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ADMINISTRATIVE ABNEGATION IN THE FACE OF CONGRESSIONAL COERCION: THE INTERSTATE NATURAL GAS COMPANY AFFAIR

On June 16, 1947 the Supreme Court of the United States unanimously decided that the Federal Power Commission possessed the power to regulate wholesale sales of natural gas made in the field to pipeline companies which transport the gas into other states for resale for ultimate public consumption when, at the time the sales were made, nothing further in the gathering process remained to be done.¹ Thus was rendered the final judicial disposition of a case which had become a major *cause celebre* among the members of the natural gas industry. However, the decision in this, the *Interstate* case, did not produce quiescence; the cries of anger and alarm and the accusations which the outraged natural gas industry leveled at the Federal Power Commission grew, rather than diminished, in volume and intensity. This study of a problem for which the *Interstate* case served as an apex, will demonstrate that these frenetic protests very likely did not fail to achieve their objective, i. e., a diminution of effective federal regulatory authority over natural gas companies which either sell or transport natural gas in interstate commerce.

The fundamental legal problem involved in the *Interstate* case, and in other similar cases which have preceded it, is the interpretation of Section 1 (b) of the Natural Gas Act.² Because of its controlling importance this section has been inserted in the main text.

The provisions of this act 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

¹ *Interstate Natural Gas Company, Inc. v. Federal Power Commission*, 330 U. S. . . ., 67 Sup. Ct. 1477, 91 L. ed. 1555 (1947)

² 52 Stat. 833 (1938), 15 U. S. C. 717-717w (1940).

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.

It can be seen that Section 1(b) bestows an affirmative grant of jurisdiction over both *transportation* of gas in interstate commerce and *wholesale sales* of gas in interstate commerce. At the same time the section exempts, among other things, production and gathering³ from the jurisdiction of the Commission. The problem illustrated by the *Interstate* case is that of making determination of whether Congress has given the Federal Power Commission the authority to regulate wholesale sales of natural gas made at the termini of the field gathering lines to pipeline companies transporting the gas in interstate commerce. The Supreme Court has given an emphatic approval of the exercise of such power; industry has uttered a thunderous denial of its validity; the Commission has offered conciliation; and a determined attempt has been made in Congress to resolve the issue in such a way as to assuage the indignant members of the natural gas industry.⁴ Under such circumstances this strange display of a somewhat belated administrative self-effacement warrants investigation.

The first case before the Court which clearly raised the question was the *Columbian Fuel Corporation* case, decided in 1940.⁵ In that case the Commission decided that it did

³ While there is no absolute agreement on where the gathering process begins or ends, it can be described fairly as the collecting of the gas from the individual wells by moving it through low pressure field lines to central points, such as to the main compressor stations at the beginning of the trunk transportation lines, or to processing and dehydration plants. See Stephens, *Natural Gas Engineering* (1941), Vol. III, p. 141.

⁴ H.R. 2185 (The "Rizley" Bill) was passed by the House of Representatives on July 11, 1947. The Senate Interstate Commerce Committee, by a vote of 6 to 5, refused to report out S.734, a companion bill.

⁵ In the Matter of *Columbian Fuel Corporation*, 2 F. P. C. 200, 35 P. U. R. (N. S.) 3 (1940). The case aroused wide interest throughout the natural gas industry. Briefs were filed by the Public Service Commission of Kentucky, the State of West Virginia, the Public Service Commission of West Virginia, the National Association of Railroad and Utilities Commissioners, the Mid-Continent Oil and Gas Association, and the Independent Petroleum Association of America.

not possess jurisdiction under Section 1(b) of the Natural Gas Act to regulate rates charged for sales of natural gas in interstate commerce for resale by a company engaged solely in the production and gathering of natural gas where the sales are made as an incident to and immediately upon completion of the company's production and gathering of the natural gas, and where the company was not otherwise subject to the jurisdiction of the Commission.

The Commission's essential finding of fact was that the Columbian Fuel Corporation produced natural gas and sold it at the termini of its gathering lines within Kentucky to a pipeline company which transported it in interstate commerce. After examining the language of the Natural Gas Act, the Congressional Committee reports, and the expressions of opinion by individual Congressmen in the course of debate on the bill, the Commission reached the conclusion that this producing company, not otherwise a natural gas company subject to the Commission's jurisdiction, was exempt from its jurisdiction. The Commission took this more restricted view of its authority because it believed that Congress, in passing the Act, was of the mind that:

The companies to be subject to regulation were conceived of as "pipe line" companies, and it was assumed that production and gathering would enter the field of regulation only to the extent that the "pipe line" companies, either directly or through affiliates, controlled the production or the gathering of the gas so transported.⁶

However, the Commission uttered this admonition:

Further experience with the administration of the Natural Gas Act may reveal that the initial sales of large quantities of natural gas which eventually flows in interstate commerce are by producing or gathering companies which, through affiliation, field agreement, or dominant position in the field, are able to maintain an unreasonable price despite the appearance of competition. Under such circumstances the Commission will decide whether it can assume jurisdiction over arbitrary field prices or should report the facts to Congress with

⁶ 2 F. P. C. 200, 207.

recommendations for such broadening of the Act and provision of additional machinery as may appear necessary to close this gap in effective regulation of the natural gas industry.⁷

The majority, though evidently conscious that such a restricted view of the scope of the federal power might well result in weakening effective regulation in the interests of the consumers,⁸ and indicating by the language quoted here, that time and circumstances might induce a change in their attitude, preferred to exempt independent producers who, nevertheless, sell gas wholesale in interstate commerce. In reaching this result they ignored the arguments of their own Commission staff counsel who contended that these sales of gas to be transported in interstate commerce are "sales in interstate commerce" beyond the power of the individual states to regulate,⁹ and thus not excluded from Commission jurisdiction under the production and gathering exemption of Section 1 (b) since "sale" is distinct from "production" and "gathering" and, therefore, the negative language of the exemption does not limit the affirmative grant of jurisdiction.¹⁰

Commissioner Scott, who dissented, accepted the arguments of staff counsel. In his opinion he distinguished sharply between a sale for resale, and the physical activity of production and gathering. The exemption of production and gathering contained in Section 1 (b), he contended, was not a limitation upon the affirmative grant of jurisdiction over sales of natural gas in interstate commerce for resale. He viewed the majority's exemption of sales in interstate commerce made by an independent producer as suggesting,

⁷ *Id.* at 208.

⁸ "Clearly, if the language above quoted (Section 1(b)) is interpreted as excluding from Commission jurisdiction, and hence from Federal regulation, all companies whose sales of natural gas are made at the well mouth or at the end of the gathering lines, *there will be important initial sales of natural gas in interstate commerce which will remain outside the field of regulation altogether.* Such unregulated sales would, then, represent important elements in the costs which must be taken into account in the regulation of all subsequent sales subject to Federal or state jurisdiction." (Italics supplied) *Id.* at p. 204.

⁹ Brief of Commission Counsel, pp. 17-21.

¹⁰ *Id.*, pp. 22-27.

that the achievement of the basic purpose of the legislation, viz., to fill the gap¹¹ wherein States may not act, is to be urged toward the millenium. Neither the Act nor its legislative history indicates that Congress intended that the foregoing construction be ascribed to the statute. The sale of natural gas in the instant proceeding is clearly interstate in character.¹²

Commissioner Scott believed that, in drawing a distinction between the independent and affiliated producers who sell gas in interstate commerce, the majority erred, and that disclaiming jurisdiction in the former case, was tantamount to holding that the sale of natural gas in interstate commerce is a part of production and gathering of such gas.¹³ Answering the objection that it would be burdensome to apply the provisions of the Act to the many small producers making sales in interstate commerce, he pointed out that the Commission has the power under the Act to make reasonable classifications which are found appropriate to carry out its provisions. Using this power, the Commission, he replied, could exempt the small producing companies, having an annual gas operating revenue of less than \$25,000, from the more arduous burdens of the Act.¹⁴

In a case following close upon the *Columbian Fuel* decision the Commission held that where a producer or gatherer of natural gas is also engaged in "the subsequent transportation and sale thereof in interstate commerce, it does not fall within the same category" as the producer who only sells,

¹¹ The Natural Gas Act of 1938 was passed to fill a hiatus in regulation of the sale and transportation of natural gas in interstate commerce. This hiatus existed because numerous Supreme Court decisions had held that, in the absence of federal regulation, the Commerce Clause of the Constitution operated, of its own force, to preclude the exercise by the States of regulatory authority over sales of commodities flowing in interstate commerce. This prohibition was operative whether the sale was made (a) in the state of origin, *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 45 Sup. Ct. 481, 69 L. ed. 909 (1925), (b) in the state of destination, *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 44 Sup. Ct. 544, 68 L. ed. 1027 (1924), or (c) at the state line, *Public Utility Commission of Rhode Island v. Attleboro S. & E. Co.*, 273 U. S. 83, 47 Sup. Ct. 294, 71 L. ed. 549 (1927).

¹² 2 F. P. C. 200, 211.

¹³ 2 F. P. C. 200, 212. It might be noted that Commissioner Scott was the only lawyer member among the Commissioners participating in the decision.

¹⁴ *Id.* at p. 216.

but does not transport the gas, as was the situation in the *Columbian Fuel* case. In this *Billings Co.* case, the producing company transported gas from the termini of its gathering lines in Wyoming to the Wyoming-Montana state line where it was sold and delivered to another transporting company which resold it in Montana for ultimate public consumption.¹⁵

The next case posing the problem which the Commission had apparently resolved in the *Columbia Fuel* decision was the occasion for a noticeable change of position on the part of the Commission. In *Peoples Natural Gas Co. v. Federal Power Commission*,¹⁶ the essential facts were these: the Commission claimed that Peoples was a natural gas company because it sold gas at its compressor station located at the termini of its gathering lines in Pennsylvania to an affiliated pipe line company which transported it into New York for ultimate public consumption. After hearing, the Commission made a determination that the sale of natural gas by Peoples to New York State Natural Gas Company "is a continuous process and appears to be a sale in interstate commerce of natural gas for resale for ultimate public consumption,"¹⁷ and ordered Peoples to produce its books and records for the purpose of investigating the rates charged in such sales. Upon the refusal of the Company to produce this information, on the ground that the Commission was without jurisdiction, the Commission sought the aid of the courts. After the District Court ordered Peoples to produce the books and records requested by the Federal Power Commission the Company appealed to the Circuit Court of Appeals for the District of Columbia.

¹⁵ In the Matter of Billings Gas Co. et al., 2 F. P. C. 288, 35 P. U. R. (N. S.) 321 (1940).

¹⁶ Peoples Natural Gas Company v. Federal Power Commission, 127 F. (2d) 153 (App. D. C., 1942).

¹⁷ 2 F. P. C. 1017, 1018.

Peoples, in its argument before the District Court, had relied on the *Columbian Fuel* case,¹⁸ claiming to be exempt as a producing and gathering company. Unsuccessful below, the Company repeated this argument in its brief before the Circuit Court;¹⁹ and, furthermore, pressed vigorously the proposition that Congress, in closing the gap which previously had existed in effective regulatory authority, intended only to provide the Federal Power Commission with jurisdiction over interstate *pipeline* companies whose main function was the transportation and sale of gas at the city gate for resale for ultimate public consumption.²⁰ On the other hand the staff counsel of the Commission preferred to ignore the *Columbian Fuel* case and was content to rest with the contention that the sales made by Peoples were sales in interstate commerce under the principle of the *Attleboro*²¹ and similar cases.²² The staff counsel argued also that the allegation of "affiliation" said to exist between Peoples and the purchasing company was a sufficient basis on which to predicate the jurisdiction of the Commission.²³

When the Circuit Court came to decide the case it rested its decision purely on the grounds that the disputed sales are in interstate commerce and subject to the Commission's jurisdiction.²⁴ It hurdled any obstacle which the *Columbian Fuel* case may have been thought to present by simply pushing it aside with an innuendo as to its incorrectness, saying: "We cannot disregard the plain language of the statute because the Commission at one time interpreted it narrowly . . ." ²⁵

¹⁸ Transcript of the Record in the Supreme Court, *Peoples Natural Gas Co. v. F. P. C.*, Oct. Term (1941), No. 1234, p. A17.

¹⁹ Brief of Appellant before the Circuit Court, at p. 8 and p. 26.

²⁰ *Id.* at p. 27.

²¹ *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 45 Sup. Ct. 481, 69 L. ed. 909 (1925); *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 44 Sup. Ct. 544, 68 L. ed. 1027 (1924); *Public Utility Commission of Rhode Island v. Attleboro S. & E. Co.*, 273 U. S. 83, 47 Sup. Ct. 294, 71 L. ed. 549 (1927).

²² Brief of Appellee before the Circuit Court, at p. 12.

²³ *Ibid.*

²⁴ *Peoples Natural Gas Company v. Federal Power Commission*, 127 F (2d) 153, 155, (App. D. C., 1942).

²⁵ *Ibid.*

On petition for rehearing, after Peoples had urged more emphatically the argument that the disputed sales were not sales in interstate commerce but were sales "incident to the production and gathering of natural gas,"²⁶ the Court held to its initial opinion. However, the Court embellished the original holding by making clear the idea that the wholesale sales in interstate commerce which Congress meant to regulate through the Natural Gas Act included sales of gas which is about to move interstate as well as sales of gas which has moved interstate. The Court quoted the decision rendered in the *Illinois Natural Gas* case,²⁷ saying:

. . . the particular point at which title and custody of the gas passes to the purchaser without arresting its movement to the intended destination does not affect the essential interstate nature of the business.

The Court felt that by using the phrase "in interstate commerce" in the Natural Gas Act, Congress had not narrowed its view of what is "in" interstate commerce. The Court was of the opinion that at the time the Act was passed, the States lacked the authority to regulate the sales in issue.²⁸

From this adverse decision of the Circuit Court, Peoples unsuccessfully petitioned the Supreme Court for certiorari,²⁹ arguing again in their brief that the sales involved were sales incidental to production and gathering, made at the termini of the gathering lines, and exempt under the principle of the *Columbian Fuel* case.³⁰

²⁶ Appellants Petition for Rehearing, p. 37 *et seq.* In a lengthy footnote (pp. 36-37) petitioner argues that the *Columbian Fuel* case represented the correct interpretation of the Act.

²⁷ *Illinois Natural Gas Co. v. Central Illinois Public Service Commission*, 314 U. S. 498, 62 Sup. Ct. 384, 86 L. ed. 371 (1941).

²⁸ *Peoples Natural Gas Company v. Federal Power Commission*, 127 F (2d) 153, 158, (App. D. C., 1942). The Court paid no attention to Peoples' contention that the Pennsylvania Public Utility Commission regulated the disputed sales.

²⁹ *Peoples Natural Gas Company v. Federal Power Commission*, *cert. denied*, 316 U. S. 700 (1942).

³⁰ Brief in Support of Petition for Writ of Certiorari, p. 15. Attention was drawn to the fact that Peoples' situation was even a stranger case for the non-exercise of federal jurisdiction than that presented by the *Columbian Fuel* case, since the gas purchased by the New York State Natural Gas Co. is often stored by it in Pennsylvania, thereby substantially interrupting its movement to New York.

Meanwhile, what did the Commission think about this somewhat unexpected judicial disapprobation of the conservatism which they had exhibited by restraining their jurisdictional libido in the *Columbian Fuel* case, and the green light which the Court had flashed in favor of the exercise of the federal power over sales made at the termini of gathering lines for interstate transportation? Imbued, perhaps, with a new confidence, born of the Circuit Court's attitude in the case, staff counsel of the Commission soft-pedaled the elements of affiliation found in the case. In their brief before the Supreme Court they now rested their case on the firm basis provided them by the Circuit Court; the disputed sales were sales in interstate commerce, beyond the power of the State to regulate, and subject to the regulatory jurisdiction of the Commission as provided by Congress.³¹ Staff counsel was content to merely distinguish the *Columbian Fuel* case on hyper-technical grounds; and, if that were not sufficient to erase this haunting memory of bureaucratic self-denial the privilege of changing one's mind was relied on.³² It was now "immaterial that the sale is made by the producer at the place of production."³³

The *Peoples* decision, then, for all apparent purposes overruled, or at least substantially undermined, the *Columbian Fuel* case. Because of the fact that the *Peoples* case was tried on the pleadings of the parties, and the facts not developed, one writer infers that the case could be justified on the grounds that *Peoples* may have engaged in interstate transportation of gas before delivery.³⁴ This is an inference

³¹ Brief for Respondent in Opposition, p. 12.

³² "The decision of the Commission *In the Matter of Columbian Fuel Corporation*, 35 P. U. R. (N. S.) 3, relied on by petitioners, turns in part on the narrow circumstance that the pipe lines of the producer's vendee were all located in the state of origin and the vendee resold the gas in the same state for transportation. Moreover, the Commission reserved the right to reconsider its conclusion in the future, particularly where, as here, affiliation between vendor and vendee exists." *Id.* at p. 13.

³³ *Id.* at p. 12.

³⁴ Newcomb, *Effects of Federal Regulation Under The Natural Gas Act Upon The Production and Conservation of Natural Gas*, (1945) 14 GEORGE WASHINGTON L. REV. 217, 225.

without substance since the Circuit Court decided the case purely on the premise that sales of gas about to move in interstate commerce fall within the area of the permissible exercise of the Commission's jurisdiction.³⁵ The *Peoples* decision, indeed, was prologue to the case which was to prove a *bete noire* to the Federal Power Commission.

The *Interstate* episode began prosaically enough. Interstate Natural Gas Company produced natural gas and purchased gas produced by others in the Monroe gas field in Louisiana.³⁶ This gas is commingled, delivered, and sold to three pipeline companies³⁷ at the inlet side of compressor stations located in the Monroe field. The pipeline companies transported the gas into other states for resale for ultimate public consumption. Interstate also possesses its own interstate pipeline through which it transports gas in interstate commerce southward from the Monroe field into Mississippi and back into Louisiana where it was resold for ultimate public consumption. A complaint was filed with the Federal Power Commission by the Louisiana Public Service Commission alleging that the rates charged by Interstate for the gas sold in interstate commerce for resale for ultimate public consumption were unjust and unreasonable and requesting an investigation and the fixing of fair and reasonable rates.³⁸ Interstate filed an answer to this complaint denying the jurisdiction of the Commission; the answer alleged, *inter alia*, that there was pending undecided before the United States Court for the Eastern District of Louisiana a suit filed by Interstate to enjoin the Louisiana Public Service Commission from enforcing an order subject-

³⁵ *Peoples Natural Gas Company v. Federal Power Commission*, 127 F. (2d) 153, 159, (App. D. C., 1942).

³⁶ Interstate produced and purchased a total of 51,659,799 Mcf of gas in the Monroe field during 1941. Of this total, it produced from its own wells 28,819,814 Mcf. Interstate sold 21,863,278 Mcf to the three purchasing companies in the transactions in question.

³⁷ Mississippi River Fuel Corporation, United Gas Pipe Line Company (purchased gas for the account of Memphis Natural Gas Co.), and Southern Natural Gas Co.

³⁸ *In the Matter of Interstate Natural Gas Co., Inc.*, 3 F. P. C. 416 (1943).

ing Interstate's rates to its jurisdiction, wherein petitioner alleged that they were rates for sales in interstate commerce not subject to state regulation.³⁹ Interstate's argument convinced the District Court and on the basis of the above allegation the District Court held that since almost all of Interstate's business was in interstate commerce Louisiana could not regulate it.⁴⁰

In the proceedings before the Federal Power Commission, staff counsel relied on the distinction between production and sale in interstate commerce, a distinction which Commissioner Scott had painstakingly labored in his dissenting opinion in the *Columbian Fuel* case. These were sales in interstate commerce and controlled by the principle of the *Peoples* decision, argued staff counsel.⁴¹ The *Columbian Fuel* case received "silent treatment" at the hands of staff counsel save for a few reluctant remarks about it during oral argument before the Commission. Interstate, of course, did not omit mention of the *Columbian Fuel* decision. It argued that the disputed sales were incidental to the gathering process and that, under the *Columbian Fuel* decision, sales in interstate commerce were exempt from the Natural Gas Act when made in the production and gathering of gas.⁴²

When the Commission came to decide the case it broke completely with the unhappy memory of the *Columbian Fuel* result and boldly acknowledged that the disputed sales were wholesale sales in interstate commerce which Congress intended should be regulated by them. In answer to the contention that they fell within the production and gathering exemption they had a ready answer:

³⁹ In its petition before the District Court in Louisiana, Interstate averred "that 99 2/3% of the gas sold" by it "is sold in interstate commerce"; and "that said sales of gas so made by your petitioner are transactions in interstate commerce."

⁴⁰ *Interstate Natural Gas Company v. Louisiana Public Service Commission*, 33 F. Supp. 980 (E. D. La. 1940); 34 F. Supp. 50 (E. D. La., 1940).

⁴¹ Brief of Commission Counsel, p. 34 *et seq.*

⁴² Reply brief of Respondent, p. 19.

When the distinction between *production* and *gathering* of natural gas, and the *sale* of such gas in interstate commerce is kept in mind, effect is given to the Congressional objective. The Commission is bound to obey the command of Congress to regulate these sales in interstate commerce for resale to the three pipe line companies. Such is clearly the implication of the decision of the Circuit Court of Appeals in *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F (2d) 153, cert. den. 316 U. S. 700.⁴³ (italics supplied).

Reenforced by the clear cut decision in the *Peoples* case, the Commission had crossed the Rubicon; the *Columbian Fuel* case was presumably buried by inference, no mention of it being found in the opinion of the Commission. The Commission did find evidence of some affiliation between Interstate and two of the three pipeline companies;⁴⁴ and did insert a rather doubtful finding that Interstate was engaged in the transporting of the gas to the points of sale to the three pipeline companies.⁴⁵ However, their decision was unmistakably predicated on the premise that the disputed sales were sales in interstate commerce and not exempted as production and gathering.

Taking its appeal to the Fifth Circuit Court, Interstate claimed that Congress expressly intended to exclude from the jurisdiction of the Commission, all sales "made in the

⁴³ In the Matter of Interstate Natural Gas Co., Inc., 3 F. P. C. 416, 421 (1943).

⁴⁴ However, the Commission found: "that Mississippi River Fuel Corporation is an affiliate of Interstate; large blocks of voting stock of both companies are owned by the Standard Oil Company (N. J.) and the president of Mississippi is also president of Interstate. The evidence also disclosed that Interstate and its affiliates, Hope Producing Company and Southern Carbon Company, control a substantial portion of the gas acreage and production from Monroe field. Union Producing Company, an affiliate of United Gas Pipe Line Company, also controls a large portion of the acreage and production from the Monroe field. The evidence also shows close contractual and operating arrangements between Interstate and United Gas Pipe Line Company that have extended over a period of many years." In the Matter of Interstate Natural Gas Co., Inc., 3 F. P. C. 416, 419, (1943).

⁴⁵ *Id.* at p. 433. The record was replete with evidence that the lines through which the gas passed on its way to the points of delivery to the pipeline companies at the compressor stations within the Monroe field were gathering lines and not transmission lines. See Interstate's main brief before the Commission, pp. 129-152. Cf. Newcomb, In the Matter of Interstate Natural Gas Co., Inc., 3 F. P. C. 416, 228. (1943).

field by a producer or gatherer of gas even though such gas was then transported and sold in interstate commerce under the regulatory jurisdiction of the Act.”⁴⁶ It relied on the Commission’s decision in the *Columbian Fuel* case⁴⁷ and expressed awareness of the fact that the Commission was now following the views which dissenting Commissioner Scott had expressed in his *Columbian Fuel* opinion.⁴⁸ The arguments raised by staff counsel before the Circuit Court would seem to vindicate the charge of Interstate that the Commission had changed its tack. Contending that the disputed sales were sales in interstate commerce and not exempt as production and gathering, counsel for the Commission went to attenuated extremes to distinguish the *Columbian Fuel* case.⁴⁹ Finally, they confessed that the *Peoples* decision overruled the *Columbian Fuel* case, if there were anything contained in the earlier decision which conflicted with the *Peoples* opinion.⁵⁰

A majority of the Circuit Court construed the exemption of Section 1 (b) strictly⁵¹ and, having found the sales to be wholesale sales in interstate commerce, held that the production and gathering exemption did not apply,⁵² citing the *Peoples* case with approval. Since the disputed sales were

⁴⁶ Brief of Petitioner before the Circuit Court, p. 14.

⁴⁷ *Id.* at p. 26.

⁴⁸ *Id.* at p. 28.

⁴⁹ “The *Columbian Fuel* decision, therefore, is not persuasive in the present case:

(1) Because Interstate is not ‘engaged exclusively in the production and gathering of natural gas’ and because it is ‘otherwise subject to the jurisdiction of this Commission’ in that it is otherwise an interstate natural gas pipeline company and a natural-gas company under the Natural Gas Act. R. 58, 59, 81, 82.

(2) Because there is evidence as found by the Commission of ‘affiliation, field agreement, or dominant position in the field.’ R. 59, 63.” Brief of the Commission before the Circuit Court, p. 34.

These are distinctions without a difference. The Act confers upon the Commission power to regulate particular activities; it makes no distinction between producers and gatherers who are also engaged in transportation and those who are not; nor between producers and gatherers affiliated with a purchasing pipeline company and those who are not.

⁵⁰ *Id.* at p. 35.

⁵¹ *Ibid.*

⁵² *Interstate Natural Gas Co. v. Federal Power Commission*, 156 F (2d) 949, 951 (CCA 5th, 1946).

wholesale sales of gas they fall within the objectives Congress had in view when they passed the Act, because:

The purpose of the Natural Gas Act, as shown in the Senate and House Committee reports, which are identical, was to provide for the regulation of natural gas companies transporting and selling natural gas in interstate commerce. Its proponents were not interested in the production of gas or the individual sales of gas at the well. Nor were they interested in the gathering of gas in the field. What they were interested in, as the report in terms states, what they were trying to reach, was wholesale sales of gas. It would be difficult to conceive language better adapted to achieve this purpose than the language of the act in question here. It would be difficult to find a case more clearly illustrating the mischief which the act was supposed to remedy, more fittingly applying the remedy.⁵³

There was a strong dissenting opinion in the case, based chiefly on the view that disputed sales were not sales in interstate commerce since delivery was made within the State of Louisiana. Regulation of the price which the gatherer receives for the sale made at the termini of the gathering lines to the pipeline company appeared, in the dissenting judge's mind, as regulation of production and gathering which Congress meant to exempt from the Act.⁵⁴

Interstate petitioned the Supreme Court for certiorari, alleging that the sales were not sales in interstate commerce and thus exempted under the production and gathering prohibition.⁵⁵ Staff counsel rejoined that the sales were sales in interstate commerce, and, under the principle of the *Peoples* decision, not exempted as production and gathering. No attempt was made to distinguish the *Columbian Fuel* case, except to mention the fact that the decision of the Circuit Court in the *Peoples* case had been sustained on certiorari.⁵⁶ The Supreme Court at first denied certiorari⁵⁷

⁵³ *Id.* at p. 952.

⁵⁴ *Id.* at p. 953 *et seq.*

⁵⁵ Brief in support of Petition for Certiorari before the Supreme Court, p. 19 *et seq.*

⁵⁶ See Brief of Federal Power Commission in Opposition to Writ of Certiorari.

but reversed and granted it on petition for rehearing, limited to the jurisdictional questions.⁵⁷

At this point the grumbling which had been detected among the members of the National Gas industry became full-throated roars of virulence at what was interpreted to be an unauthorized extension of the Commission's jurisdiction into the realm of the regulation of production and gathering. The fear was expressed that not only would the Commission now be free to regulate the production and gathering functions, but that it would be in a position to assert jurisdiction over the oil business, since, save in the case of "dry" gas, wells which produce natural gas, are productive also of oil.⁵⁸ The oil industry recoiled in horror at the prospect (however imaginary) that the Federal Power Commission would attempt to apply the six and one-half per cent rate of return standard to their business.⁶⁰ Dire prophecies were indulged in to the effect that the deterrent specter of Commission jurisdiction would cause gas producers to refuse to sell their gas for interstate marketing, thus interfering with conservation measures, since it would result in the con-

⁵⁷ *Interstate Natural Gas Co. v. Federal Power Commission*, 329 U. S. 802, 67 Sup. Ct. 124, 91 L. ed. 375 (1946).

⁵⁸ *Interstate Natural Gas Co. v. Federal Power Commission*, 330 U. S. . . ., 67 Sup. Ct. 1477, 91 L. ed. 1355 (1947). In its petition for certiorari *Interstate* had also alleged that the rate order of the Commission was confiscatory. Certiorari was denied on this question.

⁵⁹ "The Federal Power Commission would seem now to have ample power at its unfettered discretion to apply its net investment rate base methods to production and gathering and fix the well-head price of any gas entering a pipeline company or purchased from others and whether or not produced in association with oil. The express exclusion of the business of producing and gathering from the jurisdiction of the Commission, blandly ignored, has been completely nullified. The Commission may also, presumably, subject oil companies and other independent suppliers of pipeline gas to the exacting requirements of its uniform system of accounts." Crosby, *Will The F. P. C. Drive Natural Gas Out of the Fuel Market* (1947) 39 *Public Utilities Fortnightly* 3, 4.

⁶⁰ "I, and many others like me, are afraid that if we separate such gas, strip it of its liquid hydrocarbons, compress it, and deliver it to main transmission lines, we are in danger of being regarded as performing an act in interstate commerce and subjecting our oil producing operations to the withering hand of federal control." Statement of Maston Nixon, Vice President of Southern Mineral Corporation, *F. P. C. Natural Gas Investigation*, Docket No. G-580, Tr. 3461. Needless to say, the Commission has never attempted to regulate any aspect of the oil business.

tinued flaring off of large volumes of casinghead (oil-well) gas.⁶¹ Attempts were also made to blame an existing natural gas shortage on the fear of the natural gas producers to sell to pipeline companies in view of the prospect that they would fall subject to Commission regulation.⁶²

At this point the diuretic protests against the Commission's alleged encroachment upon the production and gathering process roused Congress to action. Three bills to amend the Natural Gas Act were introduced in the House of Representatives and one in the Senate within a three-day period.⁶³ These bills were admittedly tailored to the desires of the natural gas industry.⁶⁴ In fact the strong inference has been made that the connection between at least one of the representatives who introduced a bill and the pipeline interests was not remote.⁶⁵ The amendments⁶⁶ were drawn to (1) exclude the jurisdiction of the Commission over transportation between the well and the point of delivery to the

⁶¹ *Federal Power Commission Natural Gas Investigation*, Docket No. G-580; Staff Rep. on Section 1(b) of the N. G. A. (March, 1947) at p. 37.

⁶² *Ibid.* See also Statement of W. Hawkins, Vice Pres., Magnolia Petroleum Co., New York Journal of Commerce, April 10, 1947.

⁶³ H.R. 2185, introduced on February 24, 1947 by Mr. Rizley of Oklahoma; H.R. 2235, introduced on February 26, 1947 by Mr. Carson of Ohio; H.R. 2292, introduced on February 27, 1947 by Mr. Davis of Tennessee; S. 734, introduced on February 28, 1947 by Senator Moore of Oklahoma. These bills were almost identical in content. H.R. 2569, introduced on March 17, 1947 by Mr. Dolliver of Iowa was concerned with providing a policy for the administration of the Natural Gas Act; a policy which would protect the use of coal as a fuel competing with natural gas.

⁶⁴ "The measure (refers to H.R. 2185 and S. 734) is frankly an industry bill and two of its sponsors, Moore and Rizley, are from the gas producing state of Oklahoma . . . The measure has general industry support since it was drafted by the Independent Natural Gas Association and attorneys for other groups and individual oil and gas companies." Ralph, *Watching Washington*, Oil and Gas Journal, March 8, 1947, pp. 37 and 39.

⁶⁵ "The bill is sponsored by Rep. Ross Rizley (D., Okla.) whose law firm is listed in Martindale and Hubble Law Directory for 1947 as having clients of which these are representative: Cities Service, Republic Natural Gas, and Panhandle Eastern Pipe Line." Ruth Finney (Scripps-Howard staff writer) in the Washington Daily News, July 11, 1947.

⁶⁶ Exclusive of the Dolliver (or "coal interests") Bill, H.R. 2185, introduced on February 24, 1947 by Mr. Rizley of Oklahoma, H.R. 2235, introduced on February 26, 1947 by Mr. Carson of Ohio, H.R. 2292, introduced on February 27, 1947 by Mr. Davis of Tennessee, S. 734, introduced on February 28, 1947 by Senator Moore of Oklahoma.

interstate trunk transmission facilities, and over any sale made at or prior to such point of delivery; (2) insure that the Commission would allow as operating expense, the actual price paid for gas purchased, if purchased from non-affiliates, or, if purchased from an affiliate, the current market price in the field or the fair and reasonable value; (3) provide that the Commission would allow reasonable compensation for gathering and delivering gas to transmission facilities. (There was a proviso in the bills, however, that a natural gas company owning production or gathering facilities could elect where it wished to waive the "current market price" or the "reasonable compensation" standards and have its production and gathering facilities included in the rate base for charges subject to Commission jurisdiction.) Furthermore, the bills amended Section 7(c) of the Natural Gas Act by providing for the issuance of certificates of public convenience and necessity without hearing under certain conditions, and for the extension of facilities to serve existing markets without the necessity of obtaining a certificate.

The fundamental objectives of the amendments plainly were (1) to knock out the decision, and the portent of that decision, made by the Circuit Court in the *Interstate* case,⁶⁷ by restricting Commission jurisdiction to sales in interstate commerce made *after transportation had begun*; and (2) to divest the Commission of the power to include production and gathering facilities in the rate base.⁶⁸ The Commission's authority to do the latter had been sustained by a five to four decision of the Supreme Court in *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 65 Sup. Ct. 829, 89 L. ed. 1206 (1945).⁶⁹

⁶⁷ Cong. Rec., 80th Cong., 1st Sess., March 10, 1947, p. 1950.

⁶⁸ House Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H. R. 2569 and H.R. 2956, (1947) pp. 26-37.

⁶⁹ After reaching the conclusion that production and gathering facilities may be included in the rate base of rates or charges subject to the Commission's jurisdiction the Court went on to say: "That does not mean that the part of Section 1(b) which provides that the Act shall not apply 'to the production or gathering

At this crucial stage the Commission released a staff report dealing with the production and gathering question under Section 1(b). This report was one of the first to come out as a result of the Commission's exhaustive Natural Gas Investigation, which Congress had authorized, and which had been in progress for nearly two years.⁷⁰ This report called attention to the "widespread atmosphere of anxiety and uncertainty among State officials and the industries concerned" with regard to the meaning and implications of Section 1(b) with reference to the exemption of production and gathering. It concluded that the legislative history of the Act compelled the conclusion that the exemption would:

clearly seem to exclude from regulation under the Act sales made incident to or immediately upon the completion of production and gathering, and *before interstate transportation begins.* (italics supplied)⁷¹

The report then reviews the Commission cases which have been concerned with the problem in order "to ascertain whether or not the Commission has adhered consistently to any central principle in its findings and decisions on this jurisdictional question." The conclusion is reached that the Commission has been a model of consistency in this regard. The *Columbian Fuel* case is brought back from the limbo of overruled cases and reinstated as the pivotal decision on the question.⁷² The *Peoples* case is passed off with the inference that the exercise of Commission jurisdiction could have

of natural gas' is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission." 324 U. S. 581, 602.

Other cases sustaining the inclusion of production and gathering facilities in the rate base are: *Cities Service Gas Co. v. Federal Power Commission*, 155 F (2d) 694 (CCA 10th, 1946) cert. den. 329 U. S. 773, 67 Sup. Ct. 191, 91 L. ed. 75 (1946); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U. S. 635, 65 Sup. Ct. 821, 89 L. ed. 1241 (1945); and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 64 Sup. Ct. 281, 88 L. Ed. 333 (1944).

⁷⁰ *Federal Power Commission Natural Gas Investigation*, Docket No. G-580; Staff Rep. on Section 1(b) of the N.G.A. (March, 1947) at p. 37.

⁷¹ *Id.* at p. 3. On this it was in complete harmony with the "Rizley" Bill.

⁷² *Id.* at p. 14.

been justified on the grounds that there could have been a finding of transportation.⁷³ Furthermore, says the report, that was a sale to an affiliated purchaser.⁷⁴ As for the *Interstate* decision (in the Circuit Court) much is made of the fact that Interstate is a natural gas company transporting natural gas for resale in interstate commerce; that Interstate had transported the gas to the points of the disputed sales; and, furthermore, there was a Commission finding of corporate affiliation existing between certain of the companies involved.⁷⁵ All this leads the report to conclude:

Consideration of the facts presented under Section 1(b) of the Act, as reviewed above, reveals no single instance where the Commission's affirmative decision as to jurisdiction depended upon the assertion that the Act applies to those who produce or gather gas and then, before transportation begins, sell it at arm's length to natural gas companies engaged in its transportation or subsequent sale for resale.⁷⁶

The report then went on to urge that an administrative rule be promulgated by the Commission which would make it clear that "all activities, including sales made at arm's length, by those who only produce, gather or process natural gas prior to its transportation or sale by others in interstate commerce" should be exempted from jurisdiction of the Commission.⁷⁷

The reaction to this staff study on the part of industry and Congress should not have been unexpected. Industry did not take kindly to the suggestion that the situation could

⁷³ *Id.* at p. 16.

⁷⁴ *Id.* at p. 18.

⁷⁵ The attempt to distinguish the *Interstate* case does not stand up under the facts. The finding of transportation made by the Commission was based on very controversial evidence and was merely a subsidiary prop, if that, upon which they relied in making jurisdiction. Furthermore, the Commission, in deciding the case before it, relied on the *Peoples* decision, which, of course, was rested entirely upon the premise that sales in interstate commerce were involved. Nor was the Commission's finding of affiliation relied on in their opinion as the basis upon which they assumed jurisdiction.

⁷⁶ *Federal Power Commission Natural Gas Investigation* Docket No. G-580; Staff Rep. on Section 1(b) of the N.G.A. (March, 1947) at. p. 22.

⁷⁷ *Id.* at p. 41.

be clarified by the issuance of an administrative rule;⁷⁸ the certainty of congressionally imposed standards could not be approximated by the vagaries of bureaucratic edict, thundered Congressman Rizley.⁷⁹ Other critics, even less kind, saw the staff report of G-580 as a stalling tactic "to prevent passage of the Rizley bill . . ." ⁸⁰

Undaunted, however, by the outcries of the hostile skeptics, the Commission proceeded to draft a rule exempting arm's length sales of gas made by independent producers. "Gathering" was defined to include sale and delivery prior to the beginning of transportation in interstate commerce within the meaning of the Act. Notice was given and interested parties asked to submit their views.⁸¹

Nor was the Commission content to rest with the proposed rule alone. In rapid fashion it ground out three decisions which should have set the apprehensions of the "independent" producers at rest. On May 21, 1947 the Commission held that the representations of a Texas partnership that it intended to engage solely in producing and gathering of natural gas or the sales of such gas at arm's length to an unaffiliated interstate pipeline company justified the Com-

⁷⁸ "An administrative body should never be permitted to define the field of its own jurisdiction. That is the function of Congress. Businesses affected by the regulations of such a body will never feel secure in any position; because if an administrative body can define its own jurisdiction, it can pick and choose and discriminate as it may please." Statement of H. H. Baker, Executive Vice President, Humble Oil Co., House Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569 and H.R. 2956, (1947) pp. 26-37, at p. 155. See also, Ralph, *Watching Washington*, Oil and Gas Journal, July 28, 1947, at p. 164.

⁷⁹ "It occurs to me, however, that the FPC like numerous other agencies and bureaus which have been for many years interpreting the laws enacted by the Congress in such a way as to give them the broadest possible power without restraint, merely wants to head off legislative action that would curb its power. . . . There is only one proper answer to all of this confusion, and that is to let the Congress write into law the standards and make sure the FPC carries out the Congressional mandate." Mr. Rizley on the floor of the House, Cong. Rec., 80th Cong., 1st Sess., March 10, 1947. p. 1950.

⁸⁰ Ralph, *Watching Washington*, Oil and Gas Journal, March 15, 1947, at p. 68.

⁸¹ *In the Matter of an Interpretative Statement of the Commission's Jurisdiction under Section 1(b) of the Natural Gas Act with Reference to Production or Gathering*, Docket No. R-106, May 27, 1947.

mission's finding that the partnership was not a natural gas company within the meaning of the Natural Gas Act.⁸² On May 22, in the *Fin-Ker Oil and Gas Production Co.* case,⁸³ the Commission held that an independent production company, which neither owns nor operates any interstate transmission facilities, and has no corporate affiliations with natural gas pipe line companies, and whose only sales of natural gas were made at the termini of its gathering lines to a pipeline company which subsequently transports and sells it in interstate commerce, is not a natural gas company subject to the Commission's jurisdiction. The Commission pointed out that their ruling was controlled by the *Columbian Fuel* case, *supra*. The *Interstate* decision was distinguished on the grounds that there the company had engaged in interstate transportation and sale, had successfully asserted in a Federal Court that Louisiana had no jurisdiction over the disputed sales, and that there was also present in that case evidence of affiliation and control of a dominant field position through the control of production acreage. Finally, in a decision handed down on May 28, 1947, the Commission disclaimed jurisdiction over a production company selling gas at arm's length to a non-affiliated production company even though, subsequent to the date of the contract between the parties, and at the time rate proceedings were instituted by the Commission, the production company owned 81% of the pipeline company's voting stock and certain officers and directors of the production company also served in a similar capacity for the pipeline company!⁸⁴ The Commission, indeed, was going to great lengths to prove its sincerity in abstaining from annoying the "independent" producer.⁸⁵

⁸² *In the Matter of R. J. and D. E. Whelan*, FPC Release No. 3347, Docket No. G-899, May 21, 1947.

⁸³ *In the Matter of The Fin-Ker Oil and Gas Production Co.*, Federal Power Commission Opinion No. 149, May 22, 1947.

⁸⁴ *In the Matter of Tennessee Gas and Transmission Company and the Chicago Corporation*, Federal Power Commission Opinion, No. 150, May 28, 1947.

⁸⁵ The *Tennessee* case suggests a rather obvious, but presumably effective method by which to avoid Commission jurisdiction over wholesale sales made in the field. Simply form two independent companies, one a production company,

In spite of these endeavors at reform, neither industry nor Congress was convinced. Self-serving motives were detected in the above decisions, and when the chairman of the Federal Power Commission mentioned them in his testimony before the House given one day after the last of the trio had been handed down,⁸⁶ pointed attention was drawn by Mr. Rizley to the fact that a period of two years, in one case, and of five years in another, had elapsed between the time applications were filed and the time of the Commission decision.⁸⁷

Up to this time the Supreme Court had not handed down its decision in the *Interstate* case and thus the Commission was still forced to explain that case at the same time they were making such violent efforts, through proposed rules, Commission decisions, and public statements, to convince Congress and the industry that they did not mean to lay a hand on the independent producer. The Commission relied on the fact that *Interstate* was "otherwise a natural gas company" which transported and sold gas in interstate commerce in addition to the sales it made in the field to the three other pipeline companies.⁸⁸ The chairman of the Commission was forced to admit, however, that should the Supreme Court sustain the Commission "in such sweeping terms as to really imply that the statute means that we do have control over the independent producer and gatherer," an amendment to the Natural Gas Act would be in order.⁸⁹ Thus, on the eve of Supreme Court's action on the *Interstate* case, we are presented with the unusual spectacle of an administrative agency frantically trying to vitiate the charges hurled at

the other a pipeline company; make a contract for the purchase of gas at pleasingly high rates; and then merge. Furthermore, the record in the case discloses that amendments of the original contract were made after the affiliation of the two companies which resulted ultimately in increased costs being passed on to consumers.

⁸⁶ House Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569 and H.R. 2956, (1947), at p. 671.

⁸⁷ *Id.* at p. 714.

⁸⁸ *Id.* at p. 673.

⁸⁹ *Id.* at p. 693.

them by the natural-gas industry members and their representatives in Congress by giving up part of their jurisdiction over wholesale sales in interstate commerce, a jurisdiction which was bestowed upon them by the clear language of the Act itself, not to mention the further abundant evidence found in the legislative history of the statute. So intent were they to mollify their critics, that they had agreed in advance that if the Supreme Court should sustain their position they would willingly surrender the fruits of that victory!

In its main brief before the Supreme Court the Commission concerned itself with an attempt to prove that its decisions had been consistent right along; that the *Columbian Fuel* case was distinguished from the case before the Supreme Court; that the *Peoples* case was rested on the affiliation found therein; and that, above all, the Commission had never sought to extend its jurisdiction over sales of natural gas made by independent producers and gatherers, but only over sales made by one "otherwise a natural-gas company," or where affiliation between seller and purchaser is involved, or where there is transportation in interstate commerce by the seller after completion of gathering prior to the wholesale sale.⁹⁰ Forsaken now was any argument that the exemption of production and gathering was inapplicable to cases of wholesale sales in interstate commerce; after all, had not the Commission found that Interstate had transported the gas after gathering had been completed? Although the obvious answers to these shaky distinctions are too obvious to repeat,⁹¹ it must be admitted the brief was safe enough for the chairman of the Federal Power Commission to distribute it

⁹⁰ Brief for the Federal Power Commission at p. 43.

⁹¹ In its Circuit Court brief the Commission relied almost exclusively on the ground that the sales in issue were sales in interstate commerce; the *Peoples* case was relied on to support the *Interstate* case without discussion of affiliation; the phantasy that Interstate "was otherwise a natural-gas company" had not yet been conjured up.

among the members of the House Interstate Commerce Committee, when he testified before them.⁹²

Fortunately, the Supreme Court of the United States still decides the law as it finds it and not as it is dressed up to suit particular individual purposes, good or bad. In a unanimous decision the Court found that the disputed sales were sales in interstate commerce⁹³ and not exempt as production or gathering since, at the time the sales were made, nothing further in the gathering process remained to be done.⁹⁴ The Court encountered no difficulty at all in arriving at the conclusion that the sales were made in interstate commerce, remarking:

We see no distinction between a sale at or before reaching the state line. There is nothing in the terms of the Act or in its legislative history to indicate that Congress intended that a more restrictive meaning be attributed to the phrase "in interstate commerce" than that which theretofore had been given to it in the opinions of this Court.⁹⁵

Answering the Company's objection that the transactions fell within the production and gathering exemption of Section 1(b), the Court gave emphasis to what they believed to be the congressional purpose in passing the Natural Gas Act, namely, to occupy the field of jurisdiction within which state regulatory authority was precluded because of previous Supreme Court decisions.⁹⁶ It acknowledged that Congress did not intend to usurp the powers of the states in those areas where valid state action could operate, such as state regulation of "the physical production and gathering of natural gas in the interests of conservation."⁹⁷ The Court,

⁹² House Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569 and H.R. 2956, (1947) p. 673.

⁹³ U. S., 67 Sup. Ct. 1477, 91 L. ed. 1383 (1947).

⁹⁴ *Id.* at p. 1488.

⁹⁵ *Id.* at p. 1486. The *Attleboro* and *Peoples* cases are cited by the court in support of the conclusion reached on this point.

⁹⁶ *Id.* at p. 1487. *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 45 Sup. Ct. 481, 69 L. ed. 909 (1925); *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 44 Sup. Ct. 544, 68 L. ed. 1027 (1924); *Public Utility Commission of Rhode Island v. Attleboro S. & E. Co.*, 273 U. S. 83, 47 Sup. Ct. 294, 71 L. ed. 549 (1927).

⁹⁷ *Ibid.*

speaking through Mr. Chief Justice Vinson, admitted that there might be sales which, "although 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," in which case Commission jurisdiction would not attach.⁹⁸ After pointing out that there is nothing in the record to indicate that federal regulation of the questioned sales had conflicted in any way with the elaborate conservation program of Louisiana, the Court comes to the nub of the controversy and finds that:

By the time the sales are consummated nothing further in the gathering process remains to be done. We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominantly a matter of national, as contrasted to local concern. All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.⁹⁹

The opinion of the Supreme Court appears clear, concise, and correct. Sales of commodities about to move in interstate commerce are as much "in interstate commerce" as those made after movement has begun. The legislative history of the Natural Gas Act demonstrates beyond a shadow of doubt that it was passed to close the gap where state jurisdiction was prohibited and where federal regulation was needed in order that wholesale costs could be kept down

⁹⁸ *Ibid.* Presumably this category of sales local in nature would embrace sales made at the well head by the individual well owners. It well might include sales made by small individual producers along the gathering lines of producing companies who both purchase and produce gas. For example, the gas purchased by Interstate from other producers in the Monroe Field would fall within the class referred to by the Court.

⁹⁹ *Id.* at p. 1488.

with a concomitant easing of the burden on the ultimate consumer.¹⁰⁰ Nor do sales in interstate commerce, made after gathering has ceased, fall within the exemption contained in Section 1(b). Finally, the Court recognizes that if federal regulation was impotent in such a case, the enhanced costs ultimately would be gouged out of the consumer. No specious attempts are made to rest the decision on the grounds of affiliation, transportation, or the catchy, but meaningless, "otherwise a natural-gas company" slogan. On the contrary, the Supreme Court inferentially disapproves of such ratiocinations in a cool footnote.¹⁰¹

The *Interstate* case would seem to be a firm holding that wholesale sales of natural gas in interstate commerce, made when gathering is completed, are subject to the jurisdiction of the Federal Power Commission. This would return the *Peoples'* case to favor and at the same time, would seem to knock out the *Columbian Fuel*, *Fin-Ker*, and *Tennessee* cases, *supra*, where the Commission had disclaimed jurisdiction on the grounds that the wholesale sales in interstate commerce were made by independent producers. A serious question is thus raised as to whether an administrative body could, by a case or by rule, as the Commission had attempted to do, give up the jurisdiction which Congress had bestowed upon it. In principle it would appear that an administrative tribunal can legally no more refuse to carry out, or surrender, some of the jurisdiction it possesses than it can grasp that which Congress has not allowed it. In fact, the difficulty of rectifying its error in the former case seems much greater since the absence of a complaining party in such a

¹⁰⁰ Sen. Rep. 1162, 75th Cong., 1st Sess., p. 2 (1935); H. Rep. 709, 75th Cong., 1st Sess., p. 2 (1935).

¹⁰¹ "The Federal Power Commission has not asserted jurisdiction over all sales taking place in the natural gas fields even though in interstate commerce for resale for ultimate public consumption. In the Matter of *Columbian Fuel Corp.*, 2 FPC 200; In the Matter of *Billings Co.*, 2 FPC 228. We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases."

situation is more than likely.¹⁰² As a pure legal principle the Commission can not draw a distinction between independent and affiliated producers who sell gas at wholesale in interstate commerce. Whether such a distinction could be justified on the grounds of expediency of administration will be discussed *infra*.

When the Supreme Court's decision in the *Interstate* case was handed down, the wrath of the natural gas industry and its congressional janissaries knew no bounds.¹⁰³ The fight to pass legislation amending the Natural Gas Act continued

¹⁰² "Administrative Abnegation," as a separate study, has received sparse treatment by courts and by writers. It might be that the administrative agency which is engaged in disclaiming jurisdiction and not enlarging its authority is indeed a *avis rara*. This much can be said:

(1) Where a power is conferred upon an administrative body and its exercise made mandatory, there is no discretion as to whether, in good faith, and in accordance with the legislative will, the power may be exercised, although there may be discretion as to the manner of its exercise. See *Yick Co. v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220 (1886); *Posey v. Board of Education*, 199 N. C. 306, 154 S. E. 393 (1930); *Walsh v. Waldron*, 112 Conn. 579, 153 A. 298 (1931).

(2) Nor can an administrative agency "limit or repeal the terms of a statute addressed to the same subject matter under the same Act" when the statute has not granted any power to control or modify its provisions. *United States v. Jones*, 100 F (2d) 65 (C. C. A. 8th, 1938). See also *Matter of Consumers Power Company, Holding Co. Act Release No. 1854, Dec. 28, 1938* cited by Gelhorn, (1940) *Administrative Law* at p. 581.

(3) Where the particular provisions of the statute involved are directory only, it would seem that the power to make rules and regulations under it would permit the exemption of certain classes and categories from the operation of those provisions if necessary for the administrative efficiency required to enforce the particular statute. Blachley and Oatman (1940), *Federal Regulatory Action and Control*, p. 57.

(4) The powers of an administrative body to dispense with the operation of specified statutory provisions is nothing more than a delegation of rule-making power. It must be exercised in the light of prescribed statutory standards. *People v. Klinck Packing Co.*, 214 N. Y. 121 (1915). See Sutherland (1943) *Statutory Construction*, Vol. II, Section 315.

(5) There are isolated examples of judicially approved non-enforcement of certain provisions of a statute on the part of an administrative body; these omissions are usually of a temporary or sporadic nature, carried out in good faith, as contrasted to cases of premeditated and systematic abnegation of administrative duties. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583, 60 L. ed. 984 (1915).

¹⁰³ "Three natural gas organizations declared last night that the Supreme Court's approval of the right of the Federal Power Commission to regulate the industry threatened to stifle it." Associated Press dispatch, *New York Herald Tribune*, June 23, 1947. See also *New York Journal of Commerce*, June 19 and 23, 1947.

with renewed vigor.¹⁰⁴ In the face of this concerted attack the Commission proposed its own bill which it offered as a substitute for the Rizley Bill. The Commission's proposed bill would have exempted independent producers and gatherers who engaged only in those activities and who sold gas in interstate commerce at arm's length. In addition "gathering" was defined to mean the "collecting of natural gas from wells of the gatherer or other producers by its movement to central points through pipelines and other facilities . . ." ¹⁰⁵ In essence, the proposed bill was identical with the rule the Commission had previously proposed.¹⁰⁶ The strategy of the Commission at this point seemed to be to offer a compromise and then ask Congress to wait until the full results of the Commission's Natural Gas Investigation were divulged in the fall of 1947. It appeared for a while as though their reasonable request was doomed to failure as the Rizley Bill was passed by the House of Representatives ¹⁰⁷ and another bill, embodying the Commission's proposals, was defeated.¹⁰⁸ However, at this juncture fortune smiled upon the harassed Commission. During these very trying days the Commission had been faced with two bills amending the Federal Power Act.¹⁰⁹ But on this front, the power lobby over-extended themselves. A vigorous newspaper campaign on the part of both liberal and the otherwise conservative press

¹⁰⁴ H.R. 2185, introduced on February 24, 1947 by Mr. Rizley of Oklahoma; H.R. 2235, introduced on February 26, 1947 by Mr. Carson of Ohio; H.R. 2292 introduced on February 27, 1947 by Mr. Davis of Tennessee; S. 734, introduced on February 28, 1947 by Senator Moore of Oklahoma.

¹⁰⁵ F. P. C. Release No. 3390 (G-1101), June 23, 1947.

¹⁰⁶ *In the Matter of an Interpretative Statement of the Commission's Jurisdiction under Section 1(b) of the Natural Gas Act with Reference to Production or Gathering*, Docket No. R-106, May 27, 1947.

¹⁰⁷ H.R. 2185 (The "Rizley" Bill) was passed by the House of Representatives on July 11, 1947. The Senate Interstate Commerce Committee, by a vote of 6 to 5, refused to report out S. 734, a companion bill.

¹⁰⁸ H.R. 4099, introduced by Mr. Priest of Tennessee on July 7, 1947 and defeated by voice vote in the House on July 11, 1947.

¹⁰⁹ H.R. 2972 and H.R. 2973, introduced by Mr. Miller of Connecticut on April 7, 1947. These bills, in brief, would have curtailed the Commission's jurisdiction over licensed projects and over wholesale sales of electric energy in interstate commerce.

evidently saved the day.¹¹⁰ The power bills were not reported out of committee; the natural gas interests were caught in this backwash of an aroused public opinion;¹¹¹ the Senate Interstate Commerce Committee refused to report the bill out;⁵ American consumers again could breathe easier for the while. Their escape from the fate which the natural gas interests had in store for them is remarkable when it is considered that the "consumer interests" which were allowed to be voiced at the hearing held by the Congressional Committee consisted only in the courageous and instructive voice of Miss Anne Alpern, representing the United States Conference of Mayors, plus a few letters of protest from interested community heads.¹¹²

An appraisal of the decision of the Supreme Court in the light of the factual conditions found in the natural gas industry leads this writer to the conclusion that the Court not

¹¹⁰ "Our memories are short, but padding of accounts, outrageous 'writeups', and inflation of expenditures to affiliated concerns were once common practices in the utility business. Our memories are indeed short. We have almost forgotten Sam Insull, Howard Hopson and others of their breed. The legislation sought by the power companies and being gravely considered by the House Interstate Commerce Committee seems calculated to bring us a new crop of Insulls and Hopsons." L. Mellett, *Washington Evening Star*, July 1, 1947. See also T. Stokes, *Washington Daily News*, July 1, 1947; Marquis Childs, *Washington Calling*, *Washington Post*, July 2, 1947.

¹¹¹ "Early in the present session of Congress sponsors of restrictive amendments to the Federal Power Act tried to make a deal with the natural gas industry to remedy both complaints in a single bill. Backers of the Rizley bill refused, but they have now been caught in the backwash of the power fight." Ralph, *Watching Washington*, *Oil and Gas Journal*, July 26, 1947 at p. 164. See, for example, Marquis Childs, *Washington Post*, July 18, 1947; *New York Times*, July 22, 1947; Marshall McNeill, *Washington Daily News*, July 22, 1947; *Kansas City Star*, July 13, 1947; *Kansas City Times*, July 16, 1947; Ruth Finney, *Washington Daily News*, July 25, 1947; Joseph and Stewart Alsop, *New York Herald Tribune*, July 25, 1947. These and other journalistic attacks revealed dramatically the attempt of the power lobby to inflate present prices of electric power and natural gas.

¹¹² House Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569 and H.R. 2956, (1947) p. 456 *et seq.* Miss Alpern pointed up the ineffectiveness of state and city utility commissions in the face of the heavy artillery which the individual utilities can bring to bear. She offered documentary evidence showing that the total rate reductions brought about by the Federal Power Commission from 1938 to 1946 approximated 157 million dollars. She drew attention to the fact that the Rizley bill would exempt initial sales of gas to the pipeline companies and thus create a "never-never" land within which the pipelines would be immune to both federal and state jurisdiction.

only was in accord with correct legal theory, but—and perhaps even more important—handed down a decision which recognized the actualities of transporting and selling natural gas in interstate commerce. The history of the natural gas industry, as disclosed by the Federal Trade Commission's voluminous survey of 1936 and later reports, reveals beyond doubt that the large pipeline companies, through the holding company device, have dominated and controlled gas production acreage. It is a "take it or leave it" proposition with the allegedly "independent producer" forced to seek buyers faced as he is with no freely competitive market.¹¹³ The TNEC report gave more recent evidence that the efforts of "independent" producers, without pipeline outlets of their own, to obtain a market for the gas which they produced were seriously interfered with by the large pipeline companies.¹¹⁴ The legislative history of the Natural Gas Act, based on the report of the Federal Trade Commission, the hearings, debates, and committee reports, indicates that Congress was well aware that this was the status of the natural gas industry when it enacted the statute.¹¹⁵ As Mr. Chantland, Attorney in Charge, Federal Trade Commission, testified during the hearings:

If the two prior stages in the producing and transporting phases are adequately handled so as to bring the gas to the gates at a reasonable price, reasonable local schedules are then a matter for the local regulatory bodies.

¹¹³ "The absorption by purchase of these comparatively recent developments of production, transmission and distribution systems that threatened competition with those of Columbia Gas & Electric Corporation and Standard Oil Co. (New Jersey) (Interstate Natural Gas Co. is a subsidiary of Standard Oil Co. of N. J.) interests lends support to the statements of independent gas operators of Ohio that any attempts to develop competing production and distribution systems will be met by the full financial power of the big companies to prevent their success." Federal Trade Commission Final Report, Sen. Doc. 92, Part 84-A, (1936) at p. 79. See also *Id.* at pp. 25, 26, 27, 36, 38, 42, 51, 56, 63, 68, 73, 79, 80, 132, 134, 160, 198, 227, 257, 574, 581, 601, and 607.

¹¹⁴ Temporary National Economic Committee, Investigation of Concentration of Economic Power, Sen. Comm. Print, Monograph No. 36, 1940 at p. 57. See also *Id.* at pp. 7, 11, 14, 17, 22, 29, 33, 34, 69, 70, and 71.

¹¹⁵ Hearings on H.R. 11662, 74th Cong., 2nd Sess., 1936 at pp. 51, 52, 55, 56, 57. Hearings on H. R. 4008, 75th Cong., 1st Sess., 1937; Cong. Rec., 75th Cong., 1st Sess., Vol. 81, Part 4, at pp. 6725, 9316.

But until the first two have been successfully dealt with, local regulatory bodies are seriously handicapped in their efforts, even with the authority upheld in *Smith v. Illinois*¹¹⁶ to ascertain facts. Ascertainment of facts is a far cry from power to affect those facts.¹¹⁷

While it is true that Congress did not intend to take over all phases of the regulation of the natural gas industry, it did undeniably attempt to exercise the federal power over the area in which state action had been foreclosed by prior decisions of the Supreme Court interpreting the power of the state to regulate in the light of the Commerce Clause of the Constitution. This was a large gap¹¹⁸ and Congress meant to plug it effectively. Sales in interstate commerce are just as much that if made at the beginning of transportation as when made during, or at the end of, transportation. But as a matter of practical regulation in the national interests, even if, under the more tolerant attitude which the Supreme Court has lately displayed toward state regulation of local aspects of interstate commerce,¹¹⁹ we allowed the states to

¹¹⁶ *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133, 51 Sup. Ct. 65, 75 L. ed. 255 (1930) upheld the right of a State Commission to inquire into the reasonableness of cost items such as that incurred by a purchasing pipeline company in acquiring gas from an interstate transportation company when buyer and seller are affiliated corporations and there is evidence that the sales were not made at arm's length.

¹¹⁷ Hearings on H.R. 11662, *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133, 51 Sup. Ct. 57, 75 L. ed. 255 (1930).

¹¹⁸ *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 45 Sup. Ct. 481, 69 L. ed. 909 (1925); *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 44 Sup. Ct. 544, 68 L. ed. 1027 (1924); *Public Utility Commission of Rhode Island v. Attleboro S. & E. Co.*, 273 U. S. 83, 47 Sup. Ct. 294, 71 L. Ed. 549 (1927).

¹¹⁹ *Townsend v. Yoemans*, 301 U. S. 551, 57 S. Ct. 842, 81 L. Ed. 1210 (1937), permitted state regulation of warehousemen's services. But such regulation did not have the effect of increasing the prices involved in interstate sales. *Milk Control Board v. Eisenberg*, 306 U. S. 346, 59 Sup. Ct. 528, 83 L. ed. 752 (1939), permitted state minimum price setting over sales of milk where only a small fraction of the milk was shipped in interstate commerce; and where the state regulation was in aid of a national policy of curtailing over-production of agricultural commodities. *California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1940), involved the constitutionality of a state licensing statute which did not discriminate against interstate commerce. *Cf. Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1942), which sustained proration marketing agreements dealing with raisins under the California Act even though 95% of the raisins went into interstate commerce. This case represents the high-water mark of a judicial tolerance of expanding state jurisdiction over local categories of interstate commerce. However, as in the *Eisenberg* case, *Milk Control Board v. Eisen-*

regulate initial sales made in the field to the interstate pipeline companies, experience shows that the tendency of state action is to raise the initial price, the final reaction to which is always felt by the ultimate consumer.¹²⁰

However, the concern of the pipeline companies was not for the welfare of the independent producers or the preservation of the jurisdiction of the several states. In fact, a series of amendments, sponsored by the National Association of Railroad and Utility Commissioners, which would have made sure that sales exempted from federal jurisdiction under the Rizley Bill would be subject to state regulation¹²¹ were rejected by Congress. This caused the NARUC to condemn the Rizley Bill and may very well have been the final factor in causing its defeat in Congress.¹²² No, the real objectives of the pipeline companies were to free wholesale sales in the field from effective federal regulation and to require the Federal Power Commission to allow them the "fair market price" for gas thus purchased when computing the rate base for sales over which the Commission still did retain jurisdic-

berg, the state statute was in furtherance of a national policy to raise farm prices to parity levels. See Note (1942) 26 MINNESOTA L. R. 654; Note (1942) 41 MICHIGAN L. R. 968, 971.

¹²⁰ The Corporation Commission of Oklahoma has recently issued a blanket order refusing to permit natural gas to be taken out of the producing formations of the Guymon-Hugoton Field at a price less than 7 cents per thousand cubic feet; *Peerless Oil and Gas Co. v. Cities Service Gas Co.*, Order No. 19515, issued by the Oklahoma Corporation Commission, December 9, 1946. This writer believes the Commission's action to be a violation of the Commerce Clause and in direct conflict with the decision in the *Interstate* case. A similar minimum price fixing bill, passed by the Kansas legislature, was vetoed by the Governor. See *Wall Street Journal*, April 11, 1947.

¹²¹ NARUC Bulletin No. 59, March 25, 1947. See also the testimony of John Benton, representing the NARUC, House Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569 and H.R. 2956, (1947) p. 634 *et seq.* Mr. Benton called attention to the fact that the imposition of minimum field prices by the individual states may well be beyond their power. He suggested, however, that Congress, under the principle of the *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 66 Sup. Ct. 1142, 90 L. ed. 1342 (1946), could bestow upon the states the power to regulate such interstate sales. His theory is not without validity although it is open to the theoretical objection that it makes Congress, and not the Supreme Court, the interpreter of the Commerce Clause. See Dowling, *Interstate Commerce and State Power* (1947), 47 COLUMBIAN LAW REV. 547.

¹²² F. P. C. Daily News Digest, July 16, 1947, at p. 3.

tion.¹²³ Since the "fair market price" is pretty much of a fiction, being at worst what the pipeline companies say it is, and at best a metaphysic of public utility regulation which has been found almost impossible of ascertainment, it is not difficult to imagine the mounting profits to the pipeline companies and the concomitant bite into the pockets of consumers.¹²⁴ Production and gathering remain the last area into which the concept of federal public utility regulation has not yet penetrated. If the pipeline companies can expand this enclave to include initial wholesale sales of gas their cup would run over. Such an ambition on the part of a healthy, expanding, and profitable industry is at least bad taste.¹²⁵

Conclusion

Out of the *concordia discors* which characterizes the *Interstate* case and its tempestuous background two conclusions fairly can be drawn. First, the decision of the Supreme Court was correct on the grounds of legal theory and in accordance with sound federal public utility regulation. The "gap" in jurisdiction which the Natural Gas Act was meant to fill included sales of gas to be transported in interstate commerce. The states did not possess the power to regulate the sales, according to previous decisions of the Supreme Court. Secondly, any attempt to exempt "independent" producers from the jurisdiction which the Federal Power Commission has over wholesale sales in interstate commerce

¹²³ It is this latter objective which lies closest to the hearts of the pipeline interests. The writer hopes to deal more fully with this subject in a subsequent article.

¹²⁴ House Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569 and H.R. 2956, (1947) p. 464.

¹²⁵ Operating revenues of natural gas companies reporting to the Federal Power Commission should increase for the first quarter of 1947 of 22.2 percent over the comparable 1946 period. Net income was up 19.1 percent. *New York Journal of Commerce*, June 20, 1947. The main cause of any shortage that exists is the lack of sufficient steel pipe for transportation purposes. See statement of R. A. Phillips, Vice President, Central Electric and Gas Co., in the *Lincoln (Nebr.) Journal*, April 13, 1947.

would result in increased costs to the consumers of the nation and perhaps, in the long run, retard the otherwise rapidly increasing use of natural gas as an industrial and home fuel. There are two aspects to this latter proposition. First, the exemption applicable to "arm's length" roles by independent producers would give rise to the often difficult problem of ascertaining, with the certainty of proof required, when affiliation or field dominance is present in a particular situation. The area of maneuverability thus presented to the pipeline companies would be large indeed; large enough to multiply the hazard that they successfully could divide up their producing and transportation interests in such a way as to render difficult, if not impotent, effective federal control over wholesale sales of natural gas.

Furthermore, the proposed exemption of "independent" producers is not justified by the language or legislative history of the Natural Gas Act, nor by the actual conditions found in the natural gas industry. Assuming, *arguendo*, that independent producers of gas were in a position to force the pipeline companies to bid up the price of gas, then, in the language of Chief Justice Vinson, ". . . unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer."¹²⁶ If, on the other hand, as the report of the Federal Trade Commission has indicated, the pipelines really dominate the scene, then all this solicitude for the "independent" producer borders on hypocrisy and subterfuge. The real interests to be served are all too apparent.

¹²⁶ For instance, the sales made by *Interstate* to Southern Natural, with which company the Commission was unable to find any affiliation, in 1938 amounted to over five million Mcf a year. In the *Tennessee Gas and Transmission Company* case, the amounts of gas sold by Chicago Corporation, the producing company, reached a maximum of over 200,000 Mcf daily. Under the proposed exemption the Commission would be precluded from exercising effective jurisdiction. The ultimate burden on the consumer would not be negligible.

One sympathizes with the Federal Power Commission's attempts to resolve the dilemma in which the Court has placed them. Perhaps, by adopting the suggestion of former Commissioner Scott and exempting low income producers from certain requirements of the Act they could find the equitable answer to the whole problem and at the same time avoid the change that they have forfeited jurisdiction which is rightfully theirs, an abnegation of administrative functions which the writer has suggested is beyond the proper power of the Commission.¹²⁷

As Congress returns to Washington, a temporary quietness now prevails in the formerly extremely vocal ranks of the natural gas industry.¹²⁸ One wonders if it is merely a lull before another storm, a remarshaling of forces, prior to another full scale attack on the principle of sound public utility regulation in the national public interest. Will the renewed plaintive bleatings of the lambs, i. e., the "independent" producers, prove merely to be the disguised growls of the wolves, i. e., the pipeline companies, preparatory to another succulent bite into the consumers of the nation?

Alfred Long Scanlan

¹²⁷ While the writer has taken the position, *supra* note 120, that an administrative body may not disclaim jurisdiction, an administrative agency has the power of making reasonable classifications in order to efficiently carry out the statute which it administers. Furthermore, the principle of "*de minimis non curat lex*" would seem to offer another rationale on which to overlook the small well owner and producer.

¹²⁸ There is recent evidence that the industry may adopt a more conciliatory attitude as a result of an offer by the Chairman of the F. P. C. to talk over the problems of regulation and legislation. See *Oil and Gas Journal*, Oct. 25, 1947 at p. 63.