

GAS CONTRACTS
Edited by
John S. Lowe
(Institute for Energy Development, Inc.)
(softbound) (727 pages)

Reviewed by
*Sherman S. Poland**

Sometimes the admonition of the Red Queen¹ that one must run faster just to remain in place seems particularly pertinent when reviewing developments in the gas industry. The recent publication of *Gas Contracts* is an attempt to keep pace with changing problems as they affect contracting for natural gas. Although continuing change threatens to outdate portions of the compilation, students or others who need or desire ready reference at a point in time (1982-1983) may find this volume useful.² This collection of articles, speeches, proposed legislation, regulations, and sample contracts focuses on contract issues involving natural gas producers.

Gas Contracts uses the Natural Gas Policy Act³ as its focus. The book is divided into five sections. The first section contains a collection of recent law review and miscellaneous articles. Next, a section analyzes the NGPA.⁴ Third, a chapter compares and reprints several of the major legislative proposals made earlier this year (1983) in the Ninety-Third Congress. Fourth, a collection of miscellaneous "other current developments and problems" includes Federal Register notices⁵ and a reprint of the January 1983 United States Supreme Court opinion⁶ that validated Kansas and Oklahoma statutes limiting the effect of indefinite price escalator clauses in intrastate gas contracts. Finally, the last four chapters of *Gas Contracts* provide sample contracts, examples of contract clauses, a "gas balancing agreement," and a short glossary of gas contract terms.

The first section, "Current Literature on Gas Contracts," consists of reprints of four law review articles, a Texas state bar publication, an Institute for Energy Development publication, and pieces from two trade publications. A current index of law review articles on energy subjects, with short synopses, which was not included, would have been a helpful addition.

The articles are an interesting selection. The opening piece by Martin Erck⁷ sets the stage by focusing on three matters — indefinite pricing provisions, market-out clauses, and take-or-pay provisions — all in the context of phased deregulation under the NGPA. To have a basic understanding of *Gas Contracts*, or gas contracts, one need read no more than this article. This is followed by a chapter from IED's *Handbook on Gas Contracts* that provides a precise discussion of contractual pricing

*Partner, Ross, Marsh & Foster, Washington, D.C.

¹Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass*.

²Other resource materials available to the practitioner include, *e.g.*, FERC Practice and Procedure Manual (Federal Programs Advisory Service, Steven A. Herman ed.) (originally published 1982); Regulations of the Gas Industry (AGA 1st ed. 1981) (four volumes); Tomain, *Energy Law in a Nutshell* (West 1981); Natural Gas Policy Act Information Service (Federal Programs Advisory Service) (seven volumes) (originally published 1979).

³15 U.S.C. §§ 3301-3432 (Supp. V 1981).

⁴This section consists of a paper that describes NGPA price categories and a reprint of a portion of the NGPA with attendant descriptions of NGPA price categories and applicable regulations.

⁵Order No. 94-A, 48 Fed. Reg. 5152 (Feb. 3, 1983); Limitation on Incentive Prices for High-Cost Gas to Commodity Values, 48 Fed. Reg. 7469 (Feb. 10, 1983).

⁶*Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 103 S. Ct. 697 (1983).

⁷Erck, *Gas Contract Clauses Under Current Controversial Conditions*, 9 Oil, Gas and Mineral Report (State Bar of Texas; Dec. 1982).

provisions.⁸ Also included is an article⁹ on contracts and deregulation, published in 1982 in the *Virginia Law Review*. This well-supported article concludes that deregulation is preferable to the anomalies resulting from regulation and the NGPA. The author displays in economic terms and theory the market imperfections of regulation of natural gas prices. Various types of contract clauses are explained and analyzed in the context of a post-NGPA market. The author predicts that, because of certain contract provisions, private contracts will result in prices above market-clearing levels when NGPA deregulation takes effect in 1985. Dismissing voluntary contracting practices as an incomplete solution to "supramarket" prices, and pointing out the limitations of a judicial solution, the author concludes that Congress should enact a "single-purpose, narrowly drawn statute" that would transform all favored-nations and area-rate clauses into market-price clauses.

Other articles include an elementary background piece,¹⁰ a short note explaining take-or-pay clauses¹¹ which argues that income received from minimum payments under such clauses should be subject to royalty, and an article that makes the dated observation that "a revolution is taking place in the gas industry" because of increased competition.¹²

Other articles have less bearing on gas contracts. One urges decontrol by assaulting the complexities and compromises of the NGPA while proposing a vague windfall profits tax.¹³ Another provides a well-documented history and analysis of section 311 of the NGPA,¹⁴ but it involves transportation and access to markets — concerns that have little direct bearing on the issues surrounding natural gas contracts.

Publication in a bound volume of legislative proposals has little lasting value. Actions by the Senate Energy and Natural Resources Committee¹⁵ and the House Subcommittee on Fossil and Synthetic Fuels¹⁶ have superseded original legislative proposals.

The final one-third of *Gas Contracts* may be of more practical value to one with a direct interest in gas contracting. Included here is an arrangement of sample contracts and special contract clauses, as well as a glossary that is short but fairly comprehensive. The types of contracts are exemplified: a mid-continent purchaser's contract; a Gulf coast purchaser's contract; and a seller's "ideal" contract. Model language for several types of contract clauses, *e.g.*, market-out, excess royalty, deregulation, production-related costs, and tight formation pricing provisions.

Gas Contracts purports only to supply interested parties with current information on the subject. It appears thorough, if becoming outdated. When first published, it would have been an ideal workbook for a seminar in the subject. For energy law practitioners and others who may keep current legislative and regulatory proposals on their shelves, this volume may be superfluous. Nevertheless, the

⁸Handbook on Gas Contracts (IED; 1982) (Chapter 5: The Pricing Provisions by Thomas G. Johnson).

⁹Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63 (1982).

¹⁰J. Clayton LaGrone, *Natural Gas Contracting in the '80's*, 32 Oil & Gas Institute (1981).

¹¹Note, *Oil and Gas: "Take-or-pay" Clauses: Are They Subject to Royalty?*, 35 Okla. L. Rev. (1982).

¹²Tussing & Barlow, *A Survival Strategy for Gas Companies in the Post-OPEC Era*, 111 Public Util. Fort. (Feb. 3, 1983).

¹³Martin, *Brambles in the Gas Patch: Problems of Natural Gas Decontrol*, 33 Mercer L. Rev. (1982).

¹⁴Mogel & White, *Assessment of Section 311 of the Natural Gas Policy Act of 1978*, 58 N. Dak. L. Rev. (1982).

¹⁵The Senate Committee rejected the Administration's bill and voted out an entirely different proposal of their own on July 29, 1983. See S. 1715, 98th Cong. 1st Sess. (1983).

¹⁶The House Subcommittee referred an abbreviated legislative proposal to the House Energy and Commerce Committee on July 29, 1983.

sections including sample contracts and clauses may be a useful reference if one is often engaged in analyzing or drafting natural gas contracts. For newcomers, or students in the field, or others with few resources, *Gas Contracts* can be a starting place for an understanding of the primary issues in natural gas contract law.