur coal.<sup>64</sup>

### *The Practical Effect of the Preapproval Statutes*

The decision reached by the OPUC in the AEP matter is the essence of economic protectionism as defined by the Court in *Baldwin v. G.A.F. Seelig*:<sup>65</sup> one state in its dealings with others is placing itself in a position of economic isolation.<sup>66</sup> The OPUC, acting under the authority of the Ohio legislature, has essentially precluded the purchase of low sulfur coal to protect its own coal industry.<sup>67</sup> The ultimate

(2) After notice and opportunity for a hearing, the commission shall approve or disapprove the compliance plan within nine months after the plan is filed, provided that approval may be in whole or in part and may be subject to such limitations and qualifications as may be deemed necessary and in the public interest. The commission's decision shall establish that the utility's costs of compliance are recoverable costs of service, provided the costs:

- (i) are reasonable in amount and prudently incurred as determined in an appropriate rate or other proceeding; and
- (ii) represent investment in flue gas desulfurization devices, clean coal technologies, or similar facilities designed to maintain or promote the use of coal, including facilities which intermittently or simultaneously burn natural gas with coal.

(3) Costs established as recoverable under paragraph (2) shall qualify as non-revenue-producing investment to improve environmental conditions under section 1315 (relating to limitation on consideration of certain costs for electric utilities), provided that any benefits to the utility generated by the sale of allowances under the Clean Air Act shall be flowed through the utility's ratepayers.

(4) The utility shall not be required to refile its plan or to seek additional commission approvals concerning its plan unless the utility's plan is significantly amended or revised.

PA. CONS. STAT. ANN. § 66-530 (supp. 1993) (emphasis added).

64. One such clean coal technology is physical cleaning: "Physical cleaning removes sulfur from the coal before it is burned. The simplest method involves equipment not much more advanced than a wire screen and garden hose: freshly mined coal is crushed, passed through a screen, and wetted, so that heavy sulfur-bearing fragments can settle out." BRUCE A. ACKERMAN AND WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT*, 15-16 (New Haven and London Yale Press, 1981).

65. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935).

66. See *supra* note 16.

67. The Ohio Public Utility Commission stated that:

[t]his new state law provides a procedure for obtaining Commission approval of a utility's compliance plan prior to the utility implementing that plan. The law requires that environmental compliance plans only be approved by the Commission if they use Ohio coal to the maximum extent possible under Sections 4909.158(A)(3) and 4913.04(A)(3), Revised Code, unless such option cannot be justified as least cost. Additionally, tax advantages are provided for the use of Ohio coal pursuant to section 5727.301(B), Revised Code. Clearly,

effect of the Ohio preapproval statutes is not only to make it less expensive for Ohio utilities to install scrubbers and burn high sulfur coal, but ultimately to place a tariff on coal produced outside of Ohio. Ohio has done precisely what is prohibited in *Baldwin* by using its tax and police power, "with the aim and effect of establishing an economic barrier against competition with the products of another state."<sup>68</sup>

Illinois seeks the same effect with its preapproval statute by mandating the installation of scrubbers and prohibiting a decrease in Illinois coal consumption absent Illinois Commerce Commission approval.<sup>69</sup> The preapproval statutes in Indiana and Pennsylvania also support a discriminating effect by causing their PUC's to heavily favor compliance strategies that provide for the use of locally produced coal, disfavor fuel switching, and indicate a potent preference for the installation of scrubbers.<sup>70</sup>

The fact that these statutes only call for the voluntary submission or requests for approval of CAAA compliance plans can be deceptive. Even with no specific statutory provision that furnishes tax incentives for those that participate in the preapproval process, the public utility commissions of these states still hold the power to approve or deny requested rate base changes and rate increases that would otherwise help electric utilities recover their CAAA compliance costs.<sup>71</sup> Even without tax incentives, tremendous pressure is still placed on electric utilities to appease public utility commissions by including the use of locally produced coal as part of their compliance strategies. The denial of only one or two requests for rate increases or changes in rate base could send the stockholders of these privately owned utilities into a panic as stock values decrease. This explains why utilities are only too willing to participate in the preapproval process and ignore CAAA compliance strategies that include switching to low-sulfur western coal.

Utilities and PUCs know that CAAA compliance will be costly. However, even if fuel switching would aid in the reduction of those costs, the public utility commissions of Ohio, Illinois, Indiana and Pennsylvania can see to it that fuel switching presents itself as an extremely unattractive

the policy of the legislature is to favor the use of Ohio coal whenever feasible. In the Matter of the Long Term Forecasting Report of Ohio Power Company, 127 P.U.R. 4th 329, 404-407 (1991).

68. 294 U.S. 511 at 527.

69. See ILL. REV. STAT. ch. 220, para. 5/8-402.1, *supra* note 51.

70. See IND. CODE ANN. §§ 8-1-27-6, 8-1-27-8 and PA. CONS. STAT. ANN. § 66-530, *supra* notes 61-64 and accompanying text.

71. See *supra* notes 36 subsection (A), 51 subsections (d) & (e), 61 subsection (A), and 63 subsection (d)(2) and accompanying text.

proposition. Because of tax and ratemaking preferences given to compliance strategies that call for the use of locally produced coal, the overall effect of the preapproval statutes is to make coal from other states more expensive than coal provided by local producers, an effect which is strictly prohibited by *Baldwin v. G.A.F. Seelig*.<sup>72</sup>

There is no doubt about the protectionist nature of the preapproval legislation enacted by Ohio, Illinois, Indiana and Pennsylvania. These preapproval statutes were clearly designed to ensure the protection of local coal interests to the detriment of out-of-state low-sulfur coal producers like Wyoming. Thus, the question arises: why can't Wyoming simply repeat the process used in *Wyoming v. Oklahoma* to invoke the original jurisdiction of the Supreme Court to challenge the constitutionality of these laws under the Commerce Clause? The most pressing problem in answering this question lies not in establishing the unconstitutionality of the preapproval statutes, but in fulfilling the necessary criterion under which the Supreme Court will exercise its original jurisdiction.

#### ORIGINAL JURISDICTION

The statutes governing Supreme Court jurisdiction are found in Title 28 of the U.S. Code. Section 1251 governs the Court's original jurisdiction in a dispute between two states.<sup>73</sup> No pre-prescribed set of elements exists that must be met for the Court to exercise its original jurisdiction in a dispute between two states. Rather, whether original jurisdiction will be invoked is decided on a case by case basis.<sup>74</sup> The Supreme Court, however, is inclined to exercise its original jurisdiction in a dispute between two states sparingly,<sup>75</sup> and it is not enough that a state is a plaintiff.<sup>76</sup>

72. 294 U.S. at 511.

73. Title 28, section 1251 of the United States Code states:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1251 (1988).

74. *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). "Of course, the issue of appropriateness in an original action between States must be determined on a case-by-case basis."

75. *Utah v. United States*, 394 U.S. 89, 95 (1969). "[O]ur original jurisdiction should be invoked sparingly." *Id.* at 95.

76. *Georgia v. Pennsylvania*, 324 U.S. 439, 446 (1945). "The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened . . ." *Id.* at 446.

As Oklahoma correctly asserted in *Wyoming v. Oklahoma*, before the Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state towards another, the threatened invasion of rights must be of a serious magnitude and it must be established by clear and convincing evidence.<sup>77</sup> Justice White articulated the test used to grant its original jurisdiction in *Wyoming v. Oklahoma*:

It must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.<sup>78</sup>

The existence of another forum in which the appropriate relief can be found may preclude the assertion of the Court's power of original jurisdiction as well.<sup>79</sup>

#### *Why Wyoming Will Not Be Able to Invoke Supreme Court Original Jurisdiction*

As discussed earlier, the injury to Wyoming as a result of the passing of the Oklahoma Coal Act was direct and measurable.<sup>80</sup> However, in relation to the preapproval statutes, any injury to Wyoming can only be one that occurs in the future when electrical utilities begin to implement their plans for CAAA compliance. The questions that the Supreme Court must ask in deciding whether to exercise its original jurisdiction in a suit by Wyoming would be: what precisely is the irreparable injury to Wyoming? How much coal would the affected utilities have purchased from

77. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 799, (1992) (citing *Maryland v. Louisiana*, 451 U.S. 725, 735, quoting *Massachusetts v. Missouri*, 308 U.S. 1 (1931)).

78. *Id.* at 796.

79. 112 S.Ct. at 798. The Court stated that:

We construe 28 U.S.C. s 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.

*Id.* at 798. See also *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939) (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). "In *City of Milwaukee*, we noted that what is 'appropriate' involves not only 'the seriousness and dignity of the claim,' but also 'the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.'"

80. See *supra* notes 6-17 and accompanying text.

Wyoming in the future if the state or states in question had not passed their preapproval statutes? Would the affected utilities have purchased Wyoming coal to begin with, or would they have isolated their purchases of coal to other low sulfur coal producing states? Indeed, similar questions must be asked by the Federal District Court for the Northern District of Illinois when it decides whether or not to grant ACC's request for a permanent injunction against Illinois' preapproval statute.<sup>81</sup> Adequate answers to the above questions must exist before the courts can prescribe a remedy.<sup>82</sup>

The CAAA will no doubt make clean western coal more attractive to eastern electrical utilities in states that have no coal industries to speak of, or have not enacted preapproval statutes equivalent to those enacted in Pennsylvania, Illinois, Indiana and Ohio.<sup>83</sup> However, in states which have enacted preapproval legislation, the preapproval statutes will adversely affect future purchases of western coal. Nevertheless, to invoke original jurisdiction, the injury Wyoming suffers as a result of these preapproval statutes must be a tangible measurable wrong that will be without redress absent the Supreme Court's intervention.<sup>84</sup> Since these preapproval statutes will only affect future purchases, present tangible injury in fact will be difficult to demonstrate with clear and convincing evidence.

The task of producing clear and convincing evidence of an unjustified wrong would be easier if contracts to purchase coal were either canceled or not renewed as a result of utilities' efforts to comply with these statutes. However, no utility company in Ohio, Illinois, Indiana or Pennsylvania would enter into contracts with Wyoming coal companies knowing of the existence of the preapproval statutes, or being aware of the prevailing attitude in their home states toward western coal. These facts, coupled with the fact that the injury to Wyoming is one that will occur in the future, makes the task of invoking the Supreme Court's original jurisdiction all but impossible.

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81. See *supra* notes 57-60 and accompanying text: see generally *In Re Marriage of Sherwin*, 463 N.E.2d 755 (1984) (an injunction will not issue if it is not shown that irreparable injury will not occur and if an adequate legal remedy exists).

82. See *Georgia v. Pennsylvania R.Co.*, 324 U.S. 439, 445 (1945). "Leave to file should of course be denied if it is plain that no relief may be granted in the exercise of the original jurisdiction of this Court." *Id.* at 445.

83. See Leonard S. Greenberger, *Shopping for Acid Rain Control Strategies*, 129 No. 2 PUBLIC UTILITIES FORTNIGHTLY 37, 39 (January 15, 1991). "For utilities in states with no coal industry to protect, a whole host of strategies are possible. So far, when that is the case, most utilities are opting for low-sulfur, western coal . . ." *Id.* at 39.

84. See *supra* notes 73-79 and accompanying text.

The inevitable conclusion is that Wyoming will not be able to meet the criteria necessary to have a case against the preapproval statutes heard before the Supreme Court. Mary Guthrie, the Wyoming Attorney who argued Wyoming's case against Oklahoma in *Wyoming v. Oklahoma*, said recently that Wyoming has had its, "bite from the apple," and the chance that the Supreme Court would grant its original jurisdiction in a matter of this nature is practically nonexistent because of the inability to adequately demonstrate damages.<sup>85</sup> To make matters more difficult, the existence of another forum may preclude the exercising of the Court's power of original jurisdiction.<sup>86</sup> This alternate forum exists in the agency hearing process of the public utility commissions themselves.

#### PUBLIC UTILITY COMMISSION HEARINGS

Just as in an attempt to invoke the original jurisdiction of the Supreme Court, certain threshold showings of injury or effect must be made by a party to appear before an administrative body. This usually means that a party must demonstrate that it is either *interested*, *affected* or *adversely affected*.<sup>87</sup> However, the threshold showing for standing to participate in an agency proceeding is somewhat broader than the showing one must demonstrate to gain standing for judicial review.<sup>88</sup>

#### Ohio

The Ohio Administrative Procedure Act<sup>89</sup> specifically exempts the OPUC from its state Administrative Procedure Act.<sup>90</sup> However, adminis-

85. Interview with Mary Guthrie, Deputy Attorney General, Office of Wyoming Attorney General, in Cheyenne, Wyoming (August 16th, 1993).

86. See *supra* note 79 and accompanying text.

87. See *infra* notes 92-117 and accompanying text.

88. In *Koniag v. Andrus*, 580 F.2d 601, 606 (D.C. cir. 1978), The district court Stated:

In the *Church of Christ* case the court assumed that the same standards apply to determining standing before an agency and standing to obtain judicial review and went on to hold that the FCC must permit listeners to participate in broadcast relicensing proceedings. In the *National Welfare Rights Organization* case the court reasoned that a party with an interest sufficient to obtain judicial review of agency action should be permitted to participate before the agency to ensure it meaningful judicial review on all the issues. But it does not follow from either case that a party must be *excluded* from participation before the agency if it does not have a sufficient interest to meet Article III requirements for judicial review. Indeed, as we pointed out in the *National Welfare Rights Organization* case, "standing to sue depend(s) on more restrictive criteria than standing to appear before administrative agencies . . . ."

*Id.* at 606.

89. OHIO REV. CODE ANN. §§ 119.01-119.13 (Baldwin 1987 & supp. 1993).

90. The statute expressly states that "[s]ections 119.01 to 119.13 of the Revised Code do not

trative procedure for the OPUC is found in Title 49 of the Ohio Statutes.<sup>91</sup> Section 4903.221 of the Ohio Revised Code states that an *adversely affected person* may intervene in an OPUC proceeding provided that certain criteria are met.<sup>92</sup> Among the criteria, the commission must determine the “extent of the prospective intervenor’s interest.”<sup>93</sup> However, neither the Ohio Revised Code nor decisions of the OPUC provide any definitive clues about what is required to gain standing to appear before the OPUC as an *adversely affected person*. Clues must therefore be sought from other sources.

Section 555 of the Administrative Procedure Act governs federal agency actions and states that an “interested person” may appear before an agency or its responsible employees, “for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary or otherwise, or in connection with an agency function.”<sup>94</sup> The United States Supreme Court has stated that for an interested person to appear before a federal agency, “the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be *injuriously affected* by the order.”<sup>95</sup> The Court has also ruled that, with respect to intervention in an agency hearing process, “persons lacking a sufficient specific interest do not, of course, have the

apply to the public utility commission . . . .” OHIO REV. CODE ANN. § 119.01(A) (Baldwin 1989).

91. OHIO REV. CODE ANN. §§ 4903.01-4903.99 (Baldwin 1989).

92. The criteria are as follows:

Any other *person* who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding, provided:

(A) That such other person files a motion to intervene with the commission no later than:

(1) Any specific deadline established by order of the commission for purposes of a particular proceeding; or, if no such deadline is established;

(2) Five days prior to the scheduled date of hearing. The public utilities commission may, in its discretion, grant motions to intervene which are filed after the deadlines set forth in divisions (A)(1) and (2) of this section for good cause shown.

(B) That the commission, in ruling upon applications to intervene in its proceedings, shall consider the following criteria:

(1) The nature and extent of the prospective intervenor’s interest;

(2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;

(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;

(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

OHIO REV. CODE ANN. § 4903.221 (Baldwin 1989).

93. *Id.*

94. 5 U.S.C. §555(b) (1993).

95. *Moffat Tunnel League v. United States*, 289 U.S. 113, 119 (1933) (citing *Edward Hines Trustees v. United States*, 281 U.S. 143, 148) (emphasis added).

right to intervene,"<sup>96</sup> and that, "in each case, the sufficiency of the 'interest' in these situations must be determined with reference to the particular context in which the party seeks to assert its position."<sup>97</sup>

Consequently, to appear before a federal agency, a person must be *injuriously affected*; to appear before the OPUC, a person must be *adversely affected*. Therefore, treating the terms *injuriously* and *adversely* as synonymous, a person who is *adversely affected* by an OPUC decision is analogous to a an *interested person* as described by the APA and as interpreted by the Supreme Court. Thus, for Wyoming to intervene in an OPUC preapproval hearing as an *adversely affected person*, the state would have to demonstrate a "sufficient specific interest" in the outcome of an OPUC preapproval hearing.<sup>98</sup> Whether Wyoming can make this showing is unknown.

For purposes of the preapproval process, the OPUC can either approve or disapprove a utility's plans to purchase western low-sulfur coal as part of its CAAA compliance strategy. If Wyoming gained standing as an adversely affected party and is granted leave to intervene in an OPUC preapproval hearing, and if the OPUC finds that the injury to Wyoming would be so profound that it cannot in good conscience disapprove a plan to purchase western coal, then redress is found and Wyoming attorneys have done their job. However, if the commission decides that the injury to Wyoming would not be sufficient to warrant approval of a compliance plan that includes the purchase of low-sulfur Coal, then Wyoming would have two choices; it can either apply for rehearing<sup>99</sup> or appeal the decision to the Supreme Court of Ohio.<sup>100</sup>

96. *American Trucking Associations v. United States*, 627 F.2d 1313, 1320 n.21 (1980) (citing *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 151, 173-175 (1957)).

97. *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 151, 173 (1957).

98. *See supra* note 95 and accompanying text.

99. The Ohio rehearing statute reads:

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in said proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission, notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

OHIO REV. CODE ANN. § 4903.10 (Baldwin 1989).

100. OHIO REV. CODE ANN. § 4903.12 (Baldwin 1989 and supp. 1993). "No court other than



For the Ohio Supreme Court to exercise its appellate jurisdiction in a matter of this nature, Wyoming would have to gain standing for judicial review.<sup>101</sup> To establish standing for judicial review, Wyoming would have to demonstrate that its interests are more than abstract.<sup>102</sup> The Ohio Supreme Court has held that, “[a]ppeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant.”<sup>103</sup> A “final appealable order” under the Ohio statutes is one affecting a “substantial right.”<sup>104</sup> The court characterized the interest necessary to create a substantial right as “immediate and pecuniary.”<sup>105</sup> In addition, the Ohio court stated that, “‘a future, contingent or speculative interest is not sufficient.’”<sup>106</sup>

### *Illinois*

Unlike Ohio, the Illinois Commerce Commission [ICC] regulates the preapproval process for Illinois electrical utilities and is subject to its state Administrative Procedure Act.<sup>107</sup> However, the Illinois’ preapproval hearing procedure is more liberal than the hearing process offered by Ohio in that it offers an avenue for the intervention of any party.<sup>108</sup> The Illinois statute also offers opportunities for rehearing or judicial review.<sup>109</sup> How-

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the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties . . . .” Section 4903.13 states that:

[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

OHIO REV. CODE ANN. § 4903.13 (Baldwin 1989).

101. 5 Jacob A. Stein ET AL., ADMINISTRATIVE LAW, § 43.02[5] (1988). “A party seeking judicial review of an administrative decision must establish standing to sue.” *Id.* at § 43.02[5].

102. Ohio Contract Carriers Assn. v. Pub. Util. Comm., 42 N.E.2d 758 (1942).

103. *Id.* at 759.

104. Hall China Co. v. Pub. Util. Comm. 364 N.E.2d 852, 854 (1977).

105. 42 N.E.2d at 759 (citing 2 Am. Jur. 941, § 149).

106. *Id.* (quoting 2 Am. Jur § 150).

107. ILL. REV. STAT. ch. 220, para. 5/10-101 (Smith-Hurd 1993). “In the conduct of any investigation, inquiry or hearing the provisions of the Illinois Administrative Procedure Act, including but not limited to Sections 10 and 11 of that Act, shall be applicable and the Commission’s rules shall be consistent therewith.” *Id.*

108. See ILL. REV. STAT. ch. 220, para. 5/8-402.1(d), *supra* note 51.

109. The statute establishing jurisdiction for appeals of ICC decisions reads:

ever, to obtain judicial review of an ICC decision, one has to have been *affected* by it.<sup>110</sup> As in Ohio, the Illinois statutes provide no clue about what constitutes an *affected* party. However, Illinois has adopted the Uniform State Administrative procedure Act which requires that a party be *adversely affected* by an agency decision to obtain judicial review.<sup>111</sup>

### *Indiana and Pennsylvania*

Indiana has statutory provisions similar to those of Illinois for requesting rehearing from its Public Utility Commission, and for appealing a public utility commission decision.<sup>112</sup> However, the Indiana statute expressly provides that one must be "adversely affected" to have standing.<sup>113</sup> If Wyoming doesn't approve of a decision rendered by the Penn-

(a) Jurisdiction. Within 30 days after the service of any order or decision of the Commission refusing an application for a rehearing of any rule, regulation, order or decision of the Commission, including any order granting or denying interim rate relief, or within 30 days after the service of any final order or decision of the Commission upon and after rehearing of any rule, regulation, order or decision of the Commission, including any order granting or denying interim rate relief, any person or corporation *affected* by such rule, regulation, order or decision, may appeal to the appellate court of the judicial district in which the subject matter of the hearing is situated in more than one district, then of any one of such districts, for the purpose of having the reasonableness or lawfulness of the rule, regulation, or decision inquired into and determined.

ILL. REV. STAT. Ch. 220, para. 5/10-201 (Smith-Hurd 1993) (emphasis added.)

110. *Maybell v. Illinois Liquor Control Commission* 614 N.E.2D 1370 (1993). (The right to seek review under the Administrative Review Law of an administrative decision is limited to parties of record whose rights, privileges, or duties are *affected* by the decision.) (citing *Greer v. Illinois Liquor Commission*, 541 N.E.2d 216, 217 (1989)) (emphasis added).

111. ILLINOIS REV. STAT. ch. 5, Act 100 (Smith-Hurd 1993).

112. The Indiana statute providing for rehearing reads:

(a) If a petition for rehearing is filed with the commission by a party to the proceeding before the commission, within the time allowed by the rules of the commission, the commission must rule on the petition within a reasonable period of time after the filing of the final pleading filed in support of or opposition to the petition. If the commission fails to rule on the petition within a reasonable period of time, the petitioner may bring an action for mandate under IC 34-1-58 to compel the commission to make the ruling. However, notwithstanding IC 34-1-58 or any other law or rule, the action for mandate may only be filed in the court of appeals. For the purposes of IC 1-1-1-8, if any part of this subsection is held invalid, the entire subsection is void.

IND. CODE ANN. §8-1-3-2 (Burns 1991).

113. The Indiana statute granting jurisdiction to the Court of Appeals of Indiana for hearing appeals from the Indiana public utilities commission states:

(a) Any person, firm, association, corporation, city, town, or public utility *adversely affected* by any final decision, ruling, or order of the commission may, within thirty (30) days from the date of the entry of such decision, ruling, or order, appeal to the court of appeals of Indiana for errors of law under the same terms and conditions as govern appeals in ordinary civil actions, except as otherwise provided in this chapter and with the right in the losing party or parties in the Court of Appeals to apply to the Supreme Court for a petition to transfer the cause to said Supreme Court as in other cases. An assignment of errors that the decision, ruling, or order of the Commission is contrary to law shall be suffi-

sylvania Public Utility Commission [PPUC], the state has several options; it can file a complaint with the PPUC;<sup>114</sup> it can intervene, if the PPUC allows it;<sup>115</sup> it can apply for a rehearing, if the PPUC decides that the original decision it reached in the preapproval hearing was a "clear abuse of discretion;"<sup>116</sup> or it can appeal the decision to the Pennsylvania Commonwealth Court.<sup>117</sup>

### *Wyoming's Place in the PUC Hearing Process*

The difficulty with the PUC hearing process is that the PUCs decide whether or not a party has standing to intervene, whether or not it is *aggrieved*, or whether or not it is *adversely affected*.<sup>118</sup> In spite of the tremen-

cient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the facts found to sustain the finding of facts upon which it was rendered. (Emphasis added.)

IND. CODE ANN. §8-1-3-1 (Burns 1993).

114. The Pennsylvania complaint statute states:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The Commonwealth through the Attorney General may be a complainant before the commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. The commission may prescribe the form of complaints filed under this section.

PA. CONS. STAT. ANN. § 66-701 (1979).

115. *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 33 A.2d 641 (1943). The court stated that:

Questions of procedure in matters before public utility commission, including question whether parties should be allowed to intervene in one another's proceedings, are subordinate to the paramount functions of the commission, and should be left to commission's discretion, so long, of course, as commission observes the basic requirements designed for protection of private as well as public interest.

116. *Smith v. Pennsylvania Public Utility Commission*, 162 A.2d 80, 84 (1960). "[G]rant or refusal of petition for rehearing is a matter within discretion of public utility commission, and its action will not be reversed unless a clear abuse of discretion is shown."

117. The Pennsylvania statute that gives jurisdiction to the Pennsylvania Commonwealth Court for hearing appeals from the Pennsylvania Public Utility Commission states:

(a) General rule.—Except as provided in subsection (c), the Commonwealth court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:

(1) All appeals from Commonwealth agencies under Subchapter A of Chapter 7 of Title 2 (relating to judicial review of Commonwealth agency action) or otherwise and including appeals from the Environmental Hearing Board, the Pennsylvania public utility commission, the Unemployment Compensation Board of Review and from any other Commonwealth agency having Statewide jurisdiction.

PA. CONS. STAT. ANN. § 42-763 (1981).

118. See *supra* notes 87-117 and accompanying text.

dous economic effects the loss of severance taxes may have on Wyoming and other low-sulfur coal states, whether the loss of potential future sales of coal is an injury worthy of a PUC's attention remains to be seen. Until this issue is tested however, the door to the PUC hearing process remains open.

Since the door is open, that fact in itself presents a problem. The Supreme Court will interpret this "open door" in the PUC hearing process as another reason to preclude the exercise of original jurisdiction because it represents the existence of an alternative forum in which Wyoming might find redress.<sup>119</sup> However, the open door will close when all administrative remedies have been exhausted. That is the time when Wyoming must make the minimum showing necessary to warrant judicial review of an agency decision.

The minimal showing necessary to obtain judicial review includes a demonstration by the adversely affected party that it has suffered an "injury in fact" and that it is within the "zone of interest" of an appropriate statute.<sup>120</sup> Despite the more liberal standard of showing an injury necessary to participate in an agency proceeding,<sup>121</sup> the same barriers that prevent invocation of the Supreme Court's original jurisdiction stand to prevent judicial review of public utility commission decisions, leaving Wyoming and other western states without a remedy against blatantly protectionist legislation. The ultimate conclusion is that Ohio, Illinois, Indiana and Pennsylvania have successfully passed economically protectionist legislation for which redress is all but impossible to obtain. Nevertheless, legal avenues remain to be explored.

### SOLUTIONS

One solution to the problem of standing to invoke Supreme Court original jurisdiction might be that western low-sulfur coal producing states could form a coalition, much like the Alliance for Clean Coal in its suit

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119. See *Supra* note 79 and accompanying text.

120. *Foundation on Economic Trends v. Lyng*, 943 F.2d. 79, 82-83 (1991). The court articulated the test:

There is first the need to satisfy the minimum requirements of Article III of the Constitution. To this end, a party seeking judicial relief must show (1) an injury in fact, (2) fairly traceable to the challenged action, and (3) likely to be redressed by a favorable decision. When the party seeks judicial review of agency action under the general review provision of the APA (5 U.S.C. s 702), as the plaintiffs have in this case, there are two related requirements. The plaintiff must identify the "agency action" affecting his interests and must demonstrate that the "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute."

121. See *supra* note 86 and accompanying text.

against Illinois,<sup>122</sup> but on a much grander scale. In this way the injury to all states that produce low-sulfur coal may be demonstrated by comparing the per capita amount of coal purchased by states with preapproval statutes to those states without preapproval statutes. Demonstrating a marked difference in the purchases of clean coal by these two groups of states may result in the threshold showing necessary to invoke the Court's jurisdiction.

It may also be possible to bring a suit in *parens patriae* on behalf of Wyoming citizens, but with a novel approach: Make the suit a class action for all U.S. citizens damaged by the preapproval statutes and join the citizens of Ohio, Illinois, Indiana and Ohio. Once the electric utilities in these states begin to implement the plans approved by the public utility commissions it may be possible to demonstrate not only that Wyoming citizens are suffering as a result of a loss in severance taxes, but that the citizens of Ohio, Indiana, Illinois and Pennsylvania pay much higher rates for electricity than citizens of other states as a result of their states' economically protectionist statutes.<sup>123</sup>

The difficulty with these strategies is that Wyoming must wait until sometime after Phase I of the CAAA is implemented on January 1 of 1995 before it can demonstrate injury in fact. However, that date is less than a year away. For the time being, it is still possible to test the PUC hearing process by finding out whether or not Wyoming is in fact *adversely affected* for purposes of the eastern states' administrative hearing requirements. By doing this Wyoming may show that it has exhausted its administrative remedies before resorting to requests for judicial review. In this way the alternate forum is eliminated, giving the Court more reason to exercise jurisdiction.

Whatever strategy is used, it is important for Wyoming to resist these statutes. They are blatantly protectionist and therefore in conflict with accepted standards of interstate conduct as defined by the Constitution.<sup>124</sup> If Ohio, Illinois, Indiana and Pennsylvania are successful at maintaining the validity of their preapproval legislation, it is not impossible to conceive a new body of protectionist laws enacted by states which utilize their state agencies to circumvent judicial review. With this in mind, it is easy to see that the ramifications of this legislation go much further than the present controversy.

On October 21st, 1993, hearings concerning protectionist coal legislation were held before the Senate Committee on Environment and Public Works Subcommittee on Clean Air and Nuclear Regulation. Attorney Mary Guthrie appeared before that Committee and spoke on behalf of Wyoming concerning the preapproval statutes:

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122. See *supra* notes 57-59 and accompanying text.

123. See *supra* text accompanying note 32.

124. U.S. CONST. art. I, § 8, cl. 2.

While these laws are passed under the guise of complying with the Clean Air Act Amendments of 1990, they directly affect the interstate sale of coal by fencing out coal produced in other states. The effect of the legislation is that consumers will be required to pay more and the national market for coal will be disrupted. These laws will also have a great impact on western states' fuel producers, western states' economies and on the coal allowance trading system . . . . Congress must address the problems created by these discriminatory laws. Two years ago at this time I was in Washington to argue the the case of *Wyoming v. Oklahoma*. Apparently, even a decision from the U.S. Supreme Court invalidating a statute that preferred Oklahoma coal over out-of-state coal has not deterred other states from interfering with the national coal market.<sup>125</sup>

#### CONCLUSION

Wyoming's bread and butter comes from its minerals, a large portion of which comes from coal. Not only is coal the fuel that drives America's power plants, it is a major source of the revenue from which Wyoming drives its school system, funds its state agencies and keeps Wyoming citizens from paying state income taxes. That makes the preapproval statutes even more threatening to an industry already threatened by growing environmental concerns and competition from alternative fuels.<sup>126</sup>

The preapproval statutes enacted in Ohio, Illinois, Indiana and Pennsylvania are certainly protectionist. Yet, these states manage to preclude the possibility of Supreme Court review of their preapproval legislation by diluting and postponing the injury to low-sulfur coal states like Wyoming. This has the effect of rendering low-sulfur coal states incapable of demonstrating the threshold showing of injury necessary to invoke the Supreme Court's original jurisdiction.

The task of obtaining the Court's original jurisdiction is made even more difficult by the existence of other forums in which states like Wyoming

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125. *State Laws Mandating or Encouraging the Use of High-Sulfur Coal: Hearings before the Senate Subcommittee on Clean Air and Nuclear Regulation*, 103rd Cong., 1st Sess. (1993) (statement of Mary Guthrie, State of Wyoming Deputy Attorney General).

126. *See Potential Impact Hearings* (statement of Joseph Dowd, Senior Vice President and General Counsel of American Electric Power Service Corporation, Columbus, Ohio). "The specter of natural gas as an aggressively marketed partial solution to the acid rain issue should be a sobering prospect to the coal industry and may tend to temper the enthusiasm of some low-sulfur coal producers for freedom of choice type legislation."

might find redress: the agency hearing processes of the PUCs in Ohio, Illinois, Indiana and Pennsylvania. Once any attempt is made to challenge a PUC's decision to disapprove a utility's plan to buy low-sulfur coal as part of its CAAA compliance plan, a familiar obstacle arises — the showing of injury in fact necessary to obtain judicial review of a public utility commission decision is essentially the same showing of injury that must be made to invoke the Supreme Court's original jurisdiction.

The ultimate conclusion is that Ohio, Illinois, Indiana and Pennsylvania have enacted statutes which are clearly protectionist in nature and yet virtually beyond constitutional impediment. The result is nothing less than the unconstitutional regulation of interstate commerce by high-sulfur coal producing states intent upon protecting their own coal industries to the detriment of Wyoming and other low-sulfur coal producing states.

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