

## BOOK REVIEWS

NATURAL GAS: CURRENT FEDERAL AND STATE DEVELOPMENTS by William A. Mogel and James E. Mann. Executive Enterprises Publications Co., Inc., 1987. 325 pages.

Reviewed by *Wendell H. Adair, Jr.\**

At the end of their extremely helpful work, co-authors William A. Mogel and James E. Mann confidently predict that the future of federal and state regulation of the natural gas industry "is difficult to predict."<sup>1</sup> However, in their work entitled *NATURAL GAS: Current Federal and State Developments (CURRENT DEVELOPMENTS)*, Messrs. Mann and Mogel provide valuable legal and non-legal insights into the nine or ten issues which will focus the future of natural gas regulation and federal and state energy policies. Messrs. Mann and Mogel's backgrounds are extremely complimentary<sup>2</sup> and are reflected in the thorough, timely and balanced analysis of both federal and state energy practice set forth in *CURRENT DEVELOPMENTS*.

At the federal level, the authors have focused upon the crucial structural and "life and death" issues raised for all segments of the natural gas industry by Order No. 451, pipeline/producer take-or-pay litigation and Order No. 436. The resulting discussion is comprehensive, readable and enlightening. Without laboring the reader, the authors have managed to provide sufficient historical perspective to give the reader a sense of evolution of the issues raised by the federal push toward increased market competition. Chapters II, III, IV and V of *CURRENT DEVELOPMENTS* provide a well-indexed and subtitled survey which will be a useful tool both to the experienced practitioner and any other person desiring greater insight into the changing natural gas industry.

Chapters VI and VII of *CURRENT DEVELOPMENTS* provide both a well-researched and current survey of selected state responses to the push for open access and increased competition. It also provides a timely examination of the constitutional limitations upon federal pre-emption. While the authors raise these very important constitutional issues in a thoughtful fashion, my only regret is that they did not spend more time exploring the social and political actions of the growing federal pre-emption of historical state actions

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1. W. MOGEL & J. MANN, *NATURAL GAS: CURRENT FEDERAL AND STATE DEVELOPMENTS* 324 (1987).

2. Mr. Mann is a partner in the Austin, Texas law firm of Clark, Thomas, Winters & Newton and is a leading practitioner before the Texas Railroad Commission and other State regulatory bodies. Mr. Mogel is the Founder and Editor-in-Chief of the *Energy Law Journal* and has almost twenty years of experience as a leading practitioner before the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission.

aimed at protecting the public health, safety and welfare.<sup>3</sup> This tension has only been exacerbated by the D.C. Circuit's recent decision in the *AGD* case.<sup>4</sup>

*CURRENT DEVELOPMENTS* does not merely stop with its analysis of federal regulatory developments, rather it appropriately offers a useful overview of the impact of recent antitrust decisions as a disciplining factor upon pipeline competition and expansion. Chapter VIII of *CURRENT DEVELOPMENTS* is both a concise and articulate examination of the current status of antitrust laws and their application to the pipeline industry as well as a source of key cites for any antitrust analysis.

Finally, Chapter IX of *CURRENT DEVELOPMENTS* provides a long needed explanation of the development and the conceptual basis for state proration and ratable take rules. It also provides a concise insider's view of the sweeping changes in proration and ratable take regulation promulgated by the Texas Railroad Commission in February of 1987. It is, therefore, required reading for any pipeline that wants to understand those new rules and, in particular, the Texas special marketing program for pipeline affiliates. It is a tribute to the authors' careful research that they do not merely stop with the Texas Railroad Commission's rules but also provide a helpful analysis of the proration and ratable take regulations in effect in the States of Oklahoma, Louisiana, New Mexico, Kansas, Alabama and Wyoming.

In summary, *CURRENT DEVELOPMENTS*, while focusing upon the current issues facing federal and state natural gas regulation, is not merely a temporary and transient survey of the immediate present, rather it provides a helpful summary of the development of current trends and raises fundamental questions which, despite the understandable caution of its authors, will affect the future of all of the natural gas industry.

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3. For example, will federally mandated by-pass result in a frustration of the state regulator's decision to have industrial user rate subsidies for the benefit of life-line rates?

4. *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987).

ENERGY: MARKETS AND REGULATION edited by Richard L. Gordon, Henry D. Jacoby, and Martin B. Zimmerman. MIT Press, Cambridge, Mass., 1987.

Reviewed by *Steven Reed*\*

Most regulatory lawyers are aware of the central role economists play in the regulatory systems that affect the energy industry. Economists are frequently the central witnesses in complex regulatory proceedings, testifying on such issues as the appropriate rate of return for a rate-regulated company or the valuation of assets and resources for a variety of regulatory purposes. Indeed, it is becoming virtually essential for the lawyer whose practice is oriented toward economic regulation to be familiar with important economic concepts and to be able to work closely with highly sophisticated economists.

Economics impacts regulation at a broader level, however, in ways that are no less significant and striking. Although the regulatory system in a particular industry can become, over time, an imposing edifice with an appearance of inevitability about it, history abounds with examples of well-established regulatory structures that have crumbled under the force of changes in underlying market structures. Perhaps the classic illustration is the case of the railroad industry in the United States, which nearly collapsed under the weight of a century-old federal regulatory system before the reforms of the late 1970s and early 1980s revitalized the rail network. A more current example of this phenomenon is now visible in the natural gas industry, where the Federal Energy Regulatory Commission (FERC or Commission) is struggling to bring regulatory order to a sector of the economy hard hit by fundamental economic change.

In this context, the publication of *Energy: Markets and Regulation*, a compendium of brief articles by leading economists on various aspects of the regulation of energy resources, is both timely and potentially quite useful to energy lawyers. While these articles are diverse both in topic and in approach, they share an underlying theme that regulation cannot be properly understood without comprehending the economic forces that are operating beneath the facade of the regulatory system. By opening a window on those forces, this book can help put in perspective the sometimes perplexing regulatory developments that, taken in isolation, can seem merely arbitrary.

A prime example is the first entry in the book, a chapter describing and analyzing the developments in the natural gas industry that led to the FERC's landmark Order No. 436. This article manages, in the course of fewer than thirty pages, not only to trace the major developments in gas regulation since the passage of the Natural Gas Act in 1938, but also to provide a concise and intelligible analysis of the economic principles that appear to be driving the Commission in its efforts to open up the gas transportation network to competition. It is a mark of the success of this analysis that it was cited directly in

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the opinion of the United States Court of Appeals for the District of Columbia Circuit reviewing Order No. 436.<sup>1</sup> Indeed, the flavor of the analysis in this article—that the key to permitting market forces to operate in the natural gas industry is to turn gas pipelines into, in effect, common carriers—permeates the D.C. Circuit's precedent-setting decision.

The other articles in the book vary in quality and in potential usefulness to the regulatory practitioner. Several suffer from either too narrow and abstruse a topic or too technical and scholarly an approach. (Many lawyers will no doubt be deterred by pages that have more calculus than English on them.) On the whole, however, this is a helpful collection of economic insights, and the book is worth the cover price if only for the lead article, which has already had, in its own way, a direct impact on the industry.

A final distinguishing characteristic of this book is its unity of theme, which is unusual for a mere collection of articles. It is not surprising, however, that the theme should be on understanding and analyzing the underlying economics that drive the regulatory system. The book is dedicated to Professor Martin Adelman of MIT, an economist who virtually founded the field of energy economics and whose massive work, *The World Petroleum Market* (1972), is a standard—if not the Bible—in the area. Each of these articles is authored by one or more economists who have been students or colleagues of Professor Adelman's, and each in its own way reflects his influence. Most importantly, that influence is shown in the careful attention to facts, to clear economic thinking and to understanding that it is the operation of a regulatory system in the real world, and not in the realm of theory, that ultimately determines its success or failure. This book is a worthy tribute to Professor Adelman's long career as an energy economist.

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1. *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1027 (D.C. Cir. 1987).

## BRIEFLY NOTED

**NATURAL GAS TRANSPORTATION INFORMATION SERVICE** by Federal Programs Advisory Service. Thompson Publishing Group, Washington, D.C., 1986.

This looseleaf service is among the latest in the line of products offered by Federal Programs Advisory Service, the publisher of such familiar periodical resources as *Natural Gas Contracts*, *FERC Practice and Procedure Manual* and *Natural Gas Policy Act Information Service*. *Natural Gas Transportation* focuses on the specialized and rapidly evolving regulatory framework surrounding gas marketing, and provides the core information necessary for a practitioner to stay current with developments in that field. In addition to a monthly newsletter describing recent significant industry, regulatory and judicial events, the service includes detailed and easily updated, substantive sections on non-discriminatory access to pipelines; self-implementing transportation; quality of service and allocation of capacity; rate conditions; optional certificates for new service and facilities; options to reduce or convert firm sales; take-or-pay buyouts; producer abandonments; transitional rules; and section 7(c) certificates. There are also more procedurally oriented portions on reporting requirements, and on forms, fees and deadlines, in addition to appendices setting forth pertinent regulations, the preambles to final and interim rules, and the text of proposed rules. Finally, and of particular note, is a section detailing the transportation status of individual pipelines.

The volume is well-indexed, and usefully cross-referenced throughout. If the editors are able to continue to provide up-to-date, accurate and comprehensive information on the range of transportation-related topics encompassed within the scope of the publication, they will be providing a truly welcomed service.

**NATIONAL RESOURCES LAW SECTION MONOGRAPH SERIES** published by Section of Natural Resources Law of the American Bar Association and The National Energy Law & Policy Institute of the University of Tulsa College of Law, 1986.

As in any monograph series of this type, the individual works published by the ABA Natural Resources Section and the National Energy Law & Policy Institute are an eclectic and highly specialized lot. The first four in what promises to be a growing collection range from the highly practical to the more academic, although each is aimed at real-world issues facing energy lawyers.

The first in the series is entitled *Drafting Standard Form Farmout Agreements*. Written by Theresa U. Fay, an attorney with Sun Exploration & Production Co., it draws on Sun's experience in farmouts, and indeed includes a variety of forms developed by Sun. Ms. Fay begins with a helpful description of the various types of farmouts, and of the essential terms in any such agree-

ment. She then provides a series of exhibits demonstrating how those contractual arrangements are reflected in prototype farmout agreements.

The second monograph, *Joint Operating Agreement: Working Manual*, is authored by another Sun attorney, Andrew B. Derman. This work focuses on the 1982 revision of the standardized joint operating agreement as agreed to by the American Association of Petroleum Landmen. Mr. Derman walks through each of the fourteen uniform articles, reprinting the text of the standard agreement, and offering suggestions for how each provision might be amended or strengthened. Article XV is a catch-all "other provisions" category, and the author provides examples and descriptions of a wide variety of contractual terms that might be desirable under that heading. In addition to supplementary material on standard exhibits to joint operating agreements, Mr. Derman provides two further items of note: a relatively detailed section on tax partnership provisions, and a series of problems against which to test the principles and clauses in the standard agreement. The latter section results in a work that is useful not only as a legal resource but as an in-house teaching device as well.

Monograph No. 3 is entitled *Bidding Agreements: Tailoring the Right One for Your Company*, by Terry E. Hogwood. This work focuses on standard contracts for offshore lease bids, a transactional form much more in the evolutionary phase than are farmouts or joint operating agreements. As a result, the author quite appropriately concentrates more on anecdotal advice than do the previous two monographs, which start from a far more developed base of experience and practice. As with the others, however, the goal here is to set forth the accepted standardized terms, to describe the intent of the those provisions and to alert the practitioner to the limits and potential pitfalls of unthinking adherence to them.

The final work in the initial monograph series is *Railroad Land Grants from Canals to Transcontinentals*, by Thomas E. Root. As described by the author, it "consist[s] of a general historical and legal analysis of land grants and include[s] a treatment of mineral rights obtained pursuant to railroad land grants,"<sup>1</sup> during the period 1808-1941. In light of that scope, the author is quite predictably somewhat defensive about challenges to the work's practical significance, noting that

[i]t might be argued that a considerable portion of the material . . . is dated and of slight value to an attorney confronting practical problems of the late twentieth century . . . . [G]iven the magnitude of grants of land to railroads, and the quantity of lands currently owned by successors in interest to those railroads, it is suggested that a comprehensive treatment of legal and historical issues regarding railroad land grant lands is appropriate.<sup>2</sup>

This work certainly provides that comprehensive treatment.

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1. Root, *Railroad Land Grants from Canals to Transcontinentals*, 4 A.B.A. SEC. NATURAL RESOURCES LAW, MONOGRAPH SERIES 3 (1986).

2. *Id.* at 4.

PUBLIC UTILITIES LAW ANTHOLOGY, VOLUME VIII edited by Allison P. Zabriskie. International Library, Bethesda, MD, 1986.

This volume is the latest in a series in which articles previously published in a variety of periodicals are collected and reproduced for ready access by the utilities lawyer. Its value does not lie in originality; by definition virtually every work is available elsewhere. Instead, it gathers in one place pieces derived from a variety of sources that no single private law library can be expected routinely to house.

Volume VIII in the series brings together articles published over a two-year period that was typified by critical debate in the utility field. The editor has concentrated on writings dealing with competitive forces in the natural gas pricing and electric utilities areas. Thus, the titles range from "Bankruptcy Analysis of a Financially-Troubled Electric Utility" (first published in *The American Bankruptcy Law Journal*), to "Natural Gas Price Escalation Clauses: A Legal and Economic Analysis" (from the *Minnesota Law Review*), with nearly thirty other pieces involving gas, electric, telephone, railroad and utility-wide issues.

Taken together, the articles offer a broad snapshot of the issues of recent concern—and at least some views as to their direction and ultimate importance.

