



# Administrative Law - End Use and Price As Factors In Denial of Certificate of Public Convenience and Necessity By the Federal Power Commission

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## NOTES

### ADMINISTRATIVE LAW — END USE AND PRICE AS FACTORS IN DENIAL OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BY THE FEDERAL POWER COMMISSION

A New York public utility bought gas directly from producers in Texas, a transaction not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act.<sup>1</sup> The gas was to be used to fire the purchaser's boilers in place of coal to combat a serious air pollution problem. The purchaser arranged with respondent pipe line company for the transportation of this gas from Texas to New York. Respondent applied to the Federal Power Commission for a certificate of public convenience and necessity as required under Section 7 of the Natural Gas Act.<sup>2</sup> The Commission denied the certificate on the grounds that the end use of the gas as a boiler fuel was inferior, and the price paid by the purchaser in the direct sale was high and would tend to force up the field prices of gas. The court of appeals reversed, saying the Commission had exercised a general conservation authority not granted by Congress.<sup>3</sup> On certiorari to the Supreme Court, *held*, reversed. The Commission did not abuse its discretion in considering the factors of end use and price in denying a certificate of public convenience and necessity. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 81 Sup. Ct. 435 (1961).

The jurisdiction of the Federal Power Commission under the Natural Gas Act extends to any transportation of natural gas in interstate commerce, and to any sale, for resale in interstate commerce.<sup>4</sup> Before such activity can be engaged in, the natural gas company seeking to perform such service must be granted a certificate of public convenience and necessity by the Commis-

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1. 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958): "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas *for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production of gathering of natural gas." (Emphasis added.)

2. 56 Stat. 83 (1942), 15 U.S.C. § 717f(c) (1958).

3. Consolidated Edison Co. v. Federal Power Commission, 271 F.2d 942 (3d Cir. 1959). See also Note, 60 COLUM. L. REV. 1043 (1960).

4. 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958).

sion.<sup>5</sup> The act further provides that "a certificate shall be issued to any qualified applicant therefor, . . . if it is found that the applicant is able and willing properly to do the acts and perform the service proposed . . . and that the proposed service . . . is or will be required by the present or future public convenience and necessity."<sup>6</sup>

In its certification proceedings under Section 7 of the Natural Gas Act, the Commission has, case by case, set certain basic requirements which must be met by an applicant to show that the proposed service is in the public convenience and necessity. These usually include a showing of adequate reserves of natural gas, sufficient markets, appropriate design of facilities, and sound financing.<sup>7</sup> In addition to these basic standards, each case presents a variety of other factors that may have some bearing on the public convenience and necessity.<sup>8</sup> In each case the Commission must determine which of the factors it can and will consider, and what weight may be given to each.

In natural gas certification proceedings, the Commission or the competing fuel and transportation interests have often contended that the use of gas under boilers in place of coal is an "inferior use"<sup>9</sup> which depletes gas reserves and causes unnecessary injury to the coal industry. Prior to the amendment of the Natural Gas Act, the Commission was not receptive to these

5. 56 Stat. 83 (1942), 15 U.S.C. § 717f(c) (1958).

6. 56 Stat. 83 (1942), 15 U.S.C. § 717f(e) (1958).

7. *E.g.*, Cities Service Gas Co., 17 F.P.C. 516, 520 (1957); Northern Natural Gas Co., 15 F.P.C. 1634, 1636 (1956); Kansas Pipe Line & Gas Co., 2 F.P.C. 29 (1939).

8. Since the term "public convenience and necessity" is very imprecise in giving the Commission concrete standards by which to judge each case, it seems that the "public convenience and necessity" must be determined for each individual case. Certain basic standards have been set, but each case presents a variety of factors which must be considered in weighing its merits. In the instant case, the Commission considered as bearing on the public convenience and necessity such factors as inferior end use, high price, inability of pipelines buying for resale to compete with industrial purchasers buying in direct sales, and preemption of pipeline facilities by gas being used for boiler fuel to the detriment of purchasers who would use the gas for "superior" uses. For an early discussion of what may constitute the "public convenience and necessity," see Kansas Pipe Line & Gas Co., 2 F.P.C. 29 (1939).

9. A general classification of the uses of natural gas into "superior" and "inferior" would usually be as follows:

(1) Superior uses: Chemical production; domestic cooking and heating; commercial uses; certain highly specialized industrial uses, where, because of its qualities natural gas is of particular value;

(2) Inferior uses: General industrial use; employment for boiler fuel, the generation of electricity, the making of cement, bricks, carbon black, and like purposes.

See BLACHLY & OATMAN, *NATURAL GAS AND THE PUBLIC INTERESTS* 120 (1947).

arguments and expressed the opinion that "Congress did not intend this Commission generally to weigh the broad social and economic effects of the use of various fuels."<sup>10</sup> However, since the amendment of Section 7 of the act in 1942 expanding the Commission's jurisdiction,<sup>11</sup> these arguments have been given more weight. Though injury to competing fuels has been given some consideration,<sup>12</sup> the end use factor seems to be more important. The Commission has often expressed its feeling that the use of natural gas as a boiler fuel is undesirable in most cases, and that it should be allowed only on a positive showing that it will be required by the public convenience and necessity.<sup>13</sup> Though this factor has been dealt with in many cases, the Commission has not claimed to possess general conservation authority and has maintained the position that end use is just one factor to be considered in a certification case.<sup>14</sup> As the court of appeals pointed out, certification has been denied in few cases where end use has been considered,<sup>15</sup> but the weight accorded this factor seems to be increasing as the Commission becomes more concerned with conservation.

In a sale for resale, the Commission has control over the price paid for the gas. In a direct sale, however, the Commission has no jurisdiction, though it does have certification authority over the transportation of the gas in interstate commerce.<sup>16</sup> Because of its lack of jurisdiction, the Commission has seldom considered the price paid in a direct sale as a factor weighing against certification of the transportation of the gas

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10. *Kansas Pipe Line & Gas Co.*, 2 F.P.C. 29, 57 (1939).

11. 56 Stat. 83 (1942), 15 U.S.C. 717f(c) (1958). Under the act before amendment, the Commission was empowered to certify only those extensions of natural gas facilities which moved into areas already being served by a natural gas company. Under the amended act, the Commission has certification authority over all extensions of facilities in interstate commerce.

12. See, e.g., *Cities Service Gas Co.*, 17 F.P.C. 516, 523 (1957); *Scranton-Spring Brook Water Service Co.*, 17 F.P.C. 25, 35 (1956).

13. E.g., *Northern Natural Gas Co.*, 15 F.P.C. 1634, 1635 (1956); *Mississippi River Fuel Corp.*, 12 F.P.C. 109, 112 (1953); *Commonwealth Natural Gas Corp.*, 9 F.P.C. 70, 87 (1950).

14. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 81 Sup. Ct. 435, 443 (1961), quoting from *Tennessee Gas and Transmission Co.*, 3 F.P.C. 574, 578 (1943). See also *Cities Service Gas Co.*, 17 F.P.C. 516, 524 (1957), where the Commission said: "[T]he Natural Gas Act does not confer upon the Commission authority to promulgate a national fuels policy, or to act as the conservator of natural gas or of any other natural resource. The Commission's jurisdictional ambit is fixed and delineated by the requirement of the public convenience and necessity."

15. *Consolidated Edison Co. v. Federal Power Commission*, 271 F.2d 942, 950, n. 27 (3d Cir. 1959).

16. 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958).

in interstate commerce.<sup>17</sup> In the *Northern Natural Gas Company*<sup>18</sup> case, the hearing examiner, in denying certification for transportation of gas sold directly to the consumer, considered the price as a factor weighing against certification because it was too low. The examiner felt that the sale of gas to industrial consumers would deplete the gas company's reserves, forcing them to purchase gas at a later date to meet general consumer needs. Since the price of gas in the area was spiraling, the feeling was that the reserves would have to be replaced at a cost higher than the return the company was obtaining in the sale in question, and that this would lead to higher prices for general consumers. This decision was modified by the Commission<sup>19</sup> and later reversed on rehearing.<sup>20</sup>

The instant case is of concern to the natural gas industry because it seems to represent a considerable extension of the Commission's power to consider end use as a factor weighing against certification. Though the Commission and the Court contended that this is just one of the "countervailing factors" which "suffice to tip the balance against the grant of authority requested" by respondent,<sup>21</sup> it would appear that it was the controlling factor in this case. It seems that the difference between power to "act as arbiter over the end use uses of natural gas"<sup>22</sup> and power to consider end use as a factor in a certification proceeding is simply a matter of degree, and that this decision moves in the direction of more comprehensive power in the Commission.

The consideration of price in this direct sale represents a possible extension of Commission authority that could have an even greater effect than the end use factor. Though direct sales are not subject to the jurisdiction of the Commission under the Natural Gas Act, this decision opens the way for consideration of the price paid in such sales as a factor weighing against certification of transportation of the gas so sold. By use of this factor the Commission may express its disapproval of these non-

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17. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 81 Sup. Ct. 435, 449 (1961). Note the analogies the Court draws from consideration of non-jurisdictional facilities in determining a rate base. No direct authority is cited.

18. 15 F.P.C. 673 (1955).

19. *Northern Natural Gas Co.*, 15 F.P.C. 682 (1956).

20. *Northern Natural Gas Co.*, 15 F.P.C. 1634 (1956).

21. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 81 Sup. Ct. 435, 447 (1961).

22. This power was disclaimed in *Tennessee Gas & Transmission Co.*, 3 F.P.C. 574, 579 (1943).

jurisdictional sales and possibly exert control over the prices paid in them, or force the purchasers to conduct their business through jurisdictional channels.<sup>23</sup> It seems evident that any such power in the Commission was not authorized by Congress in the Natural Gas Act.<sup>24</sup>

There appears to be no dispute about the fact that natural gas is a wasting resource that would best be saved for homes and specialized industrial uses which cannot be served by cheaper and more abundant fuels such as coal.<sup>25</sup> Since there is a need for conservation of natural gas and Congress has granted no general conservation authority to the Commission,<sup>26</sup> the Court is apparently attempting to remedy the deficiency by allowing the Commission to place more weight on the end use factor in certification proceedings.<sup>27</sup> The Court is also attempting to fill the gap that is created by the possibility of direct sales that cannot be regulated by the Commission. It reasons that Congress intended to enact a comprehensive regulatory scheme, and since the states have proven incapable of effectively regulating the type of direct sale here in question, therefore Congress must have intended for federal authority to govern.<sup>28</sup> This interpretation of the Natural Gas Act seems somewhat strained in light of the fact that the act expressly excludes direct sales from federal regulation. Perhaps this deficiency in the regulatory scheme points the way for revision of the Natural Gas Act by Congress, but it hardly seems to warrant judicial interpretation apparently contrary to the language of the statute.<sup>29</sup>

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23. The dissent in the instant case, while not denying the Commission the right to consider the matter of effect on field prices in a certification proceeding such as this, criticized the Court for allowing the Commission to class direct sales in a group and declare them undesirable as a whole. This, said Mr. Justice Harlan, tends to place direct sales at more of a disadvantage than jurisdictional sales, since the Commission starts with the premise that they are undesirable. The dissenters felt that the Commission should be restricted to a consideration of the respective merits and demerits of each particular sale.

24. 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958) (sale for resale).

25. BLACHLY & OATMAN, NATURAL GAS AND THE PUBLIC INTEREST 142 (1947).

26. The Commission has recommended legislation amending the Natural Gas Act "to provide specifically for control by the Commission of the end-use of natural gas when required for national defense or to safeguard the available supply," (33 F.P.C. Ann. Rep. 154 (1953)) and "to provide specifically for control by the Commission of the allocation of natural gas when required for national defense or to safeguard the available supply in emergency situations." (35 F.P.C. Ann. Rep. 182 (1955)). These requests have not thus far been granted.

27. Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 81 Sup. Ct. 435 (1961).

28. *Id.* at 449-50.

29. It seems possible that the direct sales Congress intended to exempt from