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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.³⁰

The problem of public information has been remedied generally at the federal level by the Federal Register System.³¹ Further, an increasing number of states have adopted the Model State Administrative Procedure Act³² 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.³³

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

³⁰ Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 931 (1950).

³¹ Federal Administrative Procedure Act, 5 U.S.C. §§ 1001 - 1011 (1946); Federal Register Act, 49 Stat. 503, 44 U.S.C. §§ 301 - 314 (1935) as amended.

³² 9c UNIFORM LAWS ANN. 174 (1946).

³³ The following agencies filed their rules and regulations as of the effective date of the 1961 Act, January 2, 1962: Alcoholic Beverage Control Board, Corporation Commission, Department of Highways, Department of Public Welfare, Department of Wildlife Conservation, Insurance Department, Liquefied Petroleum Gas Board, Motor Vehicle Commission, Oklahoma Employment Security Commission, State Board of Cosmetology, State Department of Education, State Department of Health, State Dry Cleaners' Board, and State Personnel Board. Agencies filing subsequent to January 2, 1962 and dates of compliance with the statute are as follows: Board of Unexplained Deaths, Jan. 17, 1962; Supreme Court, January 22, 1962; Court of Criminal Appeals, Jan. 24, 1962; Division of Budget, Executive Dept., Jan. 25, 1962; Board of Examiners in the Basic Sciences, Jan. 27, 1962; Board of Medical Examiners, Jan. 27, 1962; Commission of the Land Office, April 2, 1962; State Department of Agriculture, April 24, 1962; State Board of Public Affairs, April 30, 1962; State Board of Vocation Education, June 27, 1962; Teachers Retirement System, May 1, 1963; Oklahoma Security Commission, Sept. 16, 1963; Department of Mental Health, Oct. 16, 1963; Pardon and Parole Board, Dec. 11, 1963; State Board of Accountancy, Dec. 16, 1963; State Insurance Board, Dec. 12, 1963; State Banking Department, Jan. 7, 1964; State Board of Embalmers and Funeral Directors, Jan. 29, 1964. See *The Oklahoma Gazette*, Jan. 2, 1962, vol. 1, no. 1,—Feb. 1, 1964, vol. 3, no. 3.

state of Texas.¹ In the second, Lo-Vaca agreed to sell 70,000 Mcf of gas per day for resale in interstate commerce and without restriction.² Under the third contract, Houston agreed to sell 70,000 Mcf of gas per day restricting its consumption to the state of Texas.³ 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.⁴ 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* 323 F.2d 190 (5th Cir. 1963).

The Commerce Clause⁵ 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.⁶ In *United States v. Public Util. of California* although the court held the sale of electricity to be sub-

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.

⁴ *Lo-Vaca Gathering Co. & Houston Pipe Line Co.*, 26 F.P.C. 606 (1961). See also Sullivan, *Federal Power Commission Jurisdiction Over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation*, 30 GEO. WASH. L. REV. 638 (1962).

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 separate; 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 Hastings 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 interstate contract.

In the principal case all parties agreed that the restricted use gas would not be under Commission jurisdiction if it were transported 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 permitted jurisdiction to depend solely on the contract where its provisions 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 *Oklahoma 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 separately 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.

¹⁰ 23 F.P.C. 291 (1960).

¹¹ 25 F.P.C. 1376 (1961).