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NOTES

CURTAILMENT: INCREASED FPC REGULATION OF DIRECT SALES OF NATURAL GAS

Heavy demands for natural gas plus an existing shortage forced pipeline companies to apply to the Federal Power Commission¹ for permission to reduce deliveries to their customers. Louisiana Power & Light Company sought to enjoin such curtailment. The Fifth Circuit Court of Appeals granted the injunction,² and held that under section 1(b) of the Natural Gas Act,³ FPC curtailment orders could not apply to direct sales by pipeline companies to ultimate consumers. The Supreme Court unanimously reversed and *held* that the FPC has power to authorize curtailment schedules for both resale and direct sales of natural gas under the "transportation" basis of jurisdiction granted by Congress; and that this section of the act only prohibits FPC regulation of *rates* of direct sales. *Federal Power Commission v. Louisiana Power & Light Co.*, 92 S. Ct. 1827 (1972).

Early Supreme Court cases limited the scope of state regulation of the natural gas industry by forbidding local control of sales of natural gas in interstate commerce for resale to consumers.⁴ A 1936 report by the Federal Trade Commission⁵ prompted Congress to enact the Natural Gas Act in 1938 to fill this regulatory void, and to protect consumers from exploitation by natural gas companies.⁶ In passing the act, Congress intended to create a "comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority" over local transactions.⁷ For this reason section 1(b) was included in the act to define the extent of its application:

1. Hereinafter cited as FPC.

2. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 456 F.2d 326 (1972).

3. 52 Stat. 821 (1938), 15 U.S.C. §§ 717-717(w) (1970).

4. *Peoples Natural Gas Co. v. Public Serv. Comm'n*, 270 U.S. 550 (1926); *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Public Util. Comm'n v. Landon*, 249 U.S. 236 (1919).

5. S. Doc. No. 92, pt.84A, 70th Cong., 1st Sess. (1936).

6. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137 (1960); *Phillips Petr. Co. v. Wisconsin*, 347 U.S. 672 (1954); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

7. *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 520 (1947). *See also*, *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *Phillips Petr. Co. v. Wisconsin*, 347 U.S. 672 (1954); *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

"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."⁸

Through section 1(b) Congress delegated three aspects of the natural gas industry to FPC regulation: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) those natural gas companies engaged in such transportation or sale.⁹ This section was interpreted to exclude federal regulation of direct sales, *i.e.*, those sales made to ultimate consumers for industrial uses or generation of electricity. The courts reasoned that the states could regulate such sales.¹⁰

The 1942 amendment to section 7(c)¹¹ of the act reiterated congressional intent to regulate transportation of natural gas,¹² and required natural gas pipelines to acquire a certificate of convenience and necessity from the FPC for all extensions and constructions of their lines, whether or not the proposed route was already being served by another pipeline.¹³ Without this certificate, pipeline extensions or construction could not be made to the prospective purchaser, thus causing the contemplated sale between pipeline and consumer to fail. This certification procedure under 7(c) was the only aspect of direct sales that the FPC could regulate.¹⁴

However, the commission used section 7(c) to exert indirect

8. 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1970).

9. *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 516 (1947).

10. *FPC v. Transcontinental Pipe Line Corp.*, 365 U.S. 1 (1961); *Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951); *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507 (1947); *Public Util. Comm'n v. Landon*, 249 U.S. 236 (1919).

11. 56 Stat. 83 (1942), 15 U.S.C. § 717f(c) (1970).

12. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 468 (1950).

13. Before this amendment to § 7(c), a certificate of convenience and necessity was only required if a pipeline company wished to extend into an area served by an existing pipeline.

14. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 4 (1961).

control over direct sales.¹⁵ During a certification investigation, the FPC began to consider such criteria as the impact on service to present customers,¹⁶ the effect of sale price on natural gas rates in the gas field, and the end use of the gas.¹⁷ If these facts appeared to be adverse to the public interest, the FPC refused a certificate of convenience and necessity, thereby preventing the sale. In *FPC v. Transcontinental Gas Pipe Line Corp.*,¹⁸ the Supreme Court limited the commission's authority over direct sales in certification proceedings to the exercise of a veto power over a proposed extension or construction. Even though the decision noted that the commission had no continuous control over direct sales, it was criticized for granting the FPC too much power.¹⁹

In the instant case, the issue was whether the FPC had authority to modify a certificate of convenience and necessity after it was granted in a direct sale.²⁰ The district court found any interference with direct sales to be a collateral effect of the curtailment and not an attempt by the FPC to exert jurisdiction over such contracts.²¹ The Fifth Circuit reversed, relying on *Transco* in holding that the commission's authority over direct sales ended with certification. The Supreme Court upheld the district court, finding authority to allow the curtailment under the transportation basis of authority of section 1(b). Curtailment of natural gas deliveries amounted to FPC regulation of the "transportation" of natural gas.²² Thus the

15. Comment, 1 *HOUSTON L. REV.* 29, 41 (1963): "Where non-jurisdictional transactions are involved, such as direct industrial sales or leasehold sales, the Federal Power Commission exercises an effective indirect control in that it can review the non-jurisdictional transaction before permitting the gas to move in interstate commerce."

16. *Atlantic Ref. Co. v. Public Serv. Comm'n.* 360 U.S. 378 (1959); *Panhandle E. Pipe Line Co. v. FPC*, 232 F.2d 467 (3rd Cir.), cert. denied, 352 U.S. 891 (1956).

17. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961).

18. *Id.* [Hereinafter cited as *Transco*.]

19. Armour & Flittie, *The Natural Gas Act Experience—A Study in Regulatory Aggression and Congressional Failure to Control the Legislative Process*, 19 *SW. L.J.* 448 (1965); Note, 75 *HARV. L. REV.* 239 (1961); Note, 21 *LA. L. REV.* 790 (1961).

20. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 456 F.2d 326, 335 (5th Cir. 1972).

21. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 332 F. Supp. 692, 698 (W.D. La. 1971).

22. *FPC v. Louisiana Power & Light Co.*, 92 S.Ct. 1827, 1837 (1972): "[T]he prohibition of the proviso of § 1(b) withheld from FPC only rate setting authority with respect to direct sales. Curtailment regulations are not rate setting regulations but regulations of the 'transportation' of natural gas and thus within FPC jurisdiction under the opening sentence of § 1(b) that 'The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce'"

section applied to any movement of gas, whether for resale or direct sale.

In order to reach the decision, the Court looked to the purpose of the act to protect consumers;²³ congressional desire for a comprehensive regulatory scheme with no gaps in regulation;²⁴ and the consumer's inability to bear the full brunt of the curtailment,²⁵ particularly when many direct customers had other fuel sources available.²⁶

The legislative history of the Natural Gas Act supports the Court's holding that the section 1(b) exclusion forbids only FPC regulation of direct sale rates.²⁷ *FPC v. East Ohio Gas Co.* had already recognized transportation as an important basis for FPC regulation;²⁸ and in *Panhandle Eastern Pipe Line Co. v. Public Service Commission* the Court noted that curtailment plans would fall under FPC "transportation" jurisdiction rather than "sales."²⁹ Further, in *Pennsylvania v. West Virginia*, it was held to be an interference with commerce for the states to curtail interstate gas deliveries;³⁰ and in the *Permian Basin Area Rate Cases* it was stated that the commission's important and difficult responsibilities required that the agency be upheld without compelling evidence of contrary congressional intent.³¹ By distinguishing *Transco*³² as applying FPC veto power under

23. *Id.* at 1833.

24. *Id.*

25. *Id.* at 1834: "These resale consumers could be curtailed by as much as 560,000 Mcf [million cubic feet] on cold days without dire consequences, but burdening them with the full curtailment volume would deprive them of up to 1,500,000 Mcf."

26. *Id.*

27. The language of § 1(b) tends to indicate that any regulation of direct sales was excluded; yet early versions of the act indicate an attempt to prohibit only regulation of rates. *E.g.*, H.R. 11662, 74th Cong., 2d Sess. (1936): "Provided, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."; H.R. 12680, 74th Cong., 2d Sess. (1936); H.R. REP. No. 709, 75th Cong., 1st Sess. (1937). *See also*, *FPC v. Louisiana Power & Light Co.*, 92 S. Ct. 1827, 1838 (1972); Note, 44 *Geo. L.J.* 695 (1956).

28. 338 U.S. 464, 473 (1950).

29. 332 U.S. 507, 523 (1947): "[T]he matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." *See also*, *FPC v. Louisiana Power & Light Co.*, 92 S. Ct. 1827, 1839 (1972).

30. 262 U.S. 553 (1923).

31. 390 U.S. 747, 780 (1968): "We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."

32. *FPC v. Louisiana Power & Light Co.*, 92 S. Ct. 1827, 1841 (1972).

section 7, the Supreme Court could disregard that decision here, where the FPC ordered curtailments to prevent discrimination under section 4 of the act.³³

In deciding this case the Court realized that a national problem existed that had to be solved to prevent disruption in the natural gas industry, and to protect the public. The FPC was properly acting under its general grant of authority in the absence of more recent congressional action.³⁴ This case should put other direct sale purchasers of gas for "inferior"³⁵ uses on notice that similar plans could be formulated by the FPC to protect the consuming public as the natural gas crisis becomes critical.

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PROBABLE CAUSE: VERACITY OF UNDERLYING FACTS

Defendant was charged with possession of marijuana.¹ A search warrant, whereby the crucial evidence was obtained, was issued largely on the basis of statements made by a confidential informer which the affiant, a police officer, believed in good faith to be true. The district court sustained a motion to suppress² after an evidentiary hearing showed that the informer had lied as to the facts contained in the supporting affidavit. The Louisiana supreme court granted writs to review the sustaining of the motion to suppress. *Held*, the truthfulness of the facts set out in an affidavit supporting a search warrant may not later be attacked at a hearing on a motion to suppress. *State v. Anselmo*, 260 La. 306, 256 So.2d 98 (1971).

The question of whether the underlying facts supporting a finding of probable cause are actually true is a different one

33. 52 Stat. 822 (1938), 15 U.S.C. § 717(c) (1970).

34. See generally Fuch, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 COLUM. L. REV. 216, 244 (1969): "If actual abuse at the administrative level should take place, it would probably be checked by judicial reversal or new legislation; and action by the legislature to overcome overbold decisions by agencies or courts in the construction of statutes is available as well."

35. "Inferior" use is burning natural gas for industrial purposes where more abundant energy sources could be substituted. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961).

1. LA. R.S. 40:971 (3)(c) (Supp. 1970): "It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance...."

2. LA. CODE CRIM. P. art. 703A.