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Administrative Law: Jurisdiction of F. P. C.--Commingled Inter and Intrastate Gas

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when published haphazardly and without adequate notice, like Caligula’s pronouncements, foster the ignorance in government which Dean Griswold expounded. 80

The problem of public information has been remedied generally at the federal level by the Federal Register System. 81 Further, an increasing number of states have adopted the Model State Administrative Procedure Act 82 partially or entirely. Oklahoma legislators have exhibited foresight in adopting a stringent rule filing requirement. The issue of non-compliance with the filing requirements and the validity of non-filed rules should ultimately reach the Oklahoma Supreme Court. By issuing a strong judicial edict commanding obedience and respect for the law, the Supreme Court can contribute greatly to the furtherance of modern efficient state government in Oklahoma. 83

Thomas E. Wright

ADMINISTRATIVE LAW: JURISDICTION OF F. P. C.—
COMMINGLED INTER AND INTRASTATE GAS

Lo-Vaca Gathering Company and Houston Pipe Line Company contracted to sell Texas produced gas to the El Paso Natural Gas Company. Three separate contracts were involved. Lo-Vaca, agreed under the first contract, to sell 50,000 Mcf of gas per day which was restricted in usage to El Paso’s compressor outside the

In the second, Lo-Vaca agreed to sell 70,000 Mcf of gas per day for resale in interstate commerce and without restriction. Under the third contract, Houston agreed to sell 70,000 Mcf of gas per day restricting its consumption to the state of Texas. The gas sold under all three contracts was to be commingled in an interstate pipeline with other gas prior to delivery. The Federal Power Commission held the restricted use gas was under its jurisdiction. This holding was reversed on appeal with one judge dissenting. Non-jurisdictional gas sold under a contractually segregated arrangement, coupled with separate measurement, does not become jurisdictional when it is physically commingled with jurisdictional gas. This was the decision in Lo-Vaca Gathering Company v. FPC 823 F.2d 190 (5th Cir. 1963).

The Commerce Clause of the Constitution gives Congress the power to regulate matters affecting interstate commerce, but Congress chose to limit the Federal Power Commission to matters in interstate commerce. Section 1 of the Natural Gas Act limits the jurisdiction of the Commission to: (a) the transportation of natural gas in interstate commerce; (b) its sale in interstate commerce for resale; and (c) natural gas companies engaged in such transportation or sale. The act further states that it shall not apply to any other transportation or sale. In United States v. Public Util. of California although the court held the sale of electricity to be sub-

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1 The contract provides that it is the intention and understanding of the parties that the sale would not be subject to FPC jurisdiction. It further provides: "All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

2 There is no dispute that this would be subject to FPC jurisdiction.

3 The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. El Paso covenants that the gas shall be used by El Paso solely as fuel in the operation of its plant or in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the state of Texas. El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.


5 U. S. Const. art. I, § 8, cl. 3

6 15 U. S. C. A. § 717(b) (1963): "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 also Panhandle E. Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507 (1947).
ject to the jurisdiction of the Commission, it inferred that under
certain circumstances the rule would be otherwise, saying:

"But there is no record evidence of separate rates, separate
negotiations, separate contracts or separate rate regulations by
official bodies, in short that the sales themselves were sepa-
rate; and it is in these terms that the act would fix the limits
of the jurisdictional grant."7

The court gave a caveat which has been widely followed in
subsequent cases dealing with gas and electricity. In City of Hast-
ings v. FPC,8 the Commission denied jurisdiction in a situation
where the test of "separability" was met; and its denial was affirmed
by the Court of Appeals for the District of Columbia. In North
Dakota v. FPC,9 the court said in affirming a denial of jurisdiction
by the Commission, that the fact that the gas not leaving the state
travels in the same line, in one stream, with the gas leaving the
state does not convert the intrastate gas contract into an inter-
state contract.

In the principal case all parties agreed that the restricted use
gas would not be under Commission jurisdiction if it were trans-
ported in a separate line. A majority of the court held that the
properties of gas are such that the only practical way to segregate
it is by contract, together with accurate metering of the restricted
use volumes which together are sufficient to avoid jurisdiction. The
dissenting judge took the view that the provisions of the contract
do not correspond to reality. He found that no previous case per-
mitted jurisdiction to depend solely on the contract where its pro-
visions do not correspond to what actually is to take place.

There seems to be an attempt by the Commission to expand
its jurisdiction beyond the authority given by Congress. In holding
it had jurisdiction over the sales in the principal case, it relied on
its own recent decisions which were not appealed, such as Okla-
home Natural Gas Co.10 and Shell Oil Company,11 rather than
following the decisions of the courts. Seeking to avoid the impact
of the cases which have been decided by the appellate courts,
which are contrary to the Commission's decisions, it has relied on

7 345 U.S. 295, 318 (1953). This case involved the sale of electricity in
interstate commerce to the Navy who consumed some of the power and resold
another portion.
8 221 F.2d 31 (D.C. Cir. 1954) affirming 12 F.P.C. 12 (1953), cert.
denied 349 U.S. 920 (1955). This case involved gas which was used to run
the city's power plant, and was delivered on the same line that delivered the
gas which was resold to the residences of the city but was metered sepa-
rately at the plant.
9 247 F.2d 173 (8th Cir. 1957). This case involved gas produced in
North Dakota which by contract was to be used in that state. It traveled in
the same line with gas which was sold under separate contracts to be used
in North Dakota and Montana.