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NATURAL GAS ACT — WELLHEAD SALES — JURISDICTION OF  
FEDERAL POWER COMMISSION

Petitioner, a small, unintegrated oil company,<sup>1</sup> made wellhead sales<sup>2</sup> of natural gas to an interstate pipeline corporation. The Federal Power Commission issued orders regulating the sales and petitioner appealed on the ground that under the express terms of the Natural Gas Act<sup>3</sup> the FPC lacked jurisdiction. On appeal, *held*, jurisdiction affirmed. The jurisdiction of the Federal Power Commission under the Natural Gas Act extends to wellhead sales of natural gas as long as the gas is ultimately to be placed in interstate commerce. *Deep South Oil Co. of Texas v. Federal Power Commission*,<sup>4</sup> 247 F.2d 882 (5th Cir. 1957).

In order to protect the public interest vested in the business of transportation and sale of natural gas in interstate commerce,<sup>5</sup> Congress passed the Natural Gas Act in 1938. Jurisdiction of the FPC under the act is extended to natural gas companies<sup>6</sup> engaged in the transportation and sale of natural gas in interstate commerce, but is expressly denied insofar as the production and

1. An integrated oil company is "a company engaged in all phases of the industry, from exploration for oil deposits to retail sales of oil products (including gasoline). These phases in outline are: exploration, production, transportation, manufacturing and refining, and retailing." *Saturn Oil and Gas Co. v. Federal Power Commission*, 250 F.2d 61, 67 (10th Cir. 1957).

2. A wellhead sale is a sale which is consummated by delivery at a point between the production of the gas and the transportation of the gas from the well. In such a sale the production is completed by the vendor and the transmission is accomplished through the pipelines of the vendee.

3. 52 STAT. 821 (1938), 15 U.S.C. §§ 17-17(w) (1952).

4. The instant case was a companion to three others: *Shell Oil Co. v. Federal Power Commission*, 247 F.2d 900 (5th Cir. 1957); *Humble Oil and Refg. Co. v. Federal Power Commission*, 247 F.2d 903 (5th Cir. 1957); and *Continental Oil Co. v. Federal Power Commission*, 247 F.2d 904 (5th Cir. 1957). Certiorari was applied for and denied in the *Shell* case, 78 Sup. Ct. 410 (U.S. 1958), and the *Humble* case, 78 Sup. Ct. 410 (U.S. 1958).

5. "[I]t is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a) (1952). The purpose of the act was to close a gap left by such cases as *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) and *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924), which held that the states could not regulate the transportation of natural gas in interstate commerce even in the absence of federal legislation. It has been held that Congress has preempted the field insofar as regulatory powers over the transportation and sale of natural gas in interstate commerce is concerned. *Public Utilities Comm. of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943). For an excellent survey of the reasons behind the passage of the act, see Note, *Legislative History of the Natural Gas Act*, 44 Geo. L.J. 695 (1956).

6. A natural gas company, as defined in the Natural Gas Act, is "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717(a)(6) (1952).

gathering of gas are concerned.<sup>7</sup> There has been considerable difference of opinion in regard to the extent of the Commission's jurisdiction.<sup>8</sup> The confusion appears to emanate from the terms of the act itself: a sale of gas which is made in interstate commerce — being presumptively subject to jurisdiction — may be consummated during the production or gathering phases — being supposedly exempt from jurisdiction. Several times prior to 1954 the FPC refused to take jurisdiction over sales made in interstate commerce because of the production and gathering exclusion,<sup>9</sup> and courts were consistent in holding that jurisdic-

7. "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 or gathering of natural gas." (Emphasis added.) 15 U.S.C. § 717(b) (1952).

8. It has been suggested that the confusion which has been wrought in the application of the act is largely due to a failure of the act to define some of its terms. SULLIVAN, HANDBOOK OF OIL AND GAS LAW 471 (1955). Traditionally, *production* includes all operations of a well prior to and inclusive of bringing the gas to the surface of the earth. *Gathering* entails the bringing of the gas from wells in a particular area to a central point. Production and gathering constitute what is known as the first phase of the natural gas industry. The second phase is *transportation*: the moving of the gas from the central point through transmission lines to distant areas. The third phase, *distribution*, is the distributing of the gas to the consumer. See also Crenshaw, *The Regulation of Natural Gas*, 19 LAW & CONTEMP. PROB. 325, 335 (1954) for further definitions. Legislative attempts to clarify the jurisdiction have been ill fated. The Harris-Kerr Bill, H.R. 1758, 81st Cong., 1st Sess. (1949); S. 1498, 81st Cong., 1st Sess. (1949) was vetoed by President Truman, 96 CONG. REC. 5304-05 (1950). After the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the Harris-Fulbright Bill, H.R. 4560, 84th Cong., 1st Sess. (1955); H.R. 6645, 84th Cong., 1st Sess. (1955) (amended bill); S. 1853, 84th Cong., 1st Sess. (1955) attempted to define some of the terms of the act and thereby limit the effect of the *Phillips* case. However, President Eisenhower, though agreeing with the motives behind the bill, vetoed it because of alleged bribery in lobbying tactics, 102 CONG. REC. 2524 (1956). See Peters, *Political Campaign Financing: Tax Incentives for Small Contributors*, page 414 *supra*.

9. *Columbian Fuel Corp.*, 2 F.P.C. 200 (1940) (jurisdiction does not extend to sales in interstate commerce by a corporation engaged in production and gathering phases and not otherwise subject to jurisdiction); *Fin-Ker Oil and Gas Production Co.*, 6 F.P.C. 92 (1947) (Natural Gas Act does not extend to sales of a company made at terminal points of gathering lines to distributing company where distribution is entirely intrastate); *Tennessee Gas and Transmission Co. and the Chicago Corp.*, 6 F.P.C. 98 (1947) (a person engaged primarily in production, gathering, and processing of natural gas is not under FPC jurisdiction even though it makes sales of natural gas for resale to an interstate pipeline company for transportation and sale outside of the state wherein it is produced); *Kansas-Nebraska Natural Gas Co., Inc.*, and *Kansas Natural Gas, Inc.*, 6 F.P.C. 664 (1947) (although gas sold by a company eventually reaches interstate commerce, it is not subject to FPC jurisdiction if the company's operations consist only of production and gathering); *R. J. and D. E. Whelan*, 6 F.P.C. 672 (1947) (partnership engaged in gathering and processing of natural gas not under FPC jurisdiction even though it makes arm's length sales to interstate pipeline corporation); *Hassie Hunt Trust*, 6 F.P.C. 835 (1947) (trust engaged in purchase, production, gathering, processing, and sale of natural gas was within exclusion from Natural

tion should not be so extended.<sup>10</sup> However, in 1954 the Supreme Court decided *Phillips Petroleum Co. v. Wisconsin*,<sup>11</sup> in which it held that a sale of gas consummated at a processing plant<sup>12</sup> was subject to regulation under the Natural Gas Act. Arguments have been raised as to whether the case holds that *all* sales of gas in interstate commerce are jurisdictional or that the particular sale in that case was consummated subsequent to the production and gathering phases.<sup>13</sup> There are statements in the opinion which give weight to both propositions.<sup>14</sup> The FPC has consistently interpreted the decision to mean that all sales of gas in interstate commerce come under the Natural Gas Act regardless of where they are consummated<sup>15</sup> and subsequent Supreme Court decisions reflect a similar interpretation.<sup>16</sup>

The instant case illustrates the extremes to which such an interpretation can be carried. Petitioner's sales were of a local

Gas Act jurisdiction); *LaGloria Corp.*, 7 F.P.C. 349 (1948) (company engaged in gathering of gas not subject to FPC jurisdiction even though sales were made to an interstate pipeline corporation); *The Superior Oil Corp.*, 7 F.P.C. 627 (1948) (company engaged in sales of gas to interstate gatherer not within FPC jurisdiction because of the gathering exclusion). It is noteworthy that the FPC denied jurisdiction in the petition against *Phillips Petroleum Co.*, 10 F.P.C. 246 (1951), in the original proceedings which gave rise to the celebrated case of *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

10. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). There was some thought that *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682 (1947) extended FPC jurisdiction to the gathering of gas. However, that case dealt with sales of gas in interstate commerce by a company already subject to FPC jurisdiction.

11. 347 U.S. 672 (1954).

12. A processing plant is a plant where certain impurities are removed from the natural gas in order to make it suitable for consumption. Where the processing takes place in the production-gathering-transportation procedure is not always the same. It occurs, of course, some time subsequent to the production of gas, and may be technically within interstate transportation even though the gas is still being gathered. In the *Phillips* case the Guymon-Hugoton Gas Field, which extends from Kansas to Texas, was involved. Phillips collected the gas in nine processing centers and then transported the gas to interstate pipelines.

13. See Discussion Notes on *Deep South* case, 4 Oil & Gas Rep. 1836 (1955).

14. Compare "production and gathering, in the sense that those terms are used in § 1(b), end before the sales by Phillips occur" (347 U.S. 672, 678) with "we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems." (347 U.S. 672, 683 (1954)).

15. In the Matter of *Saturn Oil & Gas Co.*, FPC Docket No. G-5999, 6 Oil & Gas Rep. 905 (1956); In the Matters of *Continental Oil Co.*, FPC Docket Nos. G-6590, G-7050, G-6909, G-6026, G-6107, G-7409, 5 Oil & Gas Rep. 629 (1956); In the Matters of *Dixie Pipe Line Co.*, FPC Docket No. 2401, 4 Oil & Gas Rep. 1837 (1955); In the Matters of *Deep South Oil Co.*, FPC Docket Nos. G-2952, G-5261, G-4671, 4 Oil & Gas Rep. 1815 (1955); In the Matter of *Humble Oil & Refg. Co.*, FPC Docket Nos. G-6282 and G-6753 through G-6761, 4 Oil & Gas Rep. 1435 (1955).

16. *Cities Service Gas Co. v. Corporation Commission of Kansas*, 78 Sup. Ct. 273 (U.S. 1958); *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (1955).

nature<sup>17</sup> and were arm's length transactions,<sup>18</sup> not made as a sham for the purpose of escaping federal regulation. The Natural Gas Act was passed to bring under regulation those kinds of operations by which consumers were subjected to the mercy of the large interstate pipeline companies.<sup>19</sup> It is difficult to see how petitioner's activities bring it within the span of those intended to be regulated. Therefore, even though the instant case seems to be consistent with prior jurisprudence,<sup>20</sup> it is doubtful that the law was ever intended to have such an effect. This fact is forcefully pointed out in Judge Brown's dissenting opinion.<sup>21</sup> He explains that neither Congress nor the Supreme Court intended to extend jurisdiction over all sales in which the gas ultimately flows into interstate commerce, but meant to exempt those sales consummated during the production and gathering phases. His argument is bolstered by illustrations of the practical effects of the court's decision: interference with state regulation of conservation,<sup>22</sup> the inability of the FPC to handle the volume of cases submitted to it,<sup>23</sup> and the utility type regulation of an industry normally regarded as a participant in free enterprise.<sup>24</sup>

The struggle concerning the extent of federal control over the natural gas industry has raged between "consumer" states and

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17. Petitioner's equipment consisted only of oil and gas well facilities which were necessary for its local production. The delivery of the gas to the vendee, Texas Gas, was accomplished on the property which petitioner had under lease. None of petitioner's pipelines extended beyond that property. See statement of facts, 247 F.2d 882, 884 (5th Cir. 1957).

18. There was no connection between petitioner and its vendee, Texas Gas.

19. *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682 (1947); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

20. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), and cases cited at note 16 *supra*.

21. 247 F.2d 882, 889 (5th Cir. 1957).

22. "Such a holding withdraws from the states a traditional field for effective regulation of an economic activity of major importance to the general welfare of the state. Specifically, such a holding will forbid state regulation of oil and gas production activities insofar as that state policy is aimed at, or works through, the use of minimum prices." *Id.* at 892.

23. "To those of us dealing with these cases since the Phillips decision, the effort of the Commission and its overburdened staff to assimilate and handle the thousands of applications for certificates of public convenience and necessity, for rate increases, etc., can evoke only the most sympathetic (*sic*, sympathetic) appreciation for a problem for which it was not equipped by Congress." *Id.* at 896, n. 18.

24. "For an industry which has been built upon the inveterate, irrepressible, sometimes flamboyant, optimism of people anxious to take great risks to reap great rewards, suddenly to make out of it the staid and conservative business of a public utility, represents such a radical abandonment of the past that I cannot believe that Congress meant to do this to the thousands who annually bring, or try to bring, or hope to bring, in gas and oil wells." *Id.* at 896.

"producer" states.<sup>25</sup> The dispute is an economic one, the crux of the issue centering around the regulation of rates. "Consumer" states argue that natural gas is vested with a public interest; that because of this interest the rates should be regulated; that regulation at the distributing end of the pipeline is little better than no regulation at all. "Producer" states reply that their lot is not the same as that of a utility; that their activity consists of the sale of a commodity; that the competition between various producers is sufficient to keep prices at a reasonable level.<sup>26</sup> Thus far the position of the producers seems to have been borne out by the fact that natural gas prices have always been at an extremely low level.<sup>27</sup>

The interpretation given the Natural Gas Act in the instant case and in other recent cases, whereby all sales of gas which ultimately reach interstate commerce fall within the purview of FPC jurisdiction, could have a seriously detrimental effect on state regulation of conservation. Under such an interpretation, jurisdiction could logically even extend to a sale of gas from a landowner to a local lease broker, as long as some of the gas was ultimately transported in interstate commerce.<sup>28</sup> Following this

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25. "Intervenors in the [*Phillips* case] included the producing states of New Mexico, Oklahoma, Texas, Kansas, Arkansas, Louisiana, and Mississippi, all protesting the attempted federal regulation on the ground that such jurisdiction would conflict with the states' regulatory and conservation powers. Intervening also were the State of Wisconsin, the City of Detroit, Michigan, the City of Kansas City, Missouri, the City of Milwaukee, Wisconsin, and the County of Wayne, Michigan, each contending for federal jurisdiction." Crenshaw, *The Regulation of Natural Gas*, 19 LAW & CONTEMP. PROB. 325, 337 (1954).

26. See *The Federal Regulation of Natural Gas Producers, A Symposium*, especially the *Foreword* by Huard, 44 GEO. L.J. 551 (1956).

27. See the comparison of natural gas prices with those of coal and oil in Foster, *Natural-Gas Regulation from the Producers' Standpoint*, 44 GEO. L.J. 658, 665 (1956). The reasons for the low prices have been summarized in this manner: "Undoubtedly, the most significant peculiarity of natural gas at this juncture of history in the United States is its low price, which, as we have seen, is the inevitable result of the supply and demand situation. Supply is determined largely by two basic facts: (1) the production of casinghead gas is an inevitable incidental to oil production; (2) most gas wells are discovered by people looking for oil. Thus both the size of reserves and the volume of output are significantly affected by forces that stem not from the gas side of the petroleum situation but from the oil side." ZIMMERMANN, CONSERVATION IN THE PRODUCTION OF PETROLEUM 243 (1957).

28. It could be argued that the FPC has already extended its jurisdiction to a royalty owner. In the *Matters of Northern Natural Gas Producing Co. and Elk River Coal and Lumber Co.*, FPC Docket Nos. G-10,001, G-10,184, 6 Oil & Gas Rep. 538 (1956). However, it is possible that the case can be construed to fit only its own particular fact situation — where the lessee of the royalty owner is also the transporter of the gas in interstate commerce. See also *J. M. Huber Corp. v. Federal Power Commission*, 236 F.2d 550 (3d Cir. 1956), in which jurisdiction is extended over the abandonment of sales from a field gathering system. However, where gas was sold to a city for consumption, it was held not a "sale for resale" so as to fall within FPC jurisdiction. *City of Hastings, Nebraska v. Federal*

interpretation, the Supreme Court has already held that an order of a state regulatory agency fixing minimum prices as a conservation measure was not within state jurisdiction.<sup>29</sup> Such a view practically denies to state regulatory agencies an important consideration of economic factors in the administration of conservation.<sup>30</sup> Although the Natural Gas Act was intended to protect the public interest in the transportation of natural gas, the act was intended to complement, not usurp, state regulation of conservation.<sup>31</sup> Local price control is both an indispensable tool for the regulation of conservation<sup>32</sup> and a natural result of such regulation.<sup>33</sup> This is not to say that all regulation of rates should be left to the states, for the public interest vested in the price of gas negates such an idea. However, the Natural Gas Act was intended to regulate interstate commerce only in those areas where state regulation was prohibited;<sup>34</sup> full freedom was intended to be given the states in the regulation of conservation.<sup>35</sup> Therefore, federal regulation of natural gas sales should be limited to those situations in which it is necessary to effectuate

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Power Commission, 221 F.2d 31 (D.C. Cir. 1954), cert. denied, 349 U.S. 920 (1955).

29. *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 78 Sup. Ct. 273 (U.S. 1958). See *Cities Service Gas Co. v. Peerless Oil Co.*, 340 U.S. 179 (1950), in which identical orders were held to be a constitutional exercise of state power. The issue in the Kansas case was not the constitutionality of the orders, but whether jurisdiction over such orders belonged to the states or the FPC.

30. See Hussey, *Conservation Developments of the Year: State Regulation of Minimum Well Head Price for Natural Gas a Prevention of Waste of Natural Resources*, to be published in SIXTH ANNUAL MINERAL LAW INSTITUTE (1958).

31. See cases at note 19 *supra*.

32. See Digby, *The Conservation Laws and Their Administration*, 17 LA. REV. STAT. ANN. 489 (West 1950).

33. "And at least everyone on the outside of a courtroom knows that modern oil-gas conservation programs, preventing waste by limiting production to meet an established market demand, whether they do so directly or indirectly, actually fix prices." Dissenting opinion, *Deep South Oil Co. v. Federal Power Commission*, 247 F.2d 882, 894 (5th Cir. 1957). See also ZIMMERMANN, *CONSERVATION IN THE PRODUCTION OF PETROLEUM* 249 (1957).

34. In cases such as *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924) and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), the Supreme Court held that the transportation of gas in interstate commerce could not be regulated by the states even in the absence of federal regulation. The Natural Gas Act was passed in order to close the gap left by such decisions. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

35. "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the states full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach." *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 690 (1947).

interstate commerce; just because gas in a particular sale ultimately flows into interstate transportation is no reason to subject the sale to federal regulation. Hence, any rate regulation which is reasonably linked to the administration of such conservation, and which does not interfere with interstate transportation of gas, should remain within the jurisdiction of the states. The regulation of wellhead sales would seem to be reasonable state action where the regulation is necessary for conservation. It would therefore appear that an interpretation of the Natural Gas Act whereby all sales of gas in interstate commerce fall within FPC jurisdiction is an unwarranted extension of jurisdiction.

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TORTS — LIABILITY FOR HARMFUL RELIANCE ON A GRATUITOUS  
PROMISE

Plaintiff was scratched or bitten by defendant's cat while shopping in defendant's store. Realizing that plaintiff would have to take curative measures if the animal were rabid, the parties agreed on the necessity of observing the cat for a stated period, whereupon the defendant promised to insure such observation by locking up the cat. In the past, the animal had enjoyed considerable freedom; but despite defendant's promise, he made no change in his usual method of keeping the cat and it disappeared a few days later before its condition could be ascertained. The cat subsequently returned and proved not to be diseased; but, during the interim, plaintiff, on the insistence of her doctor, was compelled to submit to the only known cure for rabies, the Pasteur treatment. After several injections, plaintiff sustained injury from a noxious reaction to the vaccine serum. In an action for damages, the trial court ruled for plaintiff, finding that the defendant was under a duty to confine the cat for observation. On appeal, the court of appeal *held*, affirmed. One, under no initial duty to aid another, who undertakes by express promise to act for the safety of the other, causing the other reasonably to rely on performance of the undertaking and refrain from acting for himself or from securing other available help, is liable for bodily harm resulting from the failure to use reasonable care in performing the undertaking. *Marsalis v. LaSalle*, 94 So.2d 120 (La. App. 1957).