Volume 9 | Issue 2 Article 15

1964

Interstate Commerce - Natural Gas Act - Commingling of Jurisdictional and Non-Jurisdictional Gas in Interstate Pipeline Is Not Alone Sufficient to Give Federal Power Commission Jurisdiction over Non-Jurisdictional Gas

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of the fact that the majority ignores the point (it is neither raised as an issue, nor is any relevant case cited), it is submitted that the introduction of this element into the case confuses rather than clarifies the decision.

The instant decision reaffirms and reinforces a body of law long recognized in the field of foreign branch banking. Without the separate entity doctrine, the stability of our branch banking system would be greatly altered. For reasons of precedent and practicality, this court reached a sound decision in extending the doctrine to apply to an injunction proceeding.

Robert M. Schwartz

INTERSTATE COMMERCE—NATURAL GAS ACT—COMMINGLING OF JURISDICTIONAL AND NON-JURISDICTIONAL GAS IN INTERSTATE PIPELINE IS NOT ALONE SUFFICIENT TO GIVE FEDERAL POWER COMMISSION JURISDICTION OVER NON-JURISDICTIONAL GAS.

Lo-Vaca Gathering Co. v. FPC (5th Cir. 1963)

The Lo-Vaca Gathering Co. had contracted to sell gas to the El Paso Natural Gas Co. to be used as fuel for certain of El Paso's facilities located outside the state of Texas. The contract stipulated that the gas was to be used solely by the purchaser, thereby circumventing federal control by virtue of the Natural Gas Act.[1] By the terms of another contract existing between Lo-Vaca and El Paso, gas was being sold to El Paso for sale to the ultimate consumer, such sale being within the purview of the act. Gas under both contracts was commingled and sent through the same pipeline. The FPC found that by virtue of the commingling, Lo-Vaca's otherwise non-jurisdictional[2] sale came within its regulatory powers. On appeal, the Fifth Circuit reversed the finding of the Commission *holding* that mere commingling did not give the FPC jurisdiction

1. Natural Gas Act § 1, 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958):

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

See Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 514-17, 68 S.Ct. 190, 194-95 (1947). Jurisdiction is given to the FPC by § 2, 52 Stat. 821 (1938), 15 U.S.C. § 717(a) (1958).

2. Non-jurisdictional gas here refers to the gas sold directly to El Paso for its own use and not resold by El Paso.

under the Natural Gas Act or deprive the state of its regulatory power. *Lo-Vaca Gathering Co. v. FPC,* 323 F.2d 190 (5th Cir. 1963).

The Natural Gas Act was necessitated by several Supreme Court decisions prior to 1938 limiting the power of the states to regulate interstate transportation of gas and electricity. In *Pennsylvania Gas Co. v. Public Serv. Comm'n,*[3] the Supreme Court found that the New York Public Service Commission had the power to regulate the sale of gas to New York residents despite the fact that the gas was transported into New York by means of an interstate pipeline from Pennsylvania. The rationale of this decision was that the sale to the ultimate consumer was essentially local in nature and federal regulation was not necessary. However, in *Missouri v. Kansas Natural Gas Co.,*[4] the Court found that the state of Missouri had no power to regulate the price of gas being sent into Missouri by means of an interstate pipeline for sale to distributors and resale to the ultimate consumer. The Court distinguished the *Pennsylvania* case on the ground that it involved a sale which was essentially local in nature which could be constitutionally regulated by the state, while a sale to a distributor for resale was not local, and thus federal regulation was required. The Supreme Court reaffirmed this distinction in *Public Util. Comm'n v. Attleboro Steam & Elec. Co.*[5] In that case Attleboro, a Massachusetts corporation, purchased for resale within the state of Massachusetts electricity produced by a Rhode Island corporation.[6] Rhode Island asserted the authority to regulate this sale, but the Supreme Court, citing both the *Pennsylvania* and the *Kansas* cases, held the state of Rhode Island lacked the jurisdiction to do this, since the power to regulate sales for resale in interstate commerce rested solely in the Congress.

The net effect of these decisions was that while the states could regulate the local sales of gas to the ultimate consumer, they were without power to regulate sales to distributors. This created a gap in the regulation of the sale of gas since the Court decisions held that only the federal government could regulate certain areas although Congress had never given any agency specific authority over these sales. To fill this gap Congress enacted the Natural Gas Act of 1938, giving the required authority to the FPC. At no time during the Congressional debate on this bill was there any evidence of congressional intent to exercise its full power under the commerce clause, but rather the records indicate that Congress intended this act merely to fill the gap left by the Supreme Court decisions. Speaking in behalf of the bill, Senator Wheeler stated: "There is no attempt and can be no attempt under the provisions of the bill to regulate anything in the field except where it is not regulated at the present time. It applies only as to interstate commerce and only to the wholesale price of gas."[7]

3. 252 U.S. 23, 40 S.Ct. 279 (1920).
4. 265 U.S. 298, 44 S.Ct. 544 (1924).
5. 273 U.S. 83, 47 S.Ct. 294 (1927).
6. The electricity in this case was produced by the Narragansett Electric Lighting Company in Rhode Island, and the sale to Attleboro was consummated at the Rhode Island-Massachusetts border.
7. 81 CONG. REC. 9313 (1937) (remarks of Senator Wheeler).

Subsequent Supreme Court decisions[8] have steadfastly maintained that the intention of Congress in passing the Natural Gas Act was merely to fill the gap and not to detract from the regulatory powers of the state or to exert the full force of the commerce clause.

With this background in mind, it is now necessary to consider whether transportation of non-jurisdictional gas, because of its commingling with gas which is subject to federal regulation in a common pipeline, comes within the bounds of the so-called gap prior to 1938 so as to be included within the scope of the Natural Gas Act and thus is to be federally regulated. In *People's Natural Gas Co. v. Public Serv. Comm'n,*[9] a case decided prior to the act, the Supreme Court held that the commingling of intrastate gas with interstate gas in a common pipeline did not deprive the state of jurisdiction over the intrastate gas. In this case the pipeline intersected an interstate pipeline in Pennsylvania, near the border of West Virginia and Pennsylvania. The gas in dispute was then interjected into the pipeline for sale to a distributor. The gas as it was interjected was metered, and thus the precise quantity of Pennsylvania gas could be ascertained. In reference to commingling as depriving the state of jurisdiction over the intrastate gas the Court stated that: " . . . after the commingling, the two are undistinguishable. But the proportions of both in the mixture are known, and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."[10]

Hence, the Supreme Court, prior to the passage of the Natural Gas Act, seemed to say that when intrastate gas is commingled with interstate gas, if the volume of both is capable of being ascertained, the state retains its jurisdiction despite the fact that gas is a fungible and, once mixed, physical identification is impossible. However, this general principle has not been uniformly followed by either the FPC or the lower federal courts. In *Kentucky Natural Gas Corp. v. Public Serv. Comm'n,*[11] the Sixth Circuit disallowed state jurisdiction over commingled intrastate gas. The intrastate gas was produced in Kentucky and sold under separate contracts to distributors within the state, but was shipped through an interstate

8. Panhandle Eastern Pipeline v. Public Serv. Comm'n, 332 U.S. 507, 68 S.Ct. 190 (1947), where the Court said:

> The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.

Id. at 517-18, 68 S.Ct. at 195-96. See FPC v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281 (1944); Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498, 62 S.Ct. 384 (1942).

9. 270 U.S. 550, 46 S.Ct. 371 (1925).

10. *Id.* at 554-55, 46 S.Ct. at 373. See United Fuel Gas Co. v. Hallanan, 257 U.S. 277, 42 S.Ct. 105 (1921), where the Court held that interstate gas does not become intrastate gas by virtue of its commingling; hence the converse inference that intrastate gas does not become interstate gas by virtue of commingling can be drawn.

11. 28 F. Supp. 509 (E.D. Ky. 1939).

pipeline for distribution. The court concluded that the gas in issue was only intrastate *in theory.* That is, the disputed gas *actually* flowed into Illinois due to the impossibility of physically segregating the intrastate and interstate gas once it was mixed. Hence, the only basis of maintaining separate jurisdiction was on the principle that the contracts of sale provided adequate measurement to support the state's assertion of authority.[12] The court, in denying state jurisdiction, concluded that the primary consideration in determining whether a state had jurisdiction was not severability by virtue of contract, but rather, whether the system was so integrated that control of a single activity would necessarily affect the whole system.

However, in *North Dakota v. FPC,*[13] the Eighth Circuit affirmed a finding that the FPC lacked jurisdiction over commingled intrastate gas. The facts of the *North Dakota* case are readily distinguishable from those of the *Kentucky* case. In *North Dakota,* both the intrastate and the interstate gas were produced within the state, but the intrastate gas was extracted from the interstate pipeline before it crossed any state borders. Also, both intrastate and interstate gases were shipped under separate contracts of sale. Therefore, before the gas was shipped, a definite portion of the gas was designated for interstate commerce, and a certain proportion was assigned to intrastate commerce. None of the intrastate gas crossed the state line. But though factually distinguishable, the case nevertheless involved commingling, and on principle it would seem to be similar.

The FPC in its recent *United Gas Pipe Line Co.*[14] decision, denied that states' jurisdiction over commingled gas in a factual situation which closely resembled that of *North Dakota.* United Gas Pipe Line Co. transported gas which was produced in Louisiana, through Louisiana, and northward into Mississippi, but a lateral line carried gas into several parishes of Louisiana. United maintained that the gas shipped into these Louisiana parishes was intrastate rather than interstate. The Commission, in denying state jurisdiction, accepted the interdependence and substantial impact test of *Kentucky Gas,* but applied this test to facts very similar to the *North Dakota* situation. In rendering its decision, the FPC held that the *North Dakota* case, insofar as it was inconsistent with its opinion, was decided incorrectly.[15]

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12. As to the contract theory of severability see Sullivan, *Federal Power Commission Jurisdiction Over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation,* 30 GEO. WASH. L. REV. 638 (1961).

13. 247 F.2d 173 (8th Cir. 1957).

14. United Gas Pipe Line Co., Opinion No. 401, Docket No. CP 62-161. It should be noted that this decision was rendered subsequent to the FPC's decision in the instant case, but prior to Fifth Circuit's reversal treated here.

15. The Commission in making its decision relied heavily for authority on Deep South Oil Co. v. FPC, 247 F.2d 882 (5th Cir. 1957). The petitioner, Deep South, was trying to gain exemption from federal jurisdiction through § 1(b) of the Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958), by maintaining that his sale was to a gathering company rather than to a distributor for resale. The court held that processing by the buyer before resale did not qualify as gathering under the Natural Gas Act. Thus, once the gas was sold to the buyer for resale it had commenced its journey in interstate commerce, despite the fact that the gas underwent further processing. No question was posed as to the effect of commingling

To summarize, it appears that Congress had no intention of changing the scope of federal and state jurisdiction, but merely intended to fill a regulatory gap when it passed the Natural Gas Act. The *People's Natural Gas* case had decided prior to the act that mere commingling of gas, if it could be precisely metered, did not detract from the state's jurisdiction. The *Kentucky* case, with its "substantial impact" test, and the *United* case seem to be deviations from the legislative intent since they extend federal jurisdiction to a situation which would not have been covered under *People's*. The *North Dakota* case, on the other hand, seems to represent substantial compliance with the congressional norm and a closer alignment with prior Supreme Court decisions as to the limits of federal and state jurisdiction.

The instant case not only reiterates the court's position in the *North Dakota* decision, but extends that holding factually to the situation presented in the *People's Natural Gas* case. In effect, the court rejects the test of substantial impact and interdependence. It holds that where gas is identified by contract for a purpose which is exempt by the terms of the Natural Gas Act from federal regulation, no amount of commingling with interstate gas can effect its exemption from federal power.[16]

This holding seems to represent a fairer recognition of the realities of power transmission. Natural gas by nature, like wheat or corn, is a fungible item. If two men each own half the wheat in an elevator, each can claim either half, and the other cannot contest the claim merely because some of the wheat he put in is taken by the claimant. The same is true of gas and the competing claims of state and federal jurisdiction. If a quantity of gas is put into a pipeline under a contract which is not within the purview of the Natural Gas Act, and the same amount is removed before it crosses a state border, it is unrealistic to claim that state jurisdiction is pre-empted merely because some of the gas taken out had crossed a state border, or that some of the gas remaining in the pipeline will cross a state line.

No one could seriously argue that all of the non-jurisdictional gas will be drawn out of the pipeline. But as the Supreme Court said: " . . . for all practical purposes the two are separable, and neither affects the

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intrastate and interstate gas. The court's holding that once it had been put in the interstate pipeline it had commenced its journey in interstate commerce would be limited to these facts and would present no authority for the proposition that once intrastate gas had been interjected into an interstate pipeline, such gas would be subject to federal regulation. Similarly, Philips Petroleum Co. v. Wisconsin, 347 U.S. 672, 74 S.Ct. 794 (1954), involving a decision concerning the gathering exemption of the Natural Gas Act, provides no support for the proposition that intrastate gas once commingled with interstate gas should be subject to federal regulation.

16. The notion of contract as a basis for separation of commingled gas was not precisely stated in Pennsylvania Natural Gas Co. v. Public Serv. Comm'n, 252 U.S. 23, 40 S.Ct. 279 (1920), but was first expressly required as a condition for separation in United States v. Public Util. Comm'n, 345 U.S. 295, 73 S.Ct. 706 (1953), which involved the commingled sale of electricity under a single contract, part for use by the distributor himself and part for resale to consumers. Subsequently, the theory of contract separation was accepted in the area of natural gas in City of Hastings v. FPC, 221 F.2d 31 (8th Cir. 1954), the factual situation, being similar to that of United States v. Public Util. Comm'n, *supra,* but distinguishable on the grounds that the commingled gas was delivered under two separate contracts of sale.

character of the business as to the other."[17] Congress must have recognized the realities of the commodity with which they were dealing when they passed the Natural Gas Act.[18] In the light of this fact and the expressed intention not to change either federal or state power, it seems logical that, since Congress did not phrase the statute in terms which forbade commingling, but exempted certain types of transactions from its scope, those transactions were intended to be exempt even though they involved commingling with jurisdictional gas. Thus logic seems to favor the instant decision, especially in light of the finding by the court that "[n]o one has suggested to us any reason why the mixing or commingling of this gas with other gas hampers the regulation of sale of the 'jurisdictional' gas or in any manner tends to subvert the national policy."[19]

One consideration remains, however, and that is whether the *Lo-Vaca* rationale would apply in a fact situation similar to the *Oklahoma Natural Gas Co.*[20] case which involved substitution of gas rather than commingling. Oklahoma Natural Gas, which sold gas strictly within the state of Oklahoma, entered into a contract with Consolidated Gas Utilities Corp., a corporation involved in the interstate delivery of gas, by the terms of which, Oklahoma Natural would take gas from Consolidated's interstate pipeline for delivery to its customers within Oklahoma. Then, before Consolidated's line left Oklahoma, Oklahoma Natural would return the exact amount of gas previously withdrawn.

In some aspects, it would seem that this case would be within the scope of the instant case, since this decision considers it immaterial whether jurisdictional or non-jurisdictional gas is ultimately delivered to the buyer provided the contract of sale is such that the state would have jurisdiction. It would seem that the FPC would be deprived of nothing since the volume of gas in Consolidated's pipeline would not decrease. The main objective of such a transaction would be to facilitate delivery and cut operating expenses. Certainly there would be no question of federal jurisdiction if Oklahoma Natural constructed a separate pipeline to carry intrastate gas. But, though the instant case puts much emphasis on the practicalities of the situation and substitution, like commingling, is a

17. People's Natural Gas Co. v. Public Serv. Comm'n, 270 U.S. 550, 554-55, 46 S.Ct. 371, 373 (1925).

18. An indication that Congress did have knowledge of the precise nature of natural gas may be found in dicta in Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 68 S.Ct. 190 (1947). There, speaking of the precision with which Congress drafted the Natural Gas Act, Mr. Justice Rutledge said:

> The omission of any reference to other sales . . . was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply *to any other . . . sale.*" [Emphasis by the Court] . . . [T]his unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The Act . . . *had no purpose or effect to cut down state power.* (Emphasis added.)

Id. at 516-17, 68 S.Ct. at 195. It is indeed doubtful that such "unusual legislative precision" would fail to recognize the nature of the very commodity which is its subject.

19. Lo-Vaca Gathering Co. v. FPC, 323 F.2d 190, 194-95 (5th Cir. 1963).

20. 23 F.P.C. 291 (1960).