NATURAL RESOURCES JOURNAL

Volume 17
Issue 1 *Winter 1977*

Winter 1977

Federal Jurisdiction over Producer Sales in the State of Production

J. Richard Tiano

Recommended Citation

J. R. Tiano, *Federal Jurisdiction over Producer Sales in the State of Production*, 17 Nat. Resources J. 97 (1977).
Available at: https://digitalrepository.unm.edu/nrj/vol17/iss1/6

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

FEDERAL JURISDICTION OVER PRODUCER SALES IN THE STATE OF PRODUCTION

J. RICHARD TIANO*

INTRODUCTION

When Congress passed the Natural Gas Act, it intended to close the regulatory gap caused by several Supreme Court decisions[1] which prevented the regulation of rates and services of interstate pipelines to local gas distribution companies. Indeed, the Supreme Court in *Panhandle Eastern Pipe Co. v. Public Service Commission of Indiana*[2] stated that the intent of the statute was "clear and complete" and Congress had used "unusual legislative precision" when it delegated to the Federal Power Commission (Commission) regulatory authority over (1) the transportation of natural gas in interstate commerce; (2) the sale for resale in interstate commerce; and (3) natural gas companies engaged in such transportation or sales.[3] Congress' intent underlying the Act was that Commission regulation should complement, not supplant, state regulation of the natural gas industry.[4]

Until 1954, the Commission construed its mandate as requiring it to regulate only the chain of distribution of natural gas from the point where an interstate pipeline acquired it.[5] In *Phillips Petroleum Co. v. Wisconsin,*[6] the Supreme Court concluded that independent producers, selling gas to interstate pipelines, were natural gas companies within the meaning of Section 2(6) of the Act.[7] Because the wellhead price charged by producers was, thereafter, subject to regulation by the Commission,[8] producers not surprisingly attempted to restrict by contract the use of gas sold to interstate pipelines in order

---

*Attorney, Reed & Priest, Washington, D.C.; Deputy Solicitor Federal Power Commission 1970-72; A.B.J.D. Georgetown University.

1. *E.g., Missouri ex rel. Barrett v. Kansas Natural Gas Co.,* 265 U.S. 298 (1924); *Public Utilities Commission v. Attleboro Steam Elec. Co.,* 273 U.S. 83 (1927).
2. 332 U.S. 507 (1947). The Supreme Court recently cited the *Panhandle* opinion with approval. *FPC v. Louisiana Power & Light Co.,* 406 U.S. 621 (1972).
3. 332 U.S. at 516.
4. *Id.* at 517.
5. *See, e.g., Columbian Fuel Corp.,* 2 F.P.C. 200 (1939).
6. 347 U.S. 672 (1954).
7. 15 U.S.C. § 717a(6) (1970).
8. For a discussion of the Commission's efforts to set wellhead prices, *see generally, Mobil Oil Corp. v. FPC* 417 U.S. 283 (1974); *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

to avoid federal sales regulation.[9] Employing a "commingling" theory, the Commission's assertion of jurisdiction over producers selling gas to a pipeline for the latter's own use was sustained by the Supreme Court in *California v. Lo-Vaca Gathering Co.*[10]

There are two cases[11] presently pending before the Commission wherein the issue is whether producers selling gas to an interstate pipeline are subject to federal regulation if none of the gas sold flows across a state line. This question appears to be one of first impression. The purpose of this article will be to consider the relevant precedents bearing on this jurisdictional issue and, hopefully, reach a conclusion with respect to the Commission's jurisdiction over such producer sales.

THE LO-VACA CASE

In the *Lo-Vaca* case,[12] El Paso Natural Gas Company entered into contracts with Lo-Vaca Gathering Company and Houston Pipe Line Company to purchase gas to be used by El Paso as compressor fuel. Lo-Vaca's gas was to be used in El Paso's system outside the State of Texas; Houston's gas was to be used in El Paso's compressors in the State of Texas. Both contracts prohibited the resale of the contract gas by El Paso and required metering to assure that El Paso's consumption of gas from the commingled stream of gas would exceed the amount of gas supplied under the contracts.[13] The Commission asserted jurisdiction over the producers on the grounds that the proposed sales of contract gas would be sales in interstate commerce for resale.[14]

On appeal, the Fifth Circuit reversed, holding that the physical commingling of gas sold under the contracts did not destroy its non-jurisdictional status.[15] The Supreme Court disagreed and upheld the Commission's assertion of jurisdiction.[16] The Court observed that, as a result of prior decisions,[17] the sale of gas which crosses a state line "at any stage of its movement from well-head to ultimate

---

9. *E.g., United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392 (1965); *Continental Oil Co. v. FPC*, 370 F.2d 57 (5th Cir. 1966); *Pan American Petroleum Corp. v. FPC*, 339 F.2d 694 (10th Cir. 1964), rev., 381 U.S. 762 (1965).

10. 379 U.S. 366 (1965).

11. *Colorado Interstate Gas Co.*, Docket Nos. CP75-323, *et al.*; *Columbia Gas Transmission Corp.*, Docket Nos. RP73-65, *et al.*

12. *Lo-Vaca Gathering Co.*, 26 F.P.C. 606 (1961).

13. *Id.* at 608, 610.

14. *Id.* at 611.

15. *Lo-Vaca Gathering Co. v. F.P.C.*, 323 F.2d 190 (5th Cir. 1963).

16. *See* note 10 *supra*.

17. *E.g., Connecticut Light & Power Co. v. F.P.C.*, 324 U.S. 515 (1945).

consumption" constitutes a sale in interstate commerce.[18] Although the Court appeared to reaffirm that an engineering test is the benchmark in establishing jurisdiction,[19] the Court went on to say that the fact that "a substantial part of the gas will be resold, in our view, involves federal jurisdiction at the outset over the entire transaction."[20] This result was mandated to avoid discrimination in favor of nonjurisdictional customers.[21] The Court, however, noted that it was not reaching the question whether there may be non-jurisdictional sales in spite of the commingling of non-jurisdictional gas with jurisdictional gas.[22]

Later that same term, the Supreme Court issued its decision in *FPC v. Amerada Petroleum Corp.*[23] wherein Commission jurisdiction was upheld as to gas delivery contracts which expressly provided that all gas purchased would be transported, delivered and consumed within the State of North Dakota. While the majority in *Amerada* stated that the case was "on all fours" with *Lo-Vaca,*[24] Justice Goldberg in his concurring opinion noted that the result would be different if identifiable volumes of producers' gas could be traced to points of consumption in the state of production.[25]

At least three conclusions can be drawn from the *Lo-Vaca* and *Amerada* cases. First, Commission jurisdiction is established by the physical tracing of gas out of the state of its origin. Indeed, in *Lo-Vaca* and *Amerada,* the fact that gas was removed from the pipeline to be consumed within the state of origin was not decisive since the gas, a fungible commodity, was commingled with gas leaving the state of production. To this extent, the *Lo-Vaca* and *Amerada* cases were consistent with prior decisions that emphasized that jurisdiction was determined by "an engineering and scientific, rather than a legalistic or governmental test." Second, contractual restrictions will not foreclose the attachment of federal sales jurisdiction. If contracts were given dispositive weight, large volumes of a fungible commodity would move in interstate commerce and, because the gas volumes are fungible, the significant economic fact is that the gas would be resold without any federal regulation. An "attractive gap" in the regulatory scheme would emerge and such a result would be contrary to Con-

18. 379 U.S. at 369.
19. Only recently, the Supreme Court reaffirmed this principle. *F.P.C. v. Florida Power & Light Co.*, 404 U.S. 453 (1972).
20. 379 U.S. at 369.
21. *Id.* at 370.
22. *Id.* at 370.
23. 379 U.S. 687 (1965).
24. *Id.* at 690.
25. *Id.* at 691.

gress' intent to create a comprehensive and effective regulatory scheme. Third, the question of jurisdiction over sales made by producers in the state of origin if, in fact, no gas was able to leave the state was not decided. The pipelines in the *Lo-Vaca* and *Amerada* cases purchased gas which flowed in systems ultimately crossing state lines. Given the fungibility of gas, some of the producers' gas necessarily entered interstate commerce as defined in Section 2(7) of the Act.[26]

THE FLORIDA PARISHES DECISION

While the *Lo-Vaca* and *Amerada* cases dealt specifically with Commission jurisdiction over producers since the pipelines were unquestionably interstate pipelines, the Commission subsequently considered the extent of its jurisdiction over pipeline facilities in light of these precedents. In *United Gas Pipe Line Co.*,[27] United filed a petition for a declaratory order to determine whether sales to certain Louisiana communities were subject to the Commission's jurisdiction. The source of the gas for sales to 21 communities was an onshore production field in Louisiana and there was no evidence that any offshore federal domain gas was used to serve these loads. Sales to other communities were made with gas produced in the offshore federal domain. While the Presiding Examiner concluded that these sales were intrastate,[28] the Commission disagreed, asserting that the Presiding Examiner "fundamentally erred in segregating into sales characterized as being made from the Lirette-Mobile line or the Kosciusko line."[29] In the Commission's view, this dichotomy overlooked that United operated a fully integrated pipeline and "the most important consideration" was that the gas sold as "part of a single, uniform stream" flowing through the system from the point of production to customers in other states.[30] Therefore, it concluded that removal of a portion of gas from an interstate stream did not transform the gas into intrastate gas. Moreover, the Commission rejected the view that, because the gas never left the state of production, it was intrastate gas and stated:

> [I]n the instant case there is only one uniform and indistinguishable flow of gas, a very small portion of which is siphoned off before leaving the state. Until the gas reaches the point of separation, there is no way of knowing which part of the gas will not continue into

26. 15 U.S.C. § 717a(7).
27. 30 F.P.C. 560 (1963).
28. *Id.* at 580 *et seq.*
29. *Id.* at 562.
30. *Id.* at 563.

> other states. The stream of gas once having acquired an interstate character, a part of it cannot be said to lose that character by virtue of being resold within Louisiana.[31]

In conclusion, the Commission claimed that it would be irrational for Congress to establish federal sales jurisdiction at one end of a pipeline but would exclude the same sales to consumers at the other end.[32] On appeal, the Fifth Circuit[33] held that the *Lo-Vaca* and *Amerada* cases "definitely settled" the Commission's jurisdiction over the entire transaction from the outset.[34]

While prior cases held that sales for resale in the state of production are subject to federal regulation even though no state line was crossed,[35] the *Florida Parishes* case is significant because of its reliance on the commingling theory to establish jurisdiction over pipeline sales. It is important to note that the producers selling gas to United in the *Florida Parishes* cases were assumed to be subject to Commission jurisdiction.[36] To this extent, this decision is distinguishable from the *Lo-Vaca* and *Amerada* cases where the issue was the extent of jurisdiction over the producer-sellers. Second, in the *Florida Parishes* case, the commingled gas stream from which the Louisiana sales were made left the state of production. Since there was a continuous flow of gas across state lines, United's operations are indistinguishable from the pipeline systems in the *Lo-Vaca* and *Amerada* cases.

THE GREEN SYSTEM CASE

The *Lo-Vaca, Amerada* and *Florida Parishes* cases all involved pipeline systems crossing state boundaries. The Commission, however, has not been content to limit the commingling theory to such situations. In its Opinion No. 610,[37] the Commission concluded that the injection of interstate gas into the intrastate Green System-East subjected that system to the Commission's jurisdiction. While the Commission found that the Green System-East was part of an integrated interstate system and some gas left the state,[38] the Com-

31. *Id.* at 566-67 (footnote omitted).
32. *Id.* at 567-68.
33. *Louisiana Public Service Commission v. F.P.C.*, 359 F.2d 525 (5th Cir.), *cert. denied*, 385 U.S. 833 (1966).
34. *Id.* at 528.
35. *E.g., Deep South Oil v. F.P.C.*, 257 F.2d 882 (5th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958).
36. *Id.* at 563. The opinion of Commissioner O'Connor noted that the facts surrounding the producer sales were not developed on the record. *Id.* at 576.
37. *United Gas Pipe Line Co.*, 47 F.P.C. 245 (1972).
38. *Id.* at 257.

mission qualified this finding in Opinion 610-A[39] asserting that it was intended only to show that gas from the Green System-East was commingled with gas moving in interstate commerce. In its decision, however, the Commission made it clear that the commingling of interstate gas with intrastate gas and "the delivering of gas to intrastate markets from interstate pipelines are sufficient integration of interstate and intrastate operations to bring the uncertificated sales and facilities within the Commission's jurisdiction."[40] Having found that United's facilities were jurisdictional, the Commission noted that there was a "question" of its jurisdiction over the producers "both before and after" the unauthorized commingling of gas by United but it did not decide this question.[41]

On appeal, the Fifth Circuit affirmed.[42] Although recognizing that the Commission rested its assertion of jurisdiction on the commingling theory, it rejected contentions that the flows of gas into the Green System-East were irregular and minimal, stating that it was deferring to the Commission's expertise. The Court noted that it did not consider the question whether federal jurisdiction would attach if the flow of gas were *de minimis* and irregular.[43] In light of the Commission's decision to leave open the question of its jurisdiction over the producers, there was no need for the Court to address itself to this issue.

In the *Green System* case, unlike the *Lo-Vaca, Amerada* and *Florida Parishes* cases, there was no commingled gas flowing out of Louisiana although there were flows of commingled gas out of the Green System into Mid Louisiana Gas Company's system. To this extent, the *Green System* case represents a departure from those cases and constitutes an extension of the commingling doctrine. Indeed, commingling appears to become the touchstone of Commission jurisdiction. Under this view, it would seem that any commingling of gas within the state of production would make all intrastate gas sold subject to Commission jurisdiction. While the Commission left open the question of its jurisdiction over the producer sales, it is logical to conclude that, before United injected interstate gas into the Green System, the sales were non-jurisdictional but became jurisdictional after interstate gas was commingled with

39. 47 F.P.C. 1021, 1022 (1972).
40. 47 F.P.C. at 262.
41. *Id.* at 268.
42. *Louisiana Power & Light Co. v. F.P.C.*, 483 F.2d 623 (5th Cir. 1973), *cert. denied sub nom. Texasgulf, Inc. v. F.P.C.*, 416 U.S. 974 (1974).
43. *Id.* at 632. In contrast, the Supreme Court has been unwilling to engraft a *de minimus* exception to Commission jurisdiction. *F.P.C. v. Florida Power & Light Co.*, 404 U.S. 453 (1972).

the intrastate gas into the Green System. For present purposes, it is sufficient to state the conclusion; its validity will be discussed below.

The second important facet of the Green System case is the Commission's emphasis on the integrated operations of United's system. This same factor was present in the *Florida Parishes* case and constituted one of the pertinent factors in determining the jurisdictional question. Since jurisdiction over producer sales was the focal issue in *Lo-Vaca* and *Amerada,* the integrated operations theory was unnecessary to the Commission's assertion of jurisdiction.

THE STATUTORY FRAMEWORK

Before discussing the extent of federal regulation of intrastate wellhead sales of gas to interstate pipelines if such gas never leaves the state of origin, it is important to consider the relevant provisions of the Natural Gas Act. Section 1(b) indicates that Congress intended to regulate "the sale in interstate commerce of natural gas for resale" and that section plainly provides that the Act was not applicable "to any other . . . sale of natural gas."[44] Congress carefully defined "interstate commerce" to mean "commerce between any point in a state and any point thereof, or between points within the same state but through any place outside thereof. . . ."[45] Reading these sections together, it is clear that a producer sale is within Section 1(b) if it can be shown that the gas ultimately flows out of the state of origin, even if it is eventually consumed in the state of production. Indeed, both the House and Senate[46] Committee reports considered the definition of "interstate commerce" to be "self-explanatory." Since a producer's sale is the first step in the distribution chain of gas across a state line, federal jurisdiction exists.[47] It seems equally clear that, if Sections 1(b) and 2(7) are read together, not all wholesale sales are within the ambit of the Act. For example, a wellhead sale made by a producer directly to a distribution company, which also receives gas from an interstate pipeline would not be subject to federal regulation. This situation would be indistinguishable from one where the distributor owned the well and attached the reserves to its system for ultimate sales. Also, wholesale sales made by a company receiving gas within or at the boundary of a state are not subject to Commission jurisdiction if the gas is ultimately consumed within that state and the rates and services are regulated by the state

44. 15 U.S.C. § 717(b) (1970).
45. 15 U.S.C. § 717a(7) (1970).
46. H.R. Rep. 709, 75th Cong., 1st Sess. p. 4; S. Rep. 1162, 75 Cong., 1st Sess., p. 4. *See generally* Note, *Legislative History of the Natural Gas Act,* Libert, 44 Geo. L.J. 695 (1956).
47. *See* note 38 *supra.*

commission.[48] Thus, the question of federal jurisdiction over wholesale sales must be resolved by identifying the factual circumstances surrounding the sale with due consideration to Congress' intent to enact legislation complimenting, but not superseding, state regulation.

THE IMPACT OF THE COMMINGLING DOCTRINE ON INTRASTATE PRODUCER SALES

The *Green System* case presented one factual situation wherein the question of federal jurisdiction over the producer sales would arise. In such a case, a producer would be selling gas to an interstate pipeline which is interconnected at either end to facilitate crossing state lines although not necessarily belonging to the pipeline purchaser. A second situation would involve sales to an interstate pipeline within the state in which the pipeline's facilities terminate. In both cases, intrastate gas would be commingled with interstate gas.

In the former case, it is conceivable that the gas, which is commingled, can leave the state. If the evidence shows that the pressure flows would permit such a result, the case resembles the *Lo-Vaca* case, specifically the facts surrounding the El Paso-Houston Natural contract. Hence, the commingling of the producer's gas with the interstate stream would be sufficient and federal jurisdiction over the wellhead sales would attach because the gas would flow in interstate commerce. If, on the other hand, the evidence demonstrates that the commingled stream could not leave the state, notwithstanding the interconnection, the assertion of jurisdiction over the producer's wellhead sale must be premised on the affect on interstate commerce rather than flows of gas in interstate commerce. The affect on interstate commerce arises as a result of the displacement of equal volumes on some other portion of the pipeline system. Since no gas in the commingled stream leaves the state of production, there could not be a sale in interstate commerce as defined in Section 2(7) of the Act.

In light of the clear legislative history of the Act, any attempt to assert jurisdiction over producer sales in the state of origin should fail. It was at the behest of state regulators that Congress purposefully employed the language "in interstate commerce" in Section 1(b) of the Act. Congress legislated to close the "attractive gap" caused by prior Supreme Court decisions as noted above and, if it wanted to exercise the full scope of its authority under the Commerce Clause, the Act would have been drafted to permit regulation

48. 15 U.S.C. § 717(c) (1970).

of matters "affecting interstate commerce.[49] While Congress was not primarily concerned with independent producer sales at the time it passed the Natural Gas Act,[50] the Supreme Court's decision in *Phillips,* wherein federal jurisdiction over such producers was confirmed, does not indicate that its holding was based on the view that price regulation was necessary to forestall adverse effects on interstate commerce. Indeed, the Court referred to Phillips' admission that the sales were in interstate commerce[51] and throughout its opinion, spoke of sales in interstate commerce. Most significantly the decision clearly recognizes that the measure of the federal jurisdiction was the "gap" resulting from its prior decisions.[52] To assert that commingling in the factual circumstances presented in *Green System-East* case is the premise upon which jurisdiction rests is misleading. The only justification could be the affect on interstate commerce but the Supreme Court's decision in *Phillips* can only be read as reaching sales in interstate commerce.

In the second factual situation posited above, concerning wellhead sales in the state where a pipeline terminates, reliance on the commingling doctrine is equally misplaced. First, all of the gas sold by the producer would never leave the state of origin and, hence, the necessary element of interstate movement of gas required by the Act would be missing. All of the commingling cases discussed above involved commingled gas that ultimately was able to leave the state of production. Application of an "engineering and scientific test," even as liberally applied in accordance with the *Florida Power & Light* case, will not result in the determination of jurisdiction. Any assertion of jurisdiction must be premised upon an affect on interstate commerce requiring federal regulation. Just like the Green System-East situation the impact would be on the gas supply available to the system through displacement. However, it is equally clear that this assertion of jurisdiction would be incompatible with congressional intent underlying the passage of the Act.

49. *Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess. 1621-24, 1637-39 (1935), *see generally* 1604-96; *Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce,* 74th Cong., 1st Sess. 756-57, 165-66 (1935), *see generally* 746-93; *Hearings on H.R. 11662 Before Subcomm. of House Comm. on Interstate and Foreign Commerce,* 74th Cong., 2d Sess. 80-81, 86-88 (1936), *see generally* 79-98; *Hearings on H.R. 4008 Before the House Comm. on Interstate and Foreign Commerce,* 75th Cong., 1st Sess. 20-24 (1937).

Only recently, the Supreme Court has noted that statutes containing "in commerce" language have a narrower jurisdictional sweep than acts containing "affecting commerce" language. *U.S. v. American Building Maintenance Industries,* 43 U.S.L.W. 4838 (1975); *Gulf Oil Corp. v. Copp Paving Co. Inc.,* 419 U.S. 186 (1974).

50. Libert, *supra* note 46, at 697-98.

51. 347 U.S. at 677.

52. *Id.* at 682-84.

In any event, not every commingling of interstate gas with intrastate gas *per se* results in federal regulation. In *Natural Gas Pipeline Company of America,*[53] the Commission had before it a proposal of Natural Gas Pipeline Company to share a storage field with an intrastate company, Oklahoma Natural Gas Storage Company. The storage field was located entirely within the State of Oklahoma and was used to supply the Clinton distribution system in Oklahoma. The gas supply for the Clinton system came from intrastate Oklahoma fields. Under the arrangement, Natural would inject gas into the storage field for Storage's account and, upon request, redeliver gas to Storage, who was regulated by the Oklahoma Corporation Commission.

While the Staff of the Commission urged that Storage was subject to federal regulation because some of the Oklahoma gas would be sold in interstate commerce,[54] the Commission disagreed. To support its conclusion, the Commission stated that, unlike the *Lo-Vaca* case, there was no sale or delivery to an interstate pipeline of gas to be commingled with gas carrying on the pipeline's general business and all facilities used for transporting gas in interstate commerce would not escape its jurisdiction. Notwithstanding the commingling of interstate and intrastate gas in the Sayre storage field, the Commission concluded that Storage's joint use of the storage field did not constitute a sale or transportation of gas in interstate commerce and "not every transaction which involves commingling of gas from different sources *per se* requires a finding of jurisdiction."[55] To the extent Storage did not provide gas to be used as cushion gas in excess of 6,000,000 Mcf, Storage was not subject to federal regulation. While there is no explicit finding relative to the Oklahoma producers supplying Storage, it is a necessary conclusion that these producers were not engaged in jurisdictional transactions under the Natural Gas Act.

If commingling of interstate and intrastate gas were the touchstone for a jurisdictional finding, the *Natural* case provides strong precedent to the contrary. Once gas is commingled in the Sayre field it would be impossible to identify gas coming from intrastate wells to be used solely for intrastate purposes. The physical facts as well as logic would dictate subjecting Storage and its intrastate producer-suppliers to federal regulation under a strict construction of the commingling doctrine.

53. 34 F.P.C. 1258 (1965).

54. *Id.* at 1257-58.

55. *Id.* at 1262. *Compare F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *Public Service Elec. and Gas Co. v. F.P.C.*, 371 F.2d 1 (3d Cir. 1967), *cert. denied*, 389 U.S. 849 (1967); *City of Hastings v. F.P.C.*, 221 F.2d 31 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 929 (1955).

The Commission's decision in the *Natural* case is consistent with the Supreme Court's opinion in *Peoples Natural Gas Co. v. Public Service Commission.*[56] In *Peoples,* the Court unanimously held that intrastate gas fed into an interstate pipeline was in intrastate commerce. It plainly stated:

> As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipelines with the West Virginia gas works no change in this regard. Of course 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.[57]

While this case antedates the passage of the Natural Gas Act and was distinguished by the Commission in *Lo-Vaca,*[58] it is a case which is indistinguishable from the facts of the producer sales discussed herein. In fact, the producer sale situation would be *a fortiori.* The *Peoples'* case takes on added significance since it was decided contemporaneously with other Supreme Court decisions that created the "attractive gap" in the regulatory scheme that Congress sought to close with the passage of the Natural Gas Act.

In the two situations involving producer intrastate sales described above, it would appear that the producer sales should not be subject to federal control. First, the fact of commingling is not decisive. If it were, the Commission's decision in *Natural* would be inexplicable because the fungibility of gas in the Sayre field would have required the assertion of jurisdiction over Storage as well as its producer-suppliers. Where producers sell gas to interstate pipelines to be used wholly within the state of production, the commingling would be indistinguishable from the commingling of gas in the Sayre field, a portion which moves in interstate commerce. Second, it is difficult to imagine that all intrastate sales by the producers are motivated by an intent to avoid federal regulation. Indeed, the *Green System-East* case provides a stark example. Before United injected gas into an otherwise non-jurisdictional pipeline facility, the producers could reasonably and legally choose to sell their gas to the intrastate market.[59] This economic decision may have been motivated by any

56. 270 U.S. 550 (1926).
57. *Id.* at 554-55.
58. 26 F.P.C. at 840.
59. The Commission cannot force an independent producer to dedicate its gas to the interstate market. *Public Service Commission of New York v. F.P.C.*, 463 F.2d 824, 829 (D.C. Cir. 1972).

number of considerations, including price, proximity of pipelines to the field, and avoidance of delay of rental payments. Merely because United decided to integrate its pipeline facilities, thereby bringing previously non-jurisdictional facilities within the ambit of federal regulation, should not operate to transform intrastate sales into interstate deliveries.

The same practical considerations apply equally to the case where sales are made to an interstate pipeline that terminates in the state of production. It is unseemly to subject the producer sales to federal regulation since there is even less reason to believe that the sales were intentionally made to avoid federal regulation. The gas produced was sold to a pipeline reselling gas intrastate and, in such circumstance, it is difficult to attribute to the producer an intent to sell gas in interstate commerce. If jurisdiction were asserted, producers in the future would limit their sales to distributors, wholly intrastate pipelines or direct consumers within the state of production. Viewed from the overall public interest, this hardly seems desirable.

While arguably a case can be made for the assertion of jurisdiction over producer intrastate sales, it cannot rest on a commingling theory but must rest on the premise that the volumes of gas sold affect interstate commerce as do the rates charged for such gas. With respect to the rate impact, the Commission can simply remove the cost of this intrastate gas from the jurisdictional cost of service. This procedure would be no different than allocating costs between resale and direct customers on an interstate pipeline and to this extent, resale purchasers would be protected. Moreover, there is no reason to believe that the state commissions would not protect the consuming public within the state of production and ultimate consumption. If state commissions do not presently have regulatory authority, this matter is one for the legislature of the respective state. There may be countervailing considerations that would discourage state legislatures from adopting legislation to regulate intrastate wellhead sales, but inaction on the part of the states should not be a signal for the federal government to fill the void. By such logic, the allocation of regulation of the gas industry scrupulously guarded by Congress would evaporate.

With respect to the impact on the gas volumes transported by interstate pipelines purchasing intrastate gas supplies such impact is known and measurable. All volumes sold to an interstate pipeline moving in interstate commerce are sales made pursuant to rate schedules on file with the Commission. The Commission's curtail-

ment jurisdiction would apply to these volumes[60] and, so long as these volumes are allocated in a non-discriminatory manner, the Commission has satisfied its statutorily mandated obligation. Indeed, if the Commission attempts to justify its assertion over intrastate producer sales on the basis that it is necessary to make its curtailment jurisdiction effective, this position would be truly anomalous since the Commission has recognized that control of gas usage at the burner tip is beyond its jurisdiction.[61] It cannot be gainsaid that the lack of control of gas usage at the local level may undermine its ability to devise appropriate curtailment plans[62] just as lack of control over volumes sold to interstate pipelines to be resold entirely within the state of production.

As noted above,[63] the price for sales of gas in interstate commerce for resale is federally regulated but such regulation does not extend to intrastate sales of gas by producers. Whereas the nationwide rate for new gas is $1.42 per Mcf,[64] a producer selling gas to the intrastate market can obtain more than that price for his gas.[65] Given the economic choice of selling to the interstate or intrastate market, it seems clear that producers will sell to the intrastate market.[66]

Because of this price differential, interstate pipelines now have difficulty securing gas from the onshore areas since they simply cannot "meet the competition." If a pipeline is presently able to purchase gas from producers, which gas is to be sold in the state of production, this source of gas may evaporate if the Commission opts to endorse the theory that commingling of intrastate gas with interstate gas *per se* results in federal jurisdiction. Such a result is clearly not in the public interest since this loss of a supplemental source of gas will mean that gas distribution companies, primarily dependent on interstate pipelines for their gas supplies, will be required to make

---

60. *F.P.C. v. Louisiana Power & Light Co., supra* note 42.

61. *E.g.*, F.P.C. Order No. 467, 49 F.P.C. 85 (1973), petitions for review dismissed for lack of jurisdiction *sub nom. Pacific Gas and Elec. Co. v. F.P.C.*, 506 F.2d 33 (D.C. Cir. 1974); *United Gas Pipe Line Co.*, 46 F.P.C. 786 (1971), aff'd. in part and remanded in part *sub nom. International Paper Co. v. F.P.C.*, 476 F.2d 121 (5th Cir. 1973).

62. *Panhandle Eastern Pipe Line Co.*, Docket No. RP71-119, initial decision issued Aug. 29, 1975.

63. *See* notes 6-8 *supra* and accompanying text.

64. F.P.C. Opinion 770, issued on July 27, 1976.

65. *See, e.g., Transcontinental Gas Pipe Line Corp.*, Docket No. CP76-186, order issued Feb. 9, 1976.

66. The change in the price of new gas, however, does not alter the author's original premise that any assertion of F.P.C. jurisdiction over producer sales in the state of origin would be detrimental to the interstate market.

up any such loss (if they can) with high priced propane, synthetic natural gas or imported liquid natural gas.

A second adverse result flowing from the Commission's assertion of jurisdiction would be that marginal gas prospects may be left undeveloped. If a producer can receive the higher intrastate price for gas, he may be willing to undertake riskier exploration and development activities. Accordingly, full resource development can take place. To ameliorate the present gas supply shortage, more exploratory effort is plainly necessary. If the economic incentive to explore and develop marginal prospects is removed, the result is again less gas for sale with the ultimate consumer being required to pay higher prices for supplemental gas supplies.

Finally, since the price of direct sales of gas are not subject to federal price regulation,[67] a producer may opt to sell gas directly to an industrial customer under the procedures established in FPC Order No. 533.[68] Such direct sales will mean that a producer can get a higher price for his gas but such earmarking of supplies necessarily impairs the ability of interstate pipelines to serve their customers. If the producer's gas were sold to an interstate pipeline for resale, all customers of the pipeline, to the extent that they can, would have an opportunity to purchase this gas. On the other hand, if a producer sells directly to an industry and the pipeline simply transports this gas, other customers of the pipeline receive no benefit since the pipeline's overall supply has not been increased.[69] It is ironic, indeed, that the Commission's assertion of jurisdiction would increase the number of purchases for a limited resource at a time when more supplies—not more purchases—are required.

CONCLUSION

While there may be a natural inclination on the part of federal agencies to sweep as much as possible under their jurisdiction, the integrity of such a federal regulatory scheme requires that it be confined to those areas specifically designated by Congress. Not only is it clear that the Supreme Court has refused to conclude that

67. Natural Gas Act § 1(b), 15 U.S.C. § 717(b) (1970). *F.P.C. v. Louisiana Power & Light Co., supra* note 42, at 638.

68. *Policy with Respect to Certification of Pipeline Transportation Agreements,* F.P.C. Order No. 533, Docket No. RM75-25, issued Aug. 28, 1975, reconsideration granted in part, F.P.C. Order No. 533-A, issued Nov. 10, 1975.

69. In setting pipeline rates, revenues derived from such transportation service may be credited to the pipeline's cost of service and the result would be lower wholesale rates. This small financial benefit pales as gas supplies dwindle, curtailments increase, and ultimate consumers become more dependent on expensive supplemental gas supplies and/or alternate fuels.

locally produced gas injected into an interstate system was intrastate commerce[70] but it is equally obvious that Congress did not give the Commission authority to take whatever action it deemed necessary to protect the public interest.[71] The extension of the commingling doctrine to cover intrastate producer sales of gas consumed wholly within the state of production is unnecessary and clearly conflicts with Congress' intent to circumscribe federal regulation to make it complement regulation by the states. Indeed, existing precedent cannot support such an extension of federal regulation.

Any assertion of federal jurisdiction over intrastate producer sales will implicate sensitive areas of federal-state relations. Until Congress steps into the controversy, the Commission and the courts should candidly recognize Congress' intent to limit the jurisdiction of the Commission.

70. *See* note 59 *supra* and accompanying text.

71. *Mobil Oil Corp. v. F.P.C.*, 483 F.2d 1238, 1248 (D.C. Cir. 1973); *Mobil Oil Corp. v. F.P.C.*, 463 F.2d 256, 263 (D.C. Cir.), *cert. denied* 406 U.S. 976 (1972).