

APPROPRIATENESS OF IMPOSING COMMON CARRIER STATUS ON INTERSTATE NATURAL GAS PIPELINES*

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I. INTRODUCTION

*For every problem there is a simple solution . . .
which is usually wrong.*

H. L. Mencken¹

Natural gas, which has been called a perfect fuel,² currently is too expensive,³ priced too low,⁴ in excess supply,⁵ but will be in demand in the

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1. See 128 Cong. Rec. S14,697 (daily ed. Dec. 14, 1983)(remarks of Sen. Johnston) (paraphrasing Mencken in commenting on proposed natural gas price control legislation).

2. Natural gas has been called a perfect fuel because it burns cleanly and is produced domestically. It accounts for approximately 27% of the energy consumed in the United States, supplies energy for about 55% of all residential and commercial establishments, and provides 40% of the energy that industry and agriculture consume. Natural gas is commonly measured in million cubic feet (Mcf) or its equivalent heating value, a million British Thermal Units (MMBtu). GAO, Information on Contracts Between Natural Gas Producers and Pipeline Companies 1 (1983). Cf. Commoner, *A Nearly Perfect Fuel*, New Yorker, May 2, 1983, at 66 (discussion of history and future use of methane, the principal component of natural gas).

3. Consumer interest groups view the price of natural gas as unnecessarily high because of "excessive rigidity" and lack of competition under the Natural Gas Policy Act of 1978. See Natural Gas Legislation Proposals: Hearings on S. 615 Before the Senate Comm. on Energy and Natural Resources, 98th Cong., 1st Sess. 3 (1983) (unpublished) (statement of Phillip R. O'Connor, Chairman of the Illinois Commerce Commission) (Mar. 12, 1983) [hereinafter cited as 1983 Senate Hearings]. In 1970, natural gas cost an average \$0.91 per Mcf at the burnertip. The burnertip price includes all production, transportation, and local distribution costs. In 1978, the price had risen to \$2.83. In 1982, the average cost of natural gas at the burnertip was \$6.08. GAO, Natural Gas Price Increases: A Preliminary Analysis 7 (1982) (Table 2).

4. Natural gas producers argue that the current pricing scheme provides no incentive to produce certain kinds of regulated gas and results in less than full potential reserve additions. See Natural Gas Legislation Proposals: Hearings Before the House Subcomm. on Fossil and Synthetic Fuels of the House Energy and Commerce Comm., 98th Cong., 1st Sess. 10-13 (1983) (unpublished) (statement of Donald G. Russell, Vice President of Production Shell Oil Company) (Apr. 14, 1983) [hereinafter cited as 1983 House Hearings]. These concerns have sparked the debate on the decontrol of "old gas" - gas produced from fields "committed or dedicated" prior to 1978. See 15 U.S.C. § 3431(a)(A) (Supp. V 1981) ("the Natural Gas Act . . . and the jurisdiction of the Commission . . . shall not apply to natural gas which was not committed or dedicated to interstate commerce as of November 8, 1978, solely by reason of any first sale of such natural gas.").

5. The chief irony of the current market is that prices are rising despite an oversupply. Earlier price

future.⁶ Although natural gas has enjoyed a price advantage over alternative fuels,⁷ natural gas now is more expensive than fuel oil in many parts of the United States⁸ This has caused a significant problem for interstate natural gas pipelines which find that their markets are eroding at the same time when they must take or pay for large volumes of unmarketable natural gas pursuant to contractual obligations incurred in the middle and late 1970's during the period of natural gas curtailments.⁹

As a partial solution, some¹⁰ have argued that the existing approximately 269,000 mile natural gas pipeline transportation system¹¹ is a barrier to the sale, transportation, and use of natural gas unless that system is converted to one of common, or at least, contract carriage.¹² As a result, the Reagan Administration

ceilings have become price floors that maintain natural gas prices or cause them to rise regardless of the market activity. *See, e.g.*, 129 Cong. Rec. S4260 (daily ed. Apr. 7., 1983) (remarks of Sen. Kassebaum) ("the problem is a deliverability surplus of natural gas, and - most troubling of all - sharp increases in natural gas prices"); *id.* at S4263 (remarks of Sen. Sasser) ("the poor and the elderly have become economic captives of a distorted natural gas market. . . . [S]upplies are now in a surplus, [but the cost has] . . . skyrocketed some 60 percent"). For a further discussion of rising prices and oversupply in the natural gas industry, see *infra* notes 39-44 and accompanying text.

6. Despite the current oversupply, some observers have estimated that demand for natural gas in the industrial market may double by the year 2000. *See* Muchow, *The Future of Gas Energy*, 2 ENERGY L.J. 241, 243 (1981). Some industrial consumers have had difficulty acquiring adequate supplies. *See Inquiry Into Purchasing Practices of Interstate Pipelines*, 48 Fed. Reg. 25,264 (1983) (Federal Energy Regulatory Commission notice of informal public conference to determine whether pipelines favor certain end-users with respect to transportation of gas).

7. Residual fuel oil (high sulphur oil No. 6) is the primary alternative fuel to natural gas; coal, propane, and electricity are lesser alternatives. Although the typical homeowner who uses natural gas for heating cannot use two completely different sources of energy because of the expense involved, some large industrial users of energy have installed dual energy systems—usually one oil fueled boiler and one natural gas fueled boiler—to enable them to switch to the least expensive energy source for a given period of time. *See generally* Energy Information Administration, U.S. Dep't of Energy, *The Natural Gas Market Through 1990* 32-34 (1983) (discussing natural gas competition with other fuel sources in transportation, residential, commercial, industrial, and electric utility markets). Consumption of natural gas by industry dropped an estimated 14% in 1982, due in part to "fuel switching." *See infra* note 38.

8. The GAO has reported, for example, the in January 1983 the price at which Illinois Power Company sold natural gas to its industrial customers was \$4.44/MMBtu. The residual fuel oil price to those customers at that time was \$4.17/MMBtu. *See* GAO, *State and Local Responses to Natural Gas Price Increases* 23 (1983). Natural gas prices have increased steadily while the OPEC collapse has caused the spot-market price of residual fuel oil to drop from \$30.35 to \$26.00 between October 1982 and April 1983. *Id.*

9. When a natural gas pipeline has inadequate supplies of natural gas with which to fulfill its contractual obligations, it must necessarily curtail deliveries to certain customers. In 1970, the United States first experienced chronic natural gas shortages. *See* FPC v. Louisiana Power & Light Co., 406 U.S. 621, 626 & n.2-30 (1972). *See generally* Mogel, *Food, Fuel and Federal Curtailment Regulation*, 56 Chi.-Kent L.Rev. 789 (1980). For a discussion of take-or-pay contractual obligations, see *infra* notes 46-47 and accompanying text.

10. The Association for the Equal Access to Natural Gas Markets and Suppliers (NGEA) is a leading voice in the effort to alter the status of natural gas pipelines. NGEA claims it "is a nonprofit association for independent producers and users of natural gas which was established to promote greater access to natural gas markets for producers and greater access to natural gas suppliers for users." 1983 Senate Hearings, *supra* note 3 (statement of David W. Wilson, President NGEA) (Mar. 11, 1983).

11. The entire network of natural gas pipelines, including local distribution companies, extends over one million miles. *See AGA Gas Facts* 59 (1981) (Table 46).

12. The distinction between a common carrier and a contract carrier is that a common carrier by law must carry the goods of all members of the public that request his service. A contract carrier transports only goods of certain customers. This distinction is confusing because both terms are used in pending legislation.

and several members of Congress recently introduced legislation to impose common carrier obligations on interstate natural gas pipelines.¹³ If this occurred, large end-users of natural gas, such as petrochemical companies,¹⁴ as well as local distribution companies, could purchase natural gas directly from producers in the field, compel transportation of the gas to their plants or distribution facilities, and pay, presumably, a lower price than paid presently to their interstate pipeline supplier.¹⁵

This Article discusses the various proposals intended to make interstate natural gas pipelines subject to the principles of common carriage. As background, an overview is given of the existing regulatory structure of the natural gas pipeline industry. Second, the history of common carriage and contract carriage is discussed. Third, this Article analyzes past legislative attempts to impose common and/or contract carrier status on interstate natural gas pipelines. The final sections examine current attempts to subject natural gas pipelines to common or contract carriage principles. It is concluded here that imposing common carrier obligations on interstate natural gas pipelines may be appropriate in alleviating certain price distortions but would not be a great benefit to all natural gas consumers because of the established structure of the natural gas industry.

II. THE NATURAL GAS INDUSTRY

Are you gonna get any better, or is this it?

Earl Weaver¹⁶

A. The Past

There are three major segments of the natural gas industry: production, transmission, and distribution. Essentially, interstate natural gas pipeline companies act as middlemen, buying natural gas from producers at the wellhead, transporting it, and reselling it directly to large end-users or to local distribution

See infra note 181 and accompanying text. Neither term is completely appropriate. Most proposals would impose "mandatory contract carriage" such that a pipeline must allocate all available capacity. Yet pipelines are already contract carriers, in the traditional sense, because they are authorized to perform services under individual contracts. What is at stake generally is the imposition of certain, but not all, common carrier obligations. Thus, for clarity and simplicity, general references to legislative proposals in this Article are made to "common carrier proposals," although the central proposals would not require that a pipeline become a common carrier. For a more detailed discussion of this distinction, see *infra* Section III., B.

13. *See infra* notes 151-70 and accompanying text.

14. Industry uses natural gas principally for heating, as process gas - used when alternative fuels are not technically feasible, such as for precise temperature controls - and as feedstock gas - used as raw material in the creation of an end product. 18 C.F.R. § 2.78(c) (1983). For example, the petrochemical industry uses natural gas as feedstock in its chemical processes because of natural gas' chemical properties.

15. The Illinois Commerce Commission has estimated that a \$5 to \$10 billion savings per year would result nationally if Congress changed the status of interstate natural gas pipelines to common carriers. *See* 129 Cong. Rec. H2089 (daily ed. Apr. 14, 1983) (remarks of Rep. Corcoran).

16. Will, *The Triumph of Bankers*, Wash. Post, Aug. 4, 1983, at A21, Col. 8.

companies,¹⁷ which in turn resell it for a variety of end users.¹⁸ In addition, several interstate natural gas pipelines also have established their own production affiliates for the purpose of developing their own natural gas reserves¹⁹ Interstate pipelines also perform, on a limited basis, contract carriage service, for which they receive the cost of transportation plus a profit²⁰

The federal government's first significant involvement with the natural gas industry was in 1938 with the passage of the Natural Gas Act (NGA)²¹ The NGA granted the Federal Power Commission and its successor, the Federal Energy Regulatory Commission (Commission)²² the authority to regulate the transportation and sale of natural gas for resale in interstate commerce. The NGA further provided that natural gas pipeline facilities cannot be constructed or abandoned without prior approval of the Commission.²³ Further, no rates for natural gas transported and sold for resale in interstate commerce can be charged unless first approved by the Commission.²⁴

Until 1954, the Federal Power Commission essentially regulated only the interstate natural gas companies that resold gas to local distribution companies, *i.e.*, interstate pipelines. The NGA had left ambiguous the question of whether the sale of gas from a producer to the pipeline was a "sale for resale." In *Phillips Petroleum Corp. v. Wisconsin*,²⁵ however, the United States Supreme Court concluded that the Commission had authority to regulate at the wellhead the sale

17. About 1,500 local distribution companies operate in the United States. Because these companies have natural monopolies within the industry, municipal and state agencies regulate them as public utilities. See R. Stobaugh & D. Yergin, *Energy Future* 159 (1979).

18. See *supra* note 14.

19. See *Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530, 533 (5th Cir. 1981), *vacated and remanded*, 103 S. Ct. 3049 (1983).

20. The Commission has encouraged contract carriage transportation by promulgating regulations designed to facilitate such transactions. See Order No. 30, *Transportation Certificates for Natural Gas for the Displacement of Fuel Oil*, 44 Fed. Reg. 30,323 (1979) (codified at 18 C.F.R. § 284.200-.208); Order No. 27, *Certification of Pipeline Transportation for Certain High Priority Uses*, 44 Fed. Reg. 24,825 (1979) (codified at 18 C.F.R. § 157.100-.105); Order No. 2, *Amendment to Policy Regarding Certification of Pipeline Transportation Agreements*, 43 Fed. Reg. 5362 (1978) (codified at 18 C.F.R. § 2.79). Participation in these programs has been limited. In 1982, there were no ongoing Order No. 2 transportation arrangements, and 10 ongoing under Order No. 27. See 48 Fed. Reg. 34,875, 34,880 n.8-881. See also *infra* note 54.

21. Pub. L. No. 688, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717-717w (1976 & Supp. V 1981)).

22. The Natural Gas Act conferred jurisdiction on the Federal Power Commission (FPC) to regulate natural gas that is sold in interstate commerce for ultimate public consumption. 15 U.S.C. § 717b (1976). In 1978, the FPC became the Federal Energy Regulatory Commission (FERC), a five-member independent regulatory agency within the Department of Energy. See 42 U.S.C. §§ 7171-7177 (Supp. V 1981); Exec. Order No. 12,009, 3 C.F.R. 142 (1978), *reprinted in* 42 U.S.C. § 7341, at 854-55 app. (Supp. III 1979).

23. 15 U.S.C. § 717f (1976 & Supp. V 1981). In addition, the Act required pipelines to demonstrate holdings of massive, long-term reserves as conditions for certification and licensing. The Commission adopted this requirement in construing the meaning of a public convenience and necessity. See *generally* *Kansas Pipe Line & Gas Co. and North Dakota Consumers Gas Co.*, 2 F.P.C. 29, 40 (1939) (discussing guidelines for applications of certificate of public convenience and necessity under NGA).

24. 15 U.S.C. § 717c-717d (1976 & Supp. V 1981). The Commission has the authority to approve only just and reasonable rates. *Id.* § 717c(a). See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944).

25. 347 U.S. 672 (1954).

for resale of natural gas by producers²⁶ The Supreme Court's ruling created an administrative nightmare at the Commission, which subsequently adopted various ratemaking formulas by which it regulated the price of natural gas until 1978.²⁷

What evolved from *Phillips* was a bifurcated natural gas market. The federal government regulated the price of natural gas destined for the interstate market, while the states left unregulated the intrastate market²⁸ In the late 1960's, when natural gas first became less abundant and demand increased, its price rose. In the interstate market, however, regulation kept the price of natural gas artificially low²⁹ As the price rose in the intrastate market, a two-tiered market resulted. Because natural gas received a significantly higher price in the intrastate market, a surplus developed in that market and shortages were experienced in the interstate market, which included all states in which little or no production took place.³⁰ Thus, in the 1970's, natural gas, which traditionally had been in plentiful supply, was not available in sufficient volumes to satisfy fully the demands of markets served by interstate natural gas pipelines.

The natural gas shortages in the 1970's produced a debate in Congress that resulted in the Natural Gas Policy Act of 1978 (NGPA).³¹ The NGPA effected several changes to remedy the dual market phenomenon, while abetting the creation of new problems for the 1980's. The NGPA eliminated the preference enjoyed by the intrastate market by imposing the same wellhead price controls on the intrastate market as imposed on the interstate market³² and by imposing a scheme of gradual deregulation for some categories of gas and complete price deregulation for others.³³ Essentially, the NGPA created three major categories

26. *Id.* at 682-84.

27. The Commission originally attempted to adjudicate each producer's rate for each well. When this proved infeasible, the Commission moved to ratemaking by rates based on area prices. *See generally* In re Permian Basin Area Rate Cases, 390 U.S. 747, 761 (1968) (Commission's adoption of area pricing within constitutional limitations); Southern Louisiana Area Rate Cases, 428 F.2d 407, 425 (5th Cir. 1970) (determination of area pricing rates may include non-cost items), *cert. denied*, 400 U.S. 950 (1971). The Commission next moved to setting rates on a national basis. *See American Pub. Gas Ass'n v. FPC*, 567 F.2d 1016, 1049 (D.C. Cir. 1977) (affirming Commission's use of nationwide ceilings during national supply emergency), *cert. denied*, 435 U.S. 907 (1978).

28. *See generally* R. Stobaugh & D. Yergin, *supra* note 17, at 62-66.

29. Federal regulation prohibited interstate pipelines from paying prices that exceeded a regulatory ceiling of between 160 and 170 per Mcf. *See* Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941, 979 (1973). Prices for new gas rose from 170 per Mcf in 1966 to 20.30 per Mcf in 1970. Intrastate pipelines could pay prices of up to 26.50 per Mcf while the regulated interstate pipelines could bid only 160 to 170 per Mcf as established by the regulatory ceiling. *Id.*

30. The rate of interstate reserve additions declined from 79% of all reserves added in 1968 to 17% of all reserves added in 1973. *American Pub. Gas Ass'n v. FERC*, 587 F.2d 1089, 1095 n.5 (D.C. Cir. 1978).

31. Pub. L. No. 95-621, 92 Stat. 3352, 15 U.S.C. §§ 3301-3432 (Supp. V 1981). For a general discussion of NGPA, *see* MacAvoy, *The Natural Gas Policy Act of 1978*, 19 Nat. Resources J. 811, 819-21 (1979) (NGPA's purpose, policy problems, and policy content); Nordhaus, *Producer Regulation and the Natural Gas Policy Act of 1978*, 18 Nat. Resources J. 829, 841-43 (1979) (producer regulations under NGPA).

32. *See* 15 U.S.C. §§ 3301, 3315 (Supp. V 1981) (providing for uniform price treatment of new natural gas whether interstate or intrastate).

33. 15 U.S.C. §§ 3331-3333 (Supp. V 1981). *See* Pierce, *Natural Gas Regulation, Deregulation, and*

of natural gas: "high-cost" natural gas³⁴ "new gas"³⁵ and "old gas."³⁶

The NGPA brought significant and unanticipated changes for the natural gas industry. In general, the NGPA is perceived as having accomplished its goal of eliminating a dual market and increasing supplies. Nevertheless, many fault the NGPA for a number of new problems.³⁷ The NGPA has been blamed for affecting adversely interstate pipeline purchasing practices, *i.e.*, onerous take-or-pay provisions and above market clearing prices. Prior to the NGPA, interstate pipelines faced lower risks in buying and reselling natural gas than encountered today. Under the NGPA, pipelines are exposed to significant fluctuations in field prices and a concomitant number of market decisions. Pipelines must choose

Contracts, 68 Va. L. Rev. 63, 87-90 (1982) (discussing statutory scheme of NGPA). Title II of NGPA required FERC to apply incremental pricing to industrial boiler fuel facilities served directly or indirectly by interstate pipelines within one year of the enactment of NGPA, and to expand that rule to apply to other industrial applications within six months of enactment. 15 U.S.C. §§ 3341-3342 (Supp. V 1981). Title III gave the President authority to declare a gas supply energy. *See id.* §§ 3361-3364. Title IV established a system of priorities during curtailment of natural gas supplies. *See id.* §§ 3391-3394.

34. High-cost natural gas, deregulated in November 1979, is gas that is expensive to locate and produce. It includes gas from new wells producing from a depth of greater than 15,000 feet, gas from geopressured brine, occluded gas from coal seams, and gas produced from Devonian shale. NGPA § 107(c), 15 U.S.C. § 3317(c) (Supp. V 1981).

35. New gas accounts for a much larger amount of natural gas than high-cost natural gas. It includes newly discovered natural gas, *see id.* § 102, 15 U.S.C. § 3312, for which the price ceiling was \$3.34/MMBtu in March 1983, and gas from new onshore production wells, *id.* § 103, 15 U.S.C. § 3313, for which the price ceiling was 2.47/MMBtu in March 1983. Final deregulation of new gas will conclude between 1985 and 1988. Before deregulation, however, price ceilings undoubtedly will rise. The price ceiling for gas from new onshore production wells increases only at the rate of inflation, *id.* § 103(b)(1)(B), 15 U.S.C. § 3313(b)(1)(B), but the price ceiling for new natural gas increases at inflation plus four percent. *Id.* § 102(b)(2)(B)(ii), 15 U.S.C. § 3312(b)(2)(B)(ii).

New natural gas from new onshore production wells deeper than 5,000 feet not dedicated to interstate commerce before April 20, 1977, and intrastate gas not dedicated to interstate commerce prior to passage of NGPA that is sold for more than one dollar per MMBtu, will be deregulated January 1, 1985. Gas from new onshore production wells less than 5,000 feet deep that is not dedicated to interstate commerce before April 20, 1977, will be deregulated on July 1, 1987. *Id.* § 121, 15 U.S.C. § 3331. Either the president or Congress can reimpose price ceilings for a maximum period of eighteen months any time between July 1, 1985, and June 30, 1987. *Id.* § 122, 15 U.S.C. § 3332.

36. Of the three categories, old gas has the most volumes of gas supplies. It includes: gas dedicated to interstate commerce prior to the enactment of NGPA, *id.* § 104, 15 U.S.C. § 3314, with ceiling prices varying from \$0.28 to \$2.27 per MMBtu in March 1983; gas sold under preexisting intrastate contracts, *id.* § 105, 15 U.S.C. § 3315, with ceiling price varying according to contract provisions; gas sold under rollover contracts, *id.* § 106, 15 U.S.C. § 3316; stripper well gas, *id.* § 108, 15 U.S.C. § 3318, with a ceiling price of \$3.58 per MMBtu in March 1983; and gas not otherwise covered by the NGPA Act, *id.* § 109, 15 U.S.C. § 3319, with a ceiling price of \$2.27 per MMBtu in March 1983.

Old intrastate gas sold under contracts in existence on November 8, 1978, or under intrastate rollover contracts, *id.* §§ 104, 106(6), 15 U.S.C. §§ 3314, 3316(b), will be deregulated on January 1, 1985, along with new natural gas, *see infra* note 35, if the contract price exceeds one dollar per MMBtu on December 31, 1984. Because the regulation contains the rate of price increase after deregulation, however, an indefinite escalation clause, cannot exceed inflation plus three percent per year. *Id.* 105(b)(3), 15 U.S.C. § 3315(b)(3).

37. *See, e.g.*, Radio Address of the President to the Nation, 129 Cong. Rec. S1733 (daily ed. Feb. 28, 1983) (prices will remain artificially high because NGPA prevents freedom to contract based on market forces); Mogel & Mapes, *Assessment of Incremental Pricing Under the Natural Gas Policy Act of 1978*, 29 Cath. L. Rev. 763, 794-98 (1978) (Title I I of NGPA will advance natural gas and petroleum fuels energy crisis by discouraging conservation).

carefully from the various categories of natural gas to achieve a cost-mix acceptable to its customers. Moreover, as the price of natural gas to consumers rises, demand for gas has become much more sensitive. These factors, combined with the recent warmer than normal winters and economic recession,³⁸ have raised questions about the possible reordering of the structure of natural gas industry pipeline industry.

B. Current Issues

The term "market disorder" has been used to describe distortions that have developed in the natural gas market³⁹ After a decade of soaring oil prices and a lesser period of natural gas shortages, a natural gas surplus and declining oil prices are manifest in the early 1980's.⁴⁰ Like past natural gas shortages which partly resulted from Commission regulation that kept interstate prices at an artificially low level, the present natural surplus also results from federal regulation or "deregulation" under the NGPA. The chief anomaly is that the price of natural gas has increased steadily despite a condition of oversupply. Also, pipeline suppliers seemingly have overlooked lower cost natural gas while acquiring more expensive supplies, including imported liquefied natural gas. All these factors have combined to create a serious and possibly irreversible consequence for the natural gas industry: markets permanently lost to alternate fuels and conservation. When the price of natural gas surpasses that of fuel oil, large industrial and commercial users of natural gas have the ability and incentive to switch to the cheaper fuel, thus exacerbating the current natural gas glut.⁴¹

The natural gas oversupply situation creates serious consequences for the industry. First, the diminished market for new gas has caused a sharp decline in natural gas exploration.⁴² Second, smaller independent producers that borrowed heavily in contemplation of sales income that is not forthcoming now may default on these loans. Third, notwithstanding their current oversupply problems,

38. The AGA reported that in 1982 U.S. industrial demand for natural gas dropped an estimated 14%, compared with an average annual decline of 1.1% during the period 1978-81. The study attributed 46% of the decline to the economic recession, 29% to fuel switching, and 25% to energy conservation. See Foster Rep. No. 1402 at 17 (Feb. 17, 1983). The use of electricity declined an unprecedented 2% in 1982 for some of the same reasons. Wash. Post, Sept. 11, 1982, at A1.

39. See Berry, *The Turmoil Over Natural Gas*, Wash. Post, May 8, 1983, at L1, col. 1. See generally *Impact of the NGPA on Current and Projected Natural Gas Markets*, 47 Fed. Reg. 19,157, 19, 159-60 (1982) (Commission Notice of Inquiry into market distortions); *Statement of Policy*, 47 Fed. Reg. 6253, 6255-56 (1982) (codified at 18 C.F.R. § 2.300) (market-ordering problem "engendered by major structural flaws" in NGPA).

40. See *supra* notes 5 and 8.

41. See *infra* note 180 and accompanying text. Because the degree of the 1983 economic recovery is uncertain, it is difficult to predict how long the oversupply situation will last. A study conducted by Merrill Lynch predicted that two-thirds of the surplus should be consumed by the end of 1983 based on a 4.5% increase in demand and 18% drop in reserve additions. *Oil & Gas J.*, Feb. 21, 1983, at 67.

42. Drilling activity began to drop sharply at the end of 1982. In May 1983, the FERC reported that there were 40% fewer drilling rigs in operation than in May 1982. FERC, *Monthly Gas Industry Activity Report* (No. 33) (May 31, 1983) at 1 (prepared by Office of Regulatory Analysis).

natural gas transmission companies presently have contractual obligations to buy additional supplies which they cannot sell⁴³ or store because they have reached or are close to reaching the capacity of their storage systems.⁴⁴

At the center of the controversy are two legal issues. First, section 601(c) of the NGPA⁴⁵ allows interstate pipelines to pass through automatically their cost of purchased gas. Consumer interests forced to pay the higher cost of deregulated gas claim that this passthrough guarantee partially has negated the pipelines' incentive to acquire the lowest cost natural gas. The second major legal issue concerns the contracts that pipelines negotiated with producers of natural gas following the shortages in the mid-1970's. In the sellers' market that followed those natural gas shortages, producers were able to negotiate contract provisions that called for the pipeline to either take natural gas or, even if not taken, pay for it.⁴⁶ Fundamentally, pipelines may have overestimated their supply needs in light of their experience of having been caught short before. These "take-or-pay" clauses have been the object of much debate because of the oversupply situation.⁴⁷

43. Columbia Gas Transmission Corporation, which supplies natural gas throughout the northeast, had such a large surplus of natural gas in 1982 that it could not purchase relatively inexpensive gas produced from wells in Appalachia. Over 20,000 small wells were shut down, and thousands of dollars worth of natural gas was consequently vented in the field. See Wash. Post, Sept. 4, 1982, at A 1, col. 2.

44. FERC has acknowledged that over 2 trillion cubic feet (Tct) of excess annual deliverability existed in 1982. See Off-System Sales by Interstate Pipelines; Statement of Policy, 48 Fed. Reg. 20,124, 20,125 (1983). FERC further reported that for the spring of 1983, "working" and "total storage" inventories for 37 interstate pipelines were 45.5% (470 Bcf) and 17.5% (594 Bcf) higher, respectively, than in the spring of 1982. See *id.* at 20,128 n.5 (concurring statement of Comm'r Richard). The storage of natural gas, primarily in underground formations, serves an important function. Demand for natural gas fluctuates dramatically according to the season. For example, in January 1979 monthly residential sales were 899.66 Bcf compared with 15.21 Bcf in July 1979. See 1 *Regulation of the Gas Industry* § 2[2] [g] (AGA 1st ed. 1981). Without the ability to draw from storage, most pipelines would be unable to meet the demand for natural gas in winter months. The inability to store natural gas was a major reason behind industry opposition to efforts to make natural gas pipelines common carriers in 1914 and 1935. See *infra* notes 90-91, 102-03 and accompanying text.

45. 15 U.S.C. § 3431(c) (Supp. V 1981). Pipelines' purchasing practices under this passthrough provision have become the source of considerable controversy because the increased cost of gas is regularly passed on to the consumers in periodic rate increase filings. Debate also has arisen over the meaning of the language of the section. See generally Statement of General Policy and Interpretations Under the Natural Gas Policy Act, 47 Fed. Reg. 6253 (codified at 18 C.F.R. § 2.300) (limiting consideration of NGPA's § 601(c) fraud standard to whether amounts paid by pipelines were excessive as result of first seller's misrepresentation); Columbia Gas Transmission Corp., 21 FERC (CCH) ¶ 63,100 (Dec. 30, 1982) (ALJ's initial decision holding that pipeline's practice of reducing purchases of low-cost gas in favor of high-cost deregulated gas constituted "abuse" under NGPA § 601(c)(2)).

46. See *Tennessee Gas Pipeline Co. v. FERC*, 606 F.2d 1094, 1114-28 (D.C. Cir. 1979) (Wilkey, J., concurring), *cert. denied*, 445 U.S. 920, 447 U.S. 922 (1981). Other special contract terms included indefinite-escalator clauses, most-favored-nation clauses, minimum hills, and area rate clauses. For a discussion of pipeline contracting practices, see Pierce, *supra* note 33, at 77-82.

47. Faced with larger fuel bills, consumers and their representatives are outraged by the irony of take-or-pay contracts. If any natural gas legislation passes in the current session of Congress, the bill will almost certainly address take-or-pay contracts. In the last session of Congress, a group of senators from the Midwest forced the issue to the floor of the Senate in December. See 128 Cong. Rec. S14694-721 (daily ed. Dec. 14, 1982). Although the Senate tabled an amendment to the NGPA that would have effectively outlawed take-or-pay provisions, *id.* at S14710 (56-38 vote to table), FERC quickly responded to congressional concern. On December 16, 1982, the Commission announced a new general policy regarding prepayments for natural gas pursuant to take-or-pay provisions in natural gas contracts and to amendments that became effective after

Recently, most of the Nation's large natural gas pipeline companies have taken significant efforts to alleviate their oversupply problem and to retain their eroding markets. Several have tried to lower gas purchase costs by modifying long-term contracts with natural gas producers in order to take without penalty natural gas below minimum contractual levels.⁴⁸ This type of action has not been uniformly welcomed. For example, Tennessee Gas Pipeline Company's emergency gas purchase policy, under which the pipeline attempted to lower costs by reducing purchases to a percentage of contract volumes regardless of contractual terms, was immediately challenged by producers in state and federal courts.⁴⁹ Other pipelines have undertaken experimental marketing programs in order to sell surplus natural gas.⁵⁰ Transcontinental Gas Pipe Line Corporation (Transco), for example, has begun a six-month experimental Industrial Sales Program (ISP).⁵¹ By the terms of the ISP, Transco has arranged, as broker, to

December 23, 1982. Take or Pay Provisions in Gas Purchase Contracts; Statement of Policy, 47 Fed. Reg. 57,268 (1982) (codified at 18 C.F.R. § 2.103). The policy statement provides that the Commission will apply "a rebuttable presumption in general rate increases that prepayments to [natural gas] producers will not be given rate base treatment if the prepayments are made pursuant to take or pay requirements in such gas purchase contracts or amendments to which exceed 75 percent of annual deliverability." *Id.* at 57,270.

48. For example, on March 29, 1983, Columbia Gas Transmission Company sent a letter to each of its over 3,000 producer-suppliers, notifying them that effective April 1, 1983, the pipeline would reduce its takes of gas to the amount it could absorb, or approximately 50% of the volumes specified in the contracts. In addition, Columbia notified producers that it would pay no more than 110% of the price for No. 2 fuel oil for high-cost deregulated gas. Through these actions, Columbia hoped to reduce its rates. *See generally* Holmes, *The Implosion at Columbia Gas*, *Fortune*, May 2, 1983, at 185, 196 (declining gas prices force Columbia Gas to rely on force majeure clauses in contracts and stop purchasing gas); *Wash. Post*, Apr. 6, 1983, at F1, col. 1 (Columbia Gas invokes force majeure clause to avoid contract inability.) Columbia has asked the Commission to issue a declaratory order ruling that a producer's withholding of lower priced natural gas in order to maximize sales of high-cost gas is an unlawful violation of the producer's obligation under the Natural Gas Act. "Petition for Declaratory Order," Columbia Gas Transmission Corp., Docket No. C183-304-000 (filed July 12, 1983).

49. Columbia's and Tennessee's actions have been challenged in court. *See, e.g.*, *Exxon Corp. v. Columbia Gas Transmission Corp.*, No. 83-1586 (W. D. La. filed June 22, 1983); *The Superior Oil Co. v. Tenneco Inc.*, No. 83-3053-A (15th Dist., Lafayette Parish, La., June 24, 1983) (granting preliminary injunction against pipeline). *But see* *Tennessee Gas Pipeline Co. v. Amoco Production Co., et al.*, Docket No. RP83-109-000 (filed July 14, 1983) (complaint by pipeline requesting FERC to assert primary jurisdiction in contract suits by producers). *Cf.* *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 452-55 (3d Cir. 1983) (narrow construction of force majeure provision in natural gas producer's warranty contract).

50. *See, e.g.*, *Texas Gas Transmission Corp.*, Docket No. CP83-485-000 (filed Aug. 25, 1983) ("AMFEED": one-year experimental marketing program for ammonia plant); *Columbia Gas Transmission*, Docket No. CP83-452-000 (filed Aug. 1, 1983) (application to transport gas sold by Exxon Corp. to industrial users on pipeline's system). *See also* "Notice of Application," *Tennessee Gas Pipeline Co., et al.*, Docket No. CP83-502-000 (Sept. 12, 1983) ("TEMPRO"). Under TEMPRO, the pipeline would act as an agent between purchasers and sellers. Each month the pipeline would establish a posted price at a level competitive with alternative fuels. Many parties have objected to the plan on the basis of potential market raiding and discrimination. *See* *Inside F.E.R.C.* (Oct. 3, 1983) at 4.

51. *See* *Transcontinental Pipe Line Corp.*, 23 FERC (CCH) ¶ 61,999 (Apr. 28, 1983) (letter order). By the terms of the ISP, Transco will arrange, as broker, to transport portions of the surplus gas that resulted from Transco's reduction in takes under prior contracts to eligible industrial customers that have contracted directly with producers for the surplus gas. Through retention of industrial gas users, Transco's fixed pipeline costs will be spread among more customers and will preserve lower rates. In essence, Transco's plan makes it a contract

transport portions of surplus gas to eligible industrial customers that have contracted directly with producers for the surplus gas. Another object of the plan is to create a greater supply of lower priced natural gas available to industrial customers in order to keep such industrial users from switching their energy supply to oil.

The Commission has attempted to respond to these problems, but it is constrained by the current statutory framework. In less than eighteen months, the Commission issued policy statements on the "fraud and abuse" issue, the take-or-pay issue, and off-system sales.⁵² Such policies, however, do not have the effect of law.⁵³ In addition, the Commission recently has issued final rules intended to encourage but not mandate transportation by interstate pipelines of natural gas owned by end-users.⁵⁴ Therefore, without any Commission power *inter alia* to mandate common carriage for the natural gas industry, and if specific *ad hoc* proposals of pipelines are not adequate, congressional action is perceived as being required.

III. COMMON LAW HISTORY OF COMMON CARRIAGE

*The knowledge of past times . . . is . . .
ornament and nutriment to the human mind.*
Leonardo Da Vinci⁵⁵

A. A Short History of Common Carriage

The common carrier doctrine developed under English common law during the Middle Ages. Although the exact date is not known, the term "common carrier" was first used sometime after 1300. Among the first professions to have

carrier. Instead of assuming the obligations and risks of taking title to natural gas purchased at the wellhead, Transco will transport natural gas only on behalf of one of its customers. The pipeline recovers a reasonable transportation fee that reflects a portion of its fixed costs.

52. See *supra* notes 44, 45, and 47.

53. See *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (agency policy statement no binding norm).

54. Order No. 234-B, Interstate Pipeline Blanket Certificates for Routine Transactions and Sales and Transportation by Interstate Pipelines and Distributors, 48 Fed. Reg. 34,872 (1983); Order No. 319, Sales and Transportation by Interstate Pipelines and Distributors; Expansion of Categories of Activities Authorized Under Blanket Certificate, 48 Fed. Reg. 34,875 (1983).

Order No. 234-B (RM81-19-000) extended the blanket certificate program to cover interstate pipeline transportation to all end-users, including industrial and boiler fuel users, during an experimental two-year period ending June 30, 1985. Transportation for periods up to 120 days is authorized on a self-implementing basis, while transportation for longer periods is subject to the notice and protest procedures contained in the blanket certificate regulations.

Order No. 319 (RM81-29-000) extended the Commission's blanket certificate program adopted in May 1982 to cover interstate pipeline transportation of direct sale gas to high priority end-users. To encourage such transportation, the Commission authorized pipelines electing to credit transportation revenues received in excess of 1¢/MMBtu to Account 191 (in lieu of establishing a representative level of transportation volumes or revenues to be reflected in test period rates) to collect and retain an additional charge up to 5¢/MMBtu. This additional incentive charge (AIC) will be permitted on an experimental basis for a period of about 18 months.

55. See *Aston, The Fifteenth Century* 85 (1968).

the term applied to it were printers and boatmen.⁵⁶ An earlier reference to common carrier — “*aliis communibus cariatoribus*” — referred to “the old order of porters and creelmen.”⁵⁷

One of the most important contributions to the common carrier doctrine was made in the middle of the 17th Century by Sir Matthew Hale, Lord Chief Justice of the King’s Bench⁵⁸ In *De Portibus Maris*, he summarized the law of businesses “affected with a public interest,” as follows:

If the king or subject have a publick wharf unto which all persons that come to that port must come and unlade or lade their goods, because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, . . . in that case there cannot be taken arbitrary and excessive duties or cranage, wharfage, pesage, and so forth, neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate though settled by the king’s license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *Juris prirati* only.⁵⁹

English courts distinguished between “common callings,” or “public employments,” and “private employments.” These “common” occupations included innkeepers, surgeons, smiths, victualers, ferrymen, carriers, bargemasters, wharfingers, teamsters, taverners, and sheriffs.⁶⁰ The most

56. Porters and boatmen were among the first professions referred to as common carriers. See Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 147 n.31 (1914).

57. See Beverly Town Documents 22 (Selden Society 1900) (covering period 1300-1600). Governments, however, regulated business practices long before the 14th century. The early Church Fathers created the ancient ideal of *justum pretium*, or “just price,” to prevent economic coercion in circumstances in which a seller could obtain any price for his goods, such as time of famine. Early governments soon recognized this doctrine. For example, during the decline of the Roman Empire in the years 285 and 301, A.D., the Emperor Diocletian implemented the doctrine of just price and set prices on 700-800 articles. See M. Glaeser, *Public Utilities in American Capitalism 196-97* (1957) (discussing history of just price doctrine).

In the medieval economy, town authorities, manorial courts, and guilds representing merchants and craftsmen regulated services and prices. These authorities typically applied the “just price” doctrine to allow a seller to charge only the customary price-cost plus a marginal profit. See P. Garfield & W. Lovejoy, *Public Utility Economics* 3 (1964).

The rise of nation-states during the sixteenth century gave birth to the economic policy of mercantilism. Under mercantilism, national governments exerted control over economic matters within their boundaries. They regulated prices, wages, and the quality and quantity of production, and granted monopolies by royal charter to trading and plantation companies. This policy of centralized control arose because governments believed they could promote the power and wealth of the monarchical state better than local economies. The modern concept of a public service corporation—a private enterprise chartered to perform certain government functions—was a collateral development of mercantilism. See M. Glaeser, *supra*, at 200; P. Garfield & W. Lovejoy, *supra*, at 3.

58. Sir Matthew Hale (1609-1676) was the author of two important treatises, *De Portibus Maris* and *De Jure Maris*, which dealt with the law of businesses affected with a public interest. These works have been published in I F. Hargrave, *A Collection of Tracts Relative to the Law of England, from Manuscripts* (Dublin 1787).

59. *Id.* at 77-78.

60. “Common callings” or occupations included innkeepers, see generally J. Beale, *The Law of Innkeepers and Hotels* § 12 (1906) (defining public calling characteristics of innkeepers), surgeons, smiths, carriers, bargemas among many other professions. For an exhaustive list of common callings, see Adler, *supra* note 56, at 149-51.

striking characteristic of a “common calling” was that it was a profession to serve the public needs. A “holding out” to the general public had to exist for a calling to be common.⁶¹ A “common” or “public” business had to observe special duties that other businesses did not.⁶²

The distinction between the private callings—the rule—and the public callings—the exception—is the most consequential division in the law governing our business relation. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten and give any rebates that are advantageous. All this time in public business one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable changes for the services that are rendered, and between customers under similar circumstances make no discriminations.⁶³

In 1710, an English court proclaimed that “any man undertaking for hire to carry the goods of all persons indifferently, . . . is, as to this privilege, a common carrier.”⁶⁴ Similarly, in *Lane v. Cotton*, it was observed:

If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an innkeeper refusing a guest, when he has room, against a carrier refusing to carry goods when he has convenience, his waggon not being full.⁶⁵

In sum, the essence of common carriage is the duty to serve all a reasonable rate⁶⁶ and the strict liability for the care of goods entrusted to it.⁶⁷

Toward the end of the eighteenth century many “common” callings in common law countries ceased to hold that status. The mercantilistic concepts of public interest and common carriage lost favor to laissez-faire economics. These economic principles elevated the institutions of private property and contract and advocated freedom from legal restraints.⁶⁸

Despite the influence of laissez-faire principles on American economic development, the common carrier doctrine re-emerged in the United States after the Civil War.⁶⁹ The expansion of the railroads across America led to

61. To be considered a “common calling,” a business had to have a “holding out” of service to meet public needs. It also had to fulfill special duties not imposed on private businesses. See M. Glaeser, *supra* note 56, at 199; B. Wyman, *The Special Law Governing Public Service Corporations and All Others Engaged in Public Employment* § 1 (1911); Adler, *supra* note 56, at 152.

62. For example, a common carrier was strictly liable for the care of goods entrusted to him. See generally J. Angell, *A Treatise on the Law of Carriers of Goods and Passengers by Land and Water* §§ 148-219 (Boston 1849) (common carriers are insurers).

63. Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1904).

64. *Gisbourn v. Hurst*, 1 Salk. 249, 91 Eng. Rep. 220 (1710). The case involved an action in trover for goods taken from the wagon of a carrier transporting cheese to London. Such carriers usually held themselves out to carry goods for all indifferently.

65. 1 Ld. Raym. 646, 654, 91 Eng. Rep. 1332 (1701).

66. A private calling was not subject to government regulation and could sell whatever it pleased to whomever it pleased at any price. See Adler, *supra* note 56, at 140-41.

67. See *supra* note 62.

68. See A. Smith, *The Wealth of Nations* 650-52 (Random House ed. 1937) (1st ed. 1776).

69. See M. Glaeser, *supra* note 56, at 205; D. Pegrum, *Transportation Economics and Public Policy* 260-

competitive practices that were abusive to shippers. For example, railroads charged very low rates to eliminate competition. Once a monopoly was established, however, they would raise the rates.⁷⁰ Consequently, Congress regulated the railroads, making them common carriers, by passing the Act to Regulate Commerce of 1887,⁷¹ now known as the Interstate Commerce Act. For the first time, a federal statute incorporated the common law obligations of common carriers.⁷²

Several years before, in *Munn v. Illinois*,⁷³ the United States Supreme Court upheld an Illinois statute that designated grain elevators as public warehouses. *Munn* represents the origin in this country of the principle that certain businesses are "affected with a public interest."⁷⁴ In 1871, *Munn* arose when Illinois passed a law licensing warehouses and elevators and setting maximum rates for them. Two Chicago elevator owners refused to obtain a license and continued charging rates above the statutory maximum. The Supreme Court upheld the Illinois statute, citing in support Lord Chief Justice Hale's work *De Portibus Maris*.⁷⁵ The Supreme Court concluded in *Munn*:

[W]e find that when private property is affected with a public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than two hundred years ago, . . . and been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.⁷⁶

Today, principles of common carriage are found, *inter alia*, in such

61 (1968).

70. L. Gorton, *The Concept of the Common Carrier in Anglo-American Law* 43 (1971).

71. Ch. 104, 24 Stat. 379 (codified as amended by the Interstate Commerce Act at 49 U.S.C. §§ 10101-11917 (1976 & Supp. V 1981); see *infra* notes 85-86.

72. See D. Pegrum, *supra* note 69, at 275-79. The author notes that the Act also required that all rates be just and reasonable, and prohibited discrimination or undue preference. The Act applied to all common carriers who moved goods by railroad in interstate or foreign commerce. It also included common carriers who transported goods partly by rail and partly by water if both modes of transport were under common control. *Id.* Congress subsequently has regulated other common carriers in addition to railroads. For a discussion of the Shipping Act of 1916, which regulated common carriers over waters in foreign commerce, the Motor Carrier's Act of 1935, and The Federal Aviation Act of 1958, see L. Gorton, *The Concept of the Common Carrier in Anglo-American Law* 178-213 (1971).

73. 94 U.S. 113 (1877). In 1871, Illinois passed a law licensing warehouses and elevators and setting maximum rates. *Id.* at 115. Two Chicago elevator owners refused to obtain a license and continued charging rates above the statutory maximum. *Id.* at 117-18. The Supreme Court held that one who uses his property for a use in which the public has an interest grants the public an interest in the property's use and is required to acquiesce to public control for the common good. *Id.* at 125.

74. *Id.* at 125. For information on other state statutes designating certain businesses as public utilities, see M. Hunter, *The Early Regulation of Public Service Corporations*, 7 *Amer. Econ. Rev.* 569, 569-71 (1917).

75. See *supra* notes 58-59.

76. 94 U.S. at 125-26.

industries as rail, motor, air, water, pipeline carriers, and communications.⁷⁷

B. Contract Carrier - A Form of Common Carriage

At common law the only two classes of carriage recognized were common and private. In *Niagara v. Cordes* the Supreme Court in 1858 stated:

A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey⁷⁸

Although a common carrier cannot select its customers, it may limit its service by restricting the nature of the items it transports, as long as it holds itself out to serve that entire class without discrimination.⁷⁹

In contrast, a private carrier has no duty to serve the public and may accept or reject offers even if it has available capacity to carry the goods.⁸⁰ A contract carrier also differs from a common carrier in that it provides transportation services subject to contracts with one or a limited number of persons of its choosing.⁸¹ The concept of the contract carrier arose in the 1920's in the

77. Since the late 1800's, American courts have recognized that various businesses enjoy common carrier status. See, e.g., *The Pipe Line Cases*, 234 U.S. 548, 559-60 (1914) (upholding federal statute making interstate oil pipelines common carriers); *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 414-15 (1914) (fire insurance business recognized as common carrier); *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 437 (1889) (ship carrying goods for hire is common carrier); *Arrow Aviation, Inc. v. Moore*, 255 F.2d 488, 490 (8th Cir. 1959) (air carrier who holds self out to public as willing to transport all passengers for hire indiscriminately is common carrier); *Fort Street Union Depot Co. v. Hillen*, 119 F.2d 307, 312 (6th Cir.) (terminal company that provides public with railroad transportation service is common carrier), *cert. denied*, 314 U.S. 642 (1941); *Weiner v. May Dept. Stores Co.*, 35 F. Supp. 895, 896 (S.D. Cal. 1940) (escalator operators are common carriers); *United States v. Sioux City Stock Yards Co.*, 162 F. 556, 560 (C.C.N.D. Iowa 1908) (beltline companies moving cattle from main rail lines to stockyards deemed common carriers), *aff'd*, 167 F. 126 (8th Cir. 1909); *Illinois Highway Transp. Co. v. Hantel*, 323 Ill. App. 364, 370-71, 55 N.E.2d 710, 714-15 (1944) (bus companies deemed common carriers); *Railway Express Agency v. Kessler*, 189 Va. 301, 305, 52 S.E.2d 102, 103 (1949) (express and messenger companies are common carriers). See also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979) (discussing Section 3(h) of the Federal Communications Act of 1934, 47 U.S.C. § 157(h), in context of cable television).

78. *The Propeller Niagara v. Cordes*, 62 U.S. 7, 22 (1858).

79. See *Nugent v. Smith*, 1 C.P.D. 19, 27 (1875) (the English court of common pleas) (test is whether person holds out expressly or impliedly, that he will carry all persons' goods for hire). See also J. Story, *Commentaries on the Law of Bailments* § 495 (9th ed. 1878) (common carrier must exercise public employment, undertake to carry for persons generally, and hold himself out to transport goods for hire as business rather than casual occupation).

80. At common law, persons transporting their own goods as well as those operating under contracts to transport goods for others were deemed common carriers. See *Delz v. Winfree*, 80 Tex. 400, 402, 16 S.W. 111, 112 (1891). See also W. MacNamara, *The Law of Carriers of Merchandise and Passengers by Land* 6 (1925) (defining private carrier as one who carries goods for fee on occasion, but not as public employment, and invites all to employ him as carrier, reserving the right to reject their offer of goods).

81. *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 410 n.1 (1956). See *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 674 (5th Cir. 1981) (carrier not common carrier if it makes individualized decisions as to service), *cert. denied*, 103 S. Ct. 800 (1983). In *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 390 (1949), the ICC defined contract carrier as "an independent contractor whose undertaking is defined and limited by an individual contract which calls for a service specialized to meet the peculiar needs of a particular shipper or a limited number of shippers and operates to make the carrier virtually

trucking industry, which was later regulated by the Motor Carrier Act of 1935.⁸² Certain truck operators, whose services did not fit neatly into either category of common or private carriage, were termed contract carriers because their services were “individual and specialized.”⁸³

Most fixed-rate interstate transport systems existing today have common carrier status, at least nominally, and are subject to government regulations. This common carrier status promotes two important goals. First, it ensures equal access to transportation facilities for industries in which production activity and end-use markets are far apart. Second, common carriage regulations prevent ruinous competition between carriers in industries with substantial fixed costs, such as the railroad industry, by granting quasi-franchises for specific routes.

Natural gas pipeline companies, despite characteristics quite similar to other common carriers, have avoided common carrier regulation. Although natural gas pipelines are heavily regulated, they operate as private and contract carriers because they take title to the gas that they transport and offer transportation under individualized contracts. The natural gas industry’s problems, however, have presented the possibility of imposing common carrier status on natural gas pipelines.

IV. PRIOR LEGISLATIVE ATTEMPTS TO IMPOSE COMMON CARRIAGE ON INTERSTATE NATURAL GAS PIPELINES

*Power goes to the factor which is
hardest to obtain or hardest to replace.*

John Kenneth Galbraith⁸⁴

A. Before the Natural Gas Act

Congress first considered the imposition of common carrier status on interstate natural gas pipelines when it chose in 1906 to regulate oil pipelines as common carriers under the Interstate Commerce Act.⁸⁵ Although Congress chose not to include natural gas pipelines at that time,⁸⁶ efforts to impose

a part of each shipper’s organization.” See also *ICC v. A.W. Stickle & Co.*, 41 F. Supp. 268, 271 (E.D. Okla. 1941), *aff’d*, 128 F.2d 155 (10th Cir.), *cert. denied*, 317 U.S. 650 (1942). This case involved a fine distinction between common and contract carriage. The ICC alleged that the defendant corporation had engaged in the transportation of lumber in interstate commerce without having complied with federal regulations. The company claimed it was a private carrier because the transportation of lumber was merely incidental to its primary business as a lumber wholesaler. The court found that the company was a common carrier, however, because it solicited business from retail lumber dealers in its territory and agreed to deliver to any customer any lumber purchased. In return, it charged and received compensation for the cost of transporting the lumber. *Id.* at 272. For additional discussion of the differences between common, private, and contract carriers, see Campbell, *The Contract Carrier: A History of the Concept*, 29 I.C.C. Pract. J. 952, 957 (1962).

82. 49 U.S.C. §§ 301-327 (1976) (amended 1978 & 1980).

83. 49 U.S.C. § 303(a)(15) (1976).

84. Galbraith, *The New Industrial State* 56 (1967).

85. Interstate Commerce (Hepburn) Act of 1906, ch. 3591, 34 Stat. 584 (codified as amended at 49 U.S.C. § 1-27 (1976)).

86. The Hepburn Act originally defined common carrier for the purpose of the act to be “any corporation

common carrier status on interstate natural gas pipelines were renewed. On November 3, 1913, the Senate, without debate, passed a bill, S. 3345,⁸⁷ to amend the Act of 1887 to put companies transporting natural gas by means of pipelines under the control of the Interstate Commerce Commission. The bill's intent was to make these pipelines common carriers as had been done in 1906 with regard to oil pipeline companies. The bill's proponents were motivated by the desire to compel the then federally unregulated pipelines to deliver more gas to the Midwest during the winter.⁸⁸

In 1914, the House Committee on Interstate and Foreign Commerce held hearings on S. 3345.⁸⁹ At that time, the issue of common carriage fully was aired, and pipeline interests raised a storm of protest over the Senate's action. Representatives from the industry argued that natural gas pipelines were fundamentally different than oil pipelines because of the nature of natural gas.⁹⁰ It was asserted that natural gas could not be stored like oil, had to be used contemporaneously with its transportation, and its usage was subject to seasonal peaks. Ultimately, the pipelines' position prevailed over the contention that the "world of gas available" could be brought to market at economical prices if pipelines were common carriers.⁹¹

B. Immediately Prior to the Passage of the Natural Gas Act

Although the Congress passed the Natural Gas Act (NGA) in 1938, the Act originated ten years earlier in Senate Resolution 83.⁹² That resolution authorized and directed the Federal Trade Commission (FTC) to investigate certain aspects of public utility corporations doing an interstate business in electricity or gas.⁹³ The FTC made monthly reports to the Congress for over seven years, making recommendations as to possible legislation to "correct any abuses that may exist in the operation of such holding companies."⁹⁴ This initial inquiry into the

or any persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipelines. . . ." Interstate Commerce Act of 1906, Pub. L. No. 59-337, 34 Stat. 584. This provision, as amended by the Interstate Commerce Act of 1920, Pub. L. No. 152, ch. 91, 41 Stat. 474 (current version at 49 U.S.C. § 1(1)(b) (1976)), retained the exception for natural gas pipelines. *Id.*

87. S. 3345, 63d Cong., 1st Sess., 50 Cong. Rec. 5847, 5847-49 (1913).

88. The bill's proponents noted that there was an "abundance of natural gas" ready to be marketed in Kansas and Oklahoma, but the pipeline serving the area refused to deliver it. *Id.* at 5847.

89. *To Make Gas Pipe Lines Common Carriers: Hearings on S. 3345 Before the House Comm. on Interstate and Foreign Commerce*, 63d Cong., 2d Sess. (1914) [hereinafter cited as 1914 Hearings].

90. Industry representatives, opponents of the bill, argued that the nature of natural gas precluded imposition of common carrier status on natural gas pipelines. *See, e.g.*, 1914 Hearings, *supra* note 89, at 75-79 (statement of S.M. Douglass, Counsel for Logan Natural Gas & Fuel Co.). For a full discussion of industry arguments against imposition of common carrier status on natural gas pipelines, *see infra* notes 101-09 and accompanying text.

91. Proponents argued that making natural gas pipelines common carriers would allow the "world of gas available" to be brought to the market at economical prices. *See 1914 Hearings, supra* note 89, at 3-7 (statement of Rep. Borland). H.R. 5423 died in committee. *See infra* notes 111-12 and accompanying text (discussing subsequent legislation).

92. 70th Cong., 1st Sess., 69 Cong. Rec. 3054 (1928).

93. *Id.*

94. *Id.* The reports fill more than 100 volumes. *See Note, Legislative History of the Natural Gas Act*, 44 Geo. L.J. 695, 697-98 (1956).

natural gas industry produced a recommendation that the Congress consider imposing common carrier obligations on interstate natural gas pipelines. In a portion of the report filed January 28, 1935, the FTC advised the Congress to:

give consideration to the enactment of legislation declaring all interstate gas pipelines to be common carriers or public utilities subject to Federal control and regulation as to construction, operation, financing, and matters affecting the purchase, shipment, sale, and distribution of natural gas.⁹⁵

Eleven months later, when the FTC submitted its final report including specific recommendations concerning the natural gas industry, no recommendation of a common carrier provision for natural gas pipelines was made.⁹⁶

In the same year, 1935, Representative Sam Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce, introduced H.R. 5423 for the control and elimination of public utility holding companies.⁹⁷ Extensive hearings were held.⁹⁸ Title III concerned the regulation of the natural gas industry, but this title was not reported out of committee. With significant amendments and alterations, however, this Title III ultimately became the NGA in 1938. Sections 303 and 304 of H.R. 5423 imposed a common carrier obligation on natural gas pipelines.⁹⁹ They provided in pertinent part:

Section 303(a). It shall be the duty of every distributor to furnish natural gas to, exchange natural gas with, and transmit natural gas for any person upon reasonable request therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort and conveniences of all its customers, employees, and the public, and shall be in all respects adequate, efficient and reasonable.

Section 304. Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, it may by order direct a distributor to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more persons, to permit those of its facilities by one or more persons, or to utilize the facilities of, sell natural gas to, purchase natural gas from, transmit natural gas for, or exchange natural gas with one or more other persons. . . . [T]he Commission may prescribe the terms and conditions of the arrangement to be made between such persons, including the apportionment or reimbursement reasonably due to any of

95. Docket No. 12, 70th Cong., 1st Sess. pt. 73(a), 75 (filed Jan. 28, 1935).

96. Instead, the FTC advised that interstate gas pipelines be regulated as utilities. Docket No. 92, 70th Cong., 1st Sess. pt. 84-A, 1616-17 (1936). The other principal source of congressional impetus to regulate the natural gas industry, The Splawn Report, also did not recommend that gas pipelines be regulated as common carriers. See H.R. Rep. No. 2192, 72d Cong., 2d Sess. (1933); Note, *supra* note 94, at 698 nn.29-30.

97. H.R. 5423, 74th Cong., 1st Sess., 79 Cong. Rec. 1624 (1935). This bill, known as the Rayburn Bill, contained three titles. Title I became the Public Utility Holding Company Act of 1935. Ch. 687, 49 Stat. 803 (1935) (current version at 15 U.S.C. §§ 79-792 (1976 & Supp. V 1981). Ch. 285, 41 Stat. 1063 (1920) (current version at 16 U.S.C. § 791a-825r (1976 & Supp. V 1981)). Title III, which concerned the regulation of the natural gas industry, was not reported out of committee with the other two titles. After significant amendment, however, in 1938 Title III became the NGA. Ch. 445, 52 Stat. 821 (1938) (current version at 15 U.S.C. §§ 717-717w (1976 & Supp. V 1981)).

98. See *Hearings Before the Comm. on Interstate and Foreign Commerce, House of Representatives on H.R. 5423*, 74th Cong., 1st Sess., 1646 (1935) [hereinafter cited as *Hearings on H.R. 5423*].

99. These sections particularly aroused industry. See their comments cited *infra* note 101.

them.¹⁰⁰

Thus, the original version of the NGA actually contained a comprehensive and extensive scheme to make pipelines common carriers.

During hearings held on H.R. 5423, several witnesses from the natural gas industry opposed the common carrier provision as being unrealistic and unworkable.¹⁰¹ Arguments against imposing a common carrier obligation upon interstate natural gas pipelines attempted to distinguish natural gas transportation from other common carrier enterprises, such as railroads, oil pipelines, and telephones. First, it was argued significant volumes of natural gas could not be stored economically as could oil or freight.¹⁰² Rather, natural gas had to be "used as fast as delivered and delivered as fast and only as fast as consumed."¹⁰³ Second, natural gas transmission companies claimed that they did not hold themselves out to be common carriers, whereas railroads and oil pipelines did.¹⁰⁴ Witnesses emphasized that the natural gas industry from wellhead to burnertip was integrated, not by ownership but physically and practically.¹⁰⁵ Railroads and oil pipelines, in contrast, were concerned solely with transportation. They neither purchased nor distributed their product. In the early era of natural gas usage,¹⁰⁶ however, a natural gas pipeline company usually secured supplies by producing gas itself, or by purchasing it from a production affiliate. It also was involved in the local distribution business. Distributors were sometimes completely dependent on one interstate gas pipeline. Moreover, the pipeline companies viewed the industry as an integrated whole since they designed a sale as a complete unit. Customers had to be assured an adequate supply of gas even on the coldest day. Because of this service obligation, pipeline companies were reluctant to assume solely a transportation function or to rely completely on independent producers for supplies of gas.¹⁰⁷

100. H.R. 5423, 74th Cong., 1st Sess. §§ 303-304 (1935).

101. See Hearings on H.R. 5423, *supra* note 98, at 1648, 1698-1700, 1732-33, 1740-43, 1803-04, 1813-14, 1841-42, 1867, 1874, 1907, 2282-84.

102. See *id.* at 1733, 1741, 1803, 1813-14. Natural gas delivery was tied directly to consumption.

103. *Id.* at 1803.

104. See *id.* at 1732-33 (unlike gas pipelines, oil pipelines and railroads, as common carriers, must accept shipments based on capacity available and transport with due care).

105. Today, interstate natural gas pipelines sometimes purchase all of their gas from independent producers for resale to nonaffiliated distributors. Only "rarely" did a pipeline purchase all of their gas from unaffiliated producers and deliver to unaffiliated distributors at the time of these hearings. *Id.* at 1730. One witness maintained that the perception that the transmission function was separate "belied the inherent physical characteristics of the business. *Id.*

106. The Committee Representing the Natural Gas industry reported to the House Committee that in 1933 over 1200 companies furnished gas under this integrated system to approximately 5,000 communities in 38 states, representing an investment of over \$2.3 billion. Transmission and gathering lines stretched over 75,000 miles. About five million people used natural gas in their homes. *Id.* at 1787.

107. Floyd C. Brown, the witness for Natural Gas Pipeline Co. of America, a major supplier of Chicago, stated that: "It would not only be impractical but virtually impossible to furnish dependable service to 1,200,000 domestic consumers if the pipe-line company were dependent on the whims and fancies of independent producers to drill additional wells as required. . . ." *Id.* at 1740 (statement of Floyd C. Brown). Imposition of the obligation to "carry gas for hire, and procure a portion of line requirements from irresponsible scattered producers, with no interest other than that of selling such gas as they might conveniently care to produce would completely paralyze the operating, control and service." *Id.* at 1742. See also *id.* at 2283

Maintaining a balanced delivery system with adequate but not excess capacity was a difficult task.¹⁰⁸ The pipeline companies did not want the added burden of balancing and accounting for volumes of gas that they were ordered to be transported. They feared such an obligation would thoroughly confuse and handicap the growing industry. One witness concluded:

to make natural gas pipe lines common purchasers and common carriers would disorganize the present satisfactory service to the public and increase the cost which in the end must be borne by the consumers.¹⁰⁹

A common carrier provisions again appeared in 1936 during hearings on H.R. 11662,¹¹⁰ which was introduced after H.R. 5423 died in committee.¹¹¹ H.R. 11662 had no common carrier provision,¹¹² but at least two witnesses at the hearings were asked to address specifically the issue of natural gas pipeline common carrier status.¹¹³ The subcommittee's first witness, the Solicitor of the Federal Power Commission, Dozier DeVane, confirmed at the outset that this bill contained "no provision . . . which gives the Commission the authority to make their [pipelines] take gas . . ."¹¹⁴ Mr. DeVane also noted that natural gas pipelines were different from railroads, electric utilities, and telephone utilities because the capacity of a pipeline is limited where the capacity of the others is not. He concluded:

(statement of Electric Bond & Share Co.). Natural gas pipelines secured their supply of natural gas by producing gas themselves and by implementing long-term contracts with independent producers. *See id.* at 1804 (statement of Committee representing the Natural Gas Industry) (noting that ownership of production fields and long-term contracts precludes miscellaneous purchasers of supplies).

108. A sudden change in weather necessitates the manipulation of valves regulating compression all along the pipeline. The pipelines used their own phone systems and dispatchers to order the switching of these valves, and sometimes the closing of valves in industrial plants, to protect service to individual homes and hospitals. *See id.* at 1731, 1842. A witness for the pipeline that supplied East Ohio Gas Co. explained that on one day in Cleveland, following a temperature drop from 60° to 10°, natural gas consumption jumped from 50,000,000 to 230,000,000 cubic feet. *Id.* at 1699-1700 (statement of Ralph W. Gallagher). Today there remains a dramatic difference between usage in summer and in winter that necessitates significant storage procedures by the pipelines. *See supra* note 44.

109. *See Hearings on H.R. 5423, supra* note 98, at 1840 (making gas pipelines common carriers would destroy service to 4.5 million people). Gas industry representatives emphasized that a pipeline was a monumental financial undertaking. Pipelines sought to secure their investment by producing their own supplies, which was quite costly. Forcing pipelines to carry other gas might squeeze their own production out of the marketplace. Moreover, pipelines ultimately would stop producing their own gas and become dependent on independent producers. Such a result would lead to higher rates for consumers. *See id.* at 1804, 1874, 2283.

110. H. R. 11662, 74th Cong., 2d Sess. (1936).

111. Following hearings on H.R. 11662, a "clean" bill, H.R. 12680 was reported and introduced, but that bill failed passage in the Seventy-fourth Congress. H.R. 4008, which was substantially similar to H.R. 12680 was introduced in the next Congress however, and, following further hearings, a "clean" version of that bill ultimately passed as the NGA. *See* H.R. 6586, 75th Cong., 1st Sess. (1937). For an outline of all these proposals, *see* Note, *supra* note 94, at 697-98.

112. H.R. 11662 had no common carrier provision, but did authorize the Commission to require interstate natural gas pipelines to extend their facilities to municipalities. H.R. 11662, 74th Cong., 2d Sess. § 7(a) (1936).

113. *Hearings on H.R. 11662 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 2d Sess. (1936) [hereinafter cited as *Hearings on H.R. 11662*].

114. *Id.* at 38 (statement of Dozier A. DeVane).

if the service of the other community depending on that natural gas requires all the pipe line is able to transport, then, of course, you cannot give gas to a community that may deserve it.¹¹⁵

Colonel William T. Chantland, a FTC attorney involved in an investigation of utilities, testified:

The reasons are perhaps not so much against the idea of making the obligation as they are factual, against the legal situation. The Supreme Court has said, of course, very definitely, that you cannot make a person a common carrier by declaring him to be one. The facts are the things which control. And in the natural-gas pipe-line industry the natural-gas pipe-line company carries to a large extent its own gas, whether it is produced by the company or purchased from others, so that a large number of them are outside the field of common carriers.¹¹⁶

Although Congress initially considered the idea of treating natural gas pipelines as common carriers, strong advocacy by the pipeline industry dissuaded legislative action.¹¹⁷ Thus, by 1938, when the Natural Gas Act passed, Congress appeared convinced that imposing common carrier status upon interstate natural gas pipelines was not required.

C. Legislation after the Natural Gas Act Affecting Interstate Natural Gas Pipelines

Congressional action with respect to the natural gas industry did not end with the passage of the NGA. Since 1938, Congress, in enacting several statutes, debated the common carrier issue several times, but no current law imposes common carrier status on interstate gas pipelines.

Initially, Congress confronted a problem specifically because it did not make pipelines common carriers. In 1947, Congress amended the NGA to give interstate natural gas pipelines the right of eminent domain.¹¹⁸ The right of eminent domain provides that property may be taken for public use.¹¹⁹ In several

115. *Id.* at 37-38.

116. Hearings on N.R. 11662, *supra* note 113, at 67 (statement of William T. Chantland). Colonel Chantland referred to *Michigan Pub. Util. Comm'n v. Duke*, 266 U.S. 570, 577-78 (1925). Colonel Chantland did propose that pipelines be made to be common purchasers, although not common carriers. He believed that if pipelines did not supply their entire supply of gas themselves, they should purchase ratably from other suppliers; "They must assume some sort of obligation to those who supply the gas to them." *Hearings on H.R. 11662*, *supra* note 113, at 59.

117. It may be that the resolution of the common carrier issue was a foregone conclusion. In remarks delivered on the House floor on January 11, 1935 (prior to the April hearings on H.R. 5423, Representative Rayburn announced that he believed their exemption from the Interstate Commerce Act's common carrier provision was "probably correct." 79 Cong. Rec. 374, 375 (1935).

118. The Natural Gas Act of 1947, ch. 333, 61 Stat. 459 (1947) (codified at 15 U.S.C. § 717f(h) (1976)), provides:

when any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to contract, operate, and maintain a pipe line . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

119. In the United States, the exercise of the power of eminent domain, as founded in the federal and state constitutions, is referred to as "condemnation," or "expropriation." Black's Law Dictionary 470 (rev. 5th ed. 1979).

states, however, the term “public use” was construed to be limited to local use and, thus, did not include endeavors solely in interstate commerce.¹²⁰ If a pipeline crossed a state without distributing gas in that state, the pipeline was not allowed to condemn the land necessary to construct the pipeline. Some states expressly denied the right of eminent domain to natural gas companies even though the federal certificate of public convenience and necessity permitted the company to pass through a given area.¹²¹ Rail, water, and air carriers were required to be common carriers under federal law, and, as such, had been granted the right of eminent domain by Congress.¹²² Congress chose not to make interstate natural gas pipelines of common carriers. Instead, it expressly granted them the right of eminent domain.

Congress handled differently the status of natural gas pipelines operating on federal lands. Section 28 of the Mineral Leasing Act of 1920 provided that rights-of-way through public lands would be granted to natural gas pipelines by the Secretary of Interior only “upon the express condition that such pipelines shall be constructed, operated and maintained as common carriers.”¹²³ In 1935, Congress expanded the provision by requiring that such pipelines “shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe-line in such proportionate amounts as the Secretary . . . determine[s] to be reasonable.”¹²⁴ Thus, if a natural gas pipeline company desired to operate on federal lands, it had to agree to assume the burdens of a common carrier and of a common purchaser. The Act did not provide, however, for the regulation of rates charged by such pipelines.

The absence of rate regulation in the Mineral Leasing Act was not challenged until 1941 when a dispute arose between Montana-Dakota Utilities Company, an interstate pipeline operating on federal lands pursuant to the Act, and one of its customers.¹²⁵ That customer, Mondakota Development Company, complained that rates charged by the pipeline for transportation were excessive and discriminatory, and that fair rates should be set by the Commission. In response, the pipeline maintained that its common carriage was not subject to Commission rate regulation. The Commission rejected the pipeline’s argument, pointing out that without an obligation to publish and maintain reasonable and nondiscriminatory rates, “the statutory obligation to transport natural gas as a

120. See, e.g., *Shedd v. Northern Indiana Pub. Serv. Co.*, 188 N.E. 322, 325-26 (Ind. 1934); *Columbus Waterworks Co. v. Long*, 22 So. 702, 704 (Ala. 1899).

121. See H.R. Rep. No. 429, 80th Cong., 1st Sess. 2-3 (1947) (Arkansas, Wisconsin, and Nebraska).

122. See *id.* at 3.

123. Section 28 of the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437, 449 (current version at 30 U.S.C. § 185 (1976)).

124. Act of Aug. 21, 1935, ch. 599, § 28, 49 Stat. 674, 678-79 (1935) (current version at 30 U.S.C. § 1855 (1976)). Although the Act did not provide explicitly for the regulation of rates charged by such pipelines, the Commission assumed authority to require reasonable rates for common carrier service.

125. *In re Mondakota Gas Co. v. Montana-Dakota Utils. Co.*, 5 F.P.C. 64 (1946), *aff'd in part and rev'd in part*, 169 F.2d 392 (8th Cir.) *cert. denied*, 315 U.S. 95 (1948).

common carrier would be useless."¹²⁶ The Eighth Circuit upheld the Commission's view, finding that the pipeline was subject to the rate regulation of the Commission.¹²⁷ The court of appeals further held that the regulatory power of the Commission did not end at the boundary of the public land traversed by the pipeline but extended "over every part of the interconnected pipe line system."¹²⁸

Later, a different interstate natural gas pipeline argued that the passage of the Natural Gas Act impliedly repealed section 28 of the Mineral Leasing Act. The D.C. Circuit disagreed, finding both statutes to be "fully compatible."¹²⁹ The court did refuse, however, to allow the Secretary of Interior, after thirty-one years of passive regulation, to attach extensive regulations, including rate regulation, to the pipeline's application for right-of-way in the form of a stipulation.¹³⁰ The Secretary's authority to regulate pertained only to "the physical aspects of the right-of-way and not to the operation of the pipe line."¹³¹ Thus, the court upheld the provisions but significantly constricted the Secretary of Interior's authority to regulate pipelines operating on federal lands as common carriers.¹³²

In 1953, the Congress resolved the uncertain status of natural gas pipelines operating on federal lands by specifically exempting them from section 28 of the Mineral Leasing Act.¹³³ The legislative history of the amendment documented the apparent incompatibility between the characteristics of a natural gas pipeline and its operation as a common carrier.¹³⁴ Sponsors of the amendment believed that section 28 restricted the capacity of pipelines to serve public needs and, thus, explained that the object of the amendment was to "relieve" those pipelines from

126. *See id.* at 72-73.

127. *Montana-Dakota Utils. Co. v. FPC*, 169 F.2d 392 (8th Cir.), *cert. denied*, 315 U.S. 95 (1948).

128. *Id.* at 399.

129. *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46, 52 (D.C. Cir. 1953) (Secretary of Interior's authority under section 28 of Act does not extend to rate regulation).

130. *Id.* at 48-51 & nn. 1, 3-4.

131. The court held that, in absence of more specific language in section 28, Congress intended natural gas pipelines operating in federal lands to be common law carriers, not a statutory common carrier subject to extensive regulation. *Id.* at 51.

132. The Secretary of Interior subsequently conceded his position in a letter to Congress, stating "that if Congress should see fit to require gas pipelines to be common carriers, the matter should be approached directly and not through the indirect method of regulations and conditions in the grants of right-of-way." *See* S. Rep. No. 578, 83d Cong., 1st Sess. 3, *reprinted* in 1953 Code Cong. & Ad. News 2357, 2359.

133. Act of Aug. 12, 1953, ch. 408, 67 Stat. 557 (1953) ("the common carrier provisions of this section shall not apply to any natural gas pipelines operated by any person subject to regulation under the Natural Gas Act") (current version at 30 U.S.C. § 185 (1976)). *See also* *Mondakota Gas. Co. v. FPC*, 232 F.2d 358, 361-62 (D.C. Cir.) (1953 amendment released all pipelines formally common carriers from such obligations as well as pipelines operating on federal land prospectively), *cert. denied*, 352 U.S. 846 (1956).

134. *See* H.R. Rep. No. 764, 83d Cong., 1st Sess. 1 (1953). The House Report also observed that if a natural gas pipeline was "compelled to furnish common-carrier service it is inevitable that its capacity to serve the public as a public utility will be impaired since it will be required to perform services in addition to and different from those for which it has been certificated." *Id.* at 1-2. *See also* S. Rep. No. 578, 83d Cong., 1st Sess. 1 (1953), which provided in part:

A natural-gas pipeline is designed and operated to provide a continuous fuel service to its customers and not for the purpose of providing transportation service to others. For example, a given pipe line may not have sufficient capacity to provide common-carrier service to the public.

the common carrier obligation.¹³⁵ In 1973 Congress further revised section 28 of the Mineral Leasing Act but left intact the qualified exemption for natural gas pipelines in the Trans-Alaska Pipeline Authorization Act.¹³⁶

In 1953, Congress also enacted the Outer Continental Shelf Lands Act (OCS Lands Act),¹³⁷ which gave rights-of-way to oil and natural gas pipelines operating on the Outer Continental Shelf. Section 5 of the OCS Lands Act did not expressly require natural gas pipelines operating in the outer continental shelf to be operated as common carriers, but only created the specific duty to transport or purchase natural gas without discrimination.¹³⁸ This provision cannot be characterized, however, as a common carrier provision. Congress did not grant the Commission jurisdiction to regulate rates charged by natural gas pipelines operating on the Outer Continental Shelf.¹³⁹ Section 5 was further amended by the Outer Continental Lands Acts Amendments of 1978.¹⁴⁰ The 1978 amendments primarily were with environmental and safety aspects of offshore pipelines.¹⁴¹ Congress did provide specifically, however, that natural gas pipelines granted rights-of-way on or across the Outer Continental Shelf "must provide open and nondiscriminatory access to both owner and nonowner shippers."¹⁴² In addition, the 1978 amendments granted the FERC the authority to order a pipeline to expand its facilities to increase its throughput capacity.¹⁴³

135. H.R. Rep. No. 1032, 83d Cong., 1st Sess. 2 (Conference Report), *reprinted* in 1953 U.S. Code Cong. & Ad. News 2360. *See also* H.R. Rep. No. 764, 83d Cong., 1st Sess. 1-2 (1953) (capacity of natural gas pipelines to perform services for which it was certificated would "inevitably" be impaired if made common carrier).

136. Pub. L. No. 93-153, § 101(r)(3)(A)-(B), 87 Stat. 576, 581 (1973) (codified at 30 U.S.C. § 185(r)(3)(A)-(B) (1976)). *See also* S. Rep. No. 77 207, 93d Cong., 1st Sess., *reprinted* in 1973 U.S. Code Cong. & Ad. News 2417, 2441 (noting committee's "cognizance of a widespread and long-held contention by some independent oil and gas producers that many pipelines did not in fact operate as common carriers"). This act requires pipelines operating on federal land to allocate available capacity on the basis of "ratable take." The Senate Report defined the principle of ratable take to mean "that in each shipment cycle — the period for which shipment tenders are considered - the operators must actually accept for shipment the same proportion of each shipper's tenders as the pipeline's capacity bears to the aggregate of all tenders." *Id.* at 2439.

137. Pub. L. No. 83-212, 67 Stat. 462, 43 U.S.C. §§ 1331-1343 (1976), *amended* by 43 U.S.C. §§ 1331-1335, 1337, 1340-1343 (Supp. V 1981).

138. *See id.* § 1334(c), *amended* by 43 U.S.C. § 1334(e) (Supp. V 1981). The statute provided that pipelines operating on the Outer Continental Shelf "transport or purchase without discrimination . . . natural gas produced from said submerged lands in the vicinity of the pipeline in such proportionate amounts as the . . . [Commission may] determine to be reasonable."

139. *See generally* Mogel, *Ratemaking for Oil Pipelines in the Outer Continental Shelf*, 17 *Tulsa L.J.* 469, 479-80 (1982) (lack of legislative history indicative of lack of congressional intent to make pipelines common carriers).

140. Pub. L. No. 372, 92 Stat. 629, 638-39 (1978) (codified at 43 U.S.C. § 1334(e) (Supp. V 1981)).

141. *See* H.R. Rep. No. 590, 95th Cong., 2d Sess., 133-34, *reprinted* in 1978 U.S. Code Cong. & Ad. News 1450, 1539-40 (regulatory authority extends to conservation and prevention of waste).

142. 43 U.S.C. § 1334(f)(1)(A) (Supp. V 1981) In addition, section 603 of the OCS Land Act Amendments of 1978 required the Commission to promulgate a statement of general policy concerning the transportation of natural gas owned by a local distribution company from an OCS lease to its service area. *See* 18 C.F.R. §§ 284.241-.246 (1983).

143. *Id.* § 1334(f)(1)(B). Although the amendments significantly expand the Commission's authority, they did not impose common carrier status on natural gas pipelines. The Commission may not compel a natural

When Congress enacted the Alaska Natural Gas Transportation Act of 1976 (ANGTA),¹⁴⁴ it left open the question of whether such a pipeline would be a common carrier. Section 13(a) of ANGTA¹⁴⁵ provided only for the equal access by both owners and non-owners to pipeline facilities. The purpose of the section was "to assume that any tariffs applied to the transportation of gas through the system would be equal for owners and non-owners alike."¹⁴⁶ Although section 13(a) of ANGTA made no mention of common carrier status, the Commission interpreted it "to mean that Congress wants the Alaskan gas transportation system operated as a common carrier."¹⁴⁷ Nevertheless, upon further study of the legislative history of ANGTA, the Commission reversed its original interpretation.¹⁴⁸ At issue was whether an Alaskan natural gas pipeline would be burdened with the full panoply of common carrier obligations. The Commission answered in the negative and concluded that capacity could be allocated on a first come, first served basis so long as nonowners were not discriminated against in terms of access and tariffs.¹⁴⁹

V. CURRENT PROPOSALS TO CHANGE THE STATUS OF INTERSTATE NATURAL GAS PIPELINES TO COMMON CARRIERS

[A] month of experience will be worth a year of hearings.

Harold Leventhal¹⁵⁰

A. Major Federal Legislative Proposals

On February 26, 1983, President Reagan announced that his Administration would seek to decontrol the price of natural gas.¹⁵¹ The next week Secretary of

gas pipeline company to enlarge its facilities. See NGA § 7, 15 U.S.C. § 717f(a) (1976) ("The Commission shall have no authority to compel the enlargement of transportation facilities"); *Panhandle Eastern Pipe Line Co. v. FPC*, 204 F.2d 675, 680 (3d Cir. 1953) (Congress intended to let natural gas companies' stockholders and directors decide whether to enlarge pipeline facilities). Several bills pending in Congress, however, would give the Commission authority to order expansion of a natural gas pipeline's capacity to allow it to perform contract carriage obligations. See *infra* notes 166, 196-97 and accompanying text.

144. Pub. L. No. 94-586, 90 Stat. 2903 (codified at 15 U.S.C. § 719 (Supp. V 1981)).

145. 15 U.S.C. § 719k(a) (Supp. V 1981).

146. H.R. Rep. No. 1658, 94th Cong., 2d Sess. 32, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6643, 6658.

147. Recommendation to the President Alaskan Natural Gas Transportation System, 58 F.P.C. 810, 1047 (1977). The Commission further stated, however, that "common carrier status is incompatible with our goal to effect a private financing." *Id.* at 1047.

148. See *Northwest Alaskan Pipeline Co.*, 3 FERC (CCH) ¶ 61,226 (1978). The Commission's order incorporated a legal memorandum prepared by its Office of General Counsel that analyzed the provision, and its history, finding that Congress did not intend the Alaskan natural gas pipeline to be a common carrier. See *id.* at 61,605.

149. *Id.* at 61,607. The Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1976), is the remaining federal statute involving common carrier principles and natural gas pipelines. Its application is hypothetical, however, because deepwater port facilities handle only oil, not natural gas. The drafters apparently contemplated prohibiting natural gas pipelines connected with such facilities from discriminating as to transportation and access, but the statute itself does not mention natural gas. See S. Rep. No. 1217, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7529, 7573; 33 U.S.C. § 1507 (1976).

150. *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) (opinion by Judge Leventhal).

151. *Radio Address of the President to the Nation*, 129 Cong. Rec. S1733 (daily ed. Feb. 28, 1983).

Energy, Donald P. Hodel, unveiled a comprehensive legislative proposal aimed at correcting several problems in the natural gas industry.¹⁵² On February 28, 1983, Senator McClure introduced the Administration's bill, the "Natural Gas Consumer Regulatory Reform Amendments of 1983" and it was designated S. 615.¹⁵³ The bill was referred to the Senate Committee on Energy and Natural Resources, in which extensive hearings followed.¹⁵⁴ The identical House version of the Administration's bill, H.R. 1760, was referred to the House Subcommittee on Fossil and Synthetic Fuels for hearings.¹⁵⁵

Title IV of S. 615, entitled "Removal of Impediments to Interstate Movements of Gas," would amend the NGPA to facilitate the transportation of natural gas. An important component of Title IV would give the Federal Energy Regulatory Commission the authority to order any interstate pipeline to transport natural gas on behalf of a producer or a purchaser on a contract basis. Section 403 of S. 615 would add the following new section 317 to the NGPA:

SEC. 317. CONTRACT CARRIER AUTHORIZATION.

(a) IN GENERAL - Upon application by a producer of natural gas or by a purchaser of natural gas from a producer, the Commission shall order any interstate pipeline to carry gas under contract between producer and purchaser upon such terms and subject to such conditions as it considers just and reasonable if the Commission finds that such pipeline has available capacity, that no undue burden will be placed upon such pipeline, that no construction of new facilities would be required, and that such order would not impair the ability of such pipeline to render adequate service to its existing customers. The Commission may implement this section by rule or order.

(b) CONSIDERATION - The consideration for any transportation provided under this section shall be \$.05 per million Btu's plus the cost of such transportation, as established by the Commission, unless the Commission has established, by rule, a different rate as just compensation for such transportation. No amount of such consideration shall be required to be credited and flowed back to the customers of

President Reagan declared that his legislative package was a "comprehensive proposal" that was "not a partisan plan" and resorted to "no quick political fixes." *Id.*

152. Despite an outcry from consumer interests regarding the Administration's proposals to deregulate the price of "old gas," the plan was initially applauded for its comprehensive and novel approach. *See* Wash. Post, Mar. 7, 1983, at A1, col. 5; *id.*, Mar. 6, 1983, at A24, col. 1 (editorial).

153. 129 Cong. Rec. S1732-41 (daily ed. Feb. 28, 1983) (statement of Sen. McClure). The preamble of S. 615 stated that the Act's purpose is:

[t]o cover deficiencies in the Natural Gas Policy Act of 1978, to protect natural gas consumers from price increases because of current distortions in the regulated market for natural gas, to provide for a free market for natural gas, to permit natural gas contracts to reflect the change from a regulated to a free market, to eliminate incremental pricing requirements for natural gas, to eliminate certain fuel use restrictions, and for other purposes.

S. 615, 98th Cong., 1st Sess. (1983).

154. The Committee met in open session on 29 separate days, hearing testimony from over 84 witnesses. S. Rep. No. 205, 98th Cong., 1st Sess. 15, 18 (1983).

155. Representative Corcoran, among others, introduced the administration's bill in the House of Representatives as H.R. 1760. 129 Cong. Rec. 774 (daily ed. Mar. 2, 1983).

such pipeline.¹⁵⁶

The contract carrier provision is not unique to the Administration's proposal. The concept has been included in numerous legislative proposals, including several Senate bills.¹⁵⁷ The Senate Energy and Natural Resources Committee, after extensive discussion and several mark-up sessions, substituted the contract carrier provisions of one of those bills for those of S. 615 — the "Bradley Amendment."¹⁵⁸ The Committee included this amendment in its comprehensive bill referred to the Senate in July 1983.¹⁵⁹

The "Bradley Amendment" would empower the Commission and state agencies to order natural gas pipelines to use their excess capacity to transport gas as a contract carrier. The Bradley Amendment is designed to encourage voluntary contract carriage. First, it creates a rebuttable presumption that a pipeline has excess capacity available for contract carriage. If the pipeline voluntarily transports the natural gas, it may receive up to \$0.05 per MMBtu over the cost of such transportation. If an interstate pipeline refuses to perform requested transportation service, it must protest to the Commission. Second, if the pipeline protests and the Commission determines that its protest was unreasonable, it may order the pipeline to perform the transportation service at a rate of less than \$0.05 per MMBtu. The Bradley Amendment would apply to both interstate and intrastate natural gas pipelines, but it defers to state regulatory jurisdiction over intrastate pipelines if such authority exists. Another distinct feature of the Bradley Amendment makes it difficult for industrial users to disconnect from local distribution companies that have historically served their plants should the industrial user wish to connect directly to the pipeline through a contract carriage arrangement.¹⁶⁰ The Bradley Amendment also authorizes the Commission to order construction of minor pipeline facilities, but provides that the party requesting such construction shall pay for the facilities and their operation.¹⁶¹

Many other bills addressing the common or contract carriage issue have been introduced in the House of Representatives.¹⁶² Several of the proposals

156. S. 615, 98th Cong., 1st Sess. § 403 (1983).

157. See, e.g., S. 1119, 98th Cong., 1st Sess. § 2, 129 Cong. Rec. S5027 (daily ed. Apr. 20, 1983) ("to establish natural gas pipelines as common carriers"); S. 1049, 98th Cong., 1st Sess. § 3, 129 Cong. Rec. S4571-74 (daily ed. Apr. 13, 1983) (contract carriage for natural gas volumes subject to bill's market-out provision); S. 996, 98th Cong., 1st Sess. § 106, 129 Cong. Rec. S4260-62 (daily ed. Apr. 7, 1983) (analysis of bill's grant of authority to Commission to order interstate pipelines to transport natural gas on contract basis).

158. S. 1017, 98th Cong., 1st Sess., 129 Cong. Rec. S4406-08 (1983). See Wall St. J., May 11, 1983, at 14, col. 2. Subsequent to this action Senator Johnston (D.-La.), the senior democrat on the Energy and Natural Resources Committee, proposed an entirely new bill for mark-up. With respect to contract carriage, however, the only change to the Bradley Amendment would be to add a provision to disallow the \$0.05/MMBtu incentive allowance for transportation of natural gas owned by a pipeline's or local distribution company's affiliate. See Foster Report No. 1415 (May 19, 1983) at 2. This provision was included in the bill voted out by the Committee. See S. 1715, 98th Cong., 1st Sess. § 401(0)(5) (1983).

159. S. 1715, 98th Cong., 1st Sess. § 401 (1983) (proposed § 321 of the NGPA).

160. See *infra* notes 206-07.

161. See *infra* notes 196-97 and accompanying text.

162. H.R. 2565, 98th Cong., 1st Sess. (1983) (Corcoran bill) ("to establish natural gas pipelines as common carriers"); H.R. 2508, 98th Cong., 1st Sess. (1983) (contract carriage for natural gas volumes subject

limit the impact of such a change by restricting the natural gas available for transportation to volumes freed by a marker-out clause under an existing contract.¹⁶³ Of significance is section 3 of the "Natural Gas Equal Access Amendments of 1983," H.R. 2182, introduced by Representative Schroeder. It would adopt the concept of contract carriage for natural gas transporters,¹⁶⁴ but would create a mandatory transportation obligation for intrastate, as well as interstate, pipelines based on available capacity and upon demonstration of need.¹⁶⁵ H.R. 2182's most dramatic innovation is that it would give the Commission authority to require pipelines to add compression and looping facilities to increase capacity.¹⁶⁶

Despite the variety and scope of bills introduced in the House, the House Subcommittee on Synthetic and Fossil Fuels of the Energy and Commerce Committee considered a new bill for purposes of mark-up.¹⁶⁷ The contract carrier provisions of this proposal are less extensive than that proposed by other bills. Only volumes of natural gas freed from contractual commitments would be available for contract carriage.¹⁶⁸ If an interstate or an intrastate pipeline

to bill's market out provision); H.R. 2499, 98th Cong., 1st Sess. (1983) ("providing that interstate pipelines transport natural gas by contract carriage"); H.R. 2182, 98th Cong., 1st Sess. (1983) (Natural Gas Equal Access Amendments of 1983); H.R. 2164, 98th Cong., 1st Sess. (1983) (transportation obligation for volumes of natural gas subject to bill's market-out provisions); H.R. 2154, 98th Cong., 1st Sess. (1983) (Gephardt bill); H.R. 2054, 98th Cong., 1st Sess. (1983) (contract carrier authorization for interstate and intrastate pipelines); H.R. 1760, 98th Cong., 1st Sess. (1983) (Reagan administration bill); H.R. 1752, 98th Cong., 1st Sess. (1983) (contract carriage for natural gas volumes subject to bill's market out provision); H.R. 4, 98th Cong., 1st Sess. (1983) (contract carriage for natural gas volumes subject to bill's and contract's market-out provisions).

163. See H.K. 2508, 98th Cong., 1st Sess. (1983); H.R. 2164, 98th Cong., 1st Sess. (1983); H.R. 1752, 98th Cong., 1st Sess. (1983); H.R. 4, 98th Cong., 1st Sess. (1983).

164. Section 4 of H.R. 2182, 98th Cong., 1st Sess. (1983), defines "natural gas transporter" as any person who is engaged in natural gas transportation or distribution other than a person who - (A) does not purchase natural gas for resale, (B) does not acquire property through the use of eminent domain powers, and (C) is not an affiliate to an interstate pipeline, intrastate pipeline, or local distribution company.

165. *Id.* § 3(a) (proposed § 316(a) of NGPA). Like the Bradley Amendment, H.R. 2182 would create a presumption that a pipeline had adequate capacity to transport gas under a request that could be defeated only by an affirmative finding by the Commission after hearing.

166. See *infra* note 196-97 and accompanying text.

167. Staff of House Subcomm. on Synthetic and Fossil Fuels of the Energy and Commerce Comm., 98th Cong., 1st Sess., Natural Gas Policy Adjustments Act of 1983 (Comm. Print 1983).

168. The Subcommittee proposal would add a new § 319 to the NGPA that provides in part:

SEC. 319. TRANSPORTATION SERVICES.

(a) OBLIGATION TO TRANSPORT.

Any interstate or intrastate pipeline which declines an offer made pursuant to any right of first refusal . . . shall, on request, transport through then existing facilities of such pipeline, on a best-efforts basis, the natural gas for which the market-out authority was exercised.

(b) EXCEPTION TO OBLIGATION.

Transportation shall be required of a pipeline under this section to the extent—

- (1) such transportation does not impair the pipeline's ability to render service to its then present and future customers;
- (2) all then existing obligations of the pipeline are satisfied before undertaking such transportation; and

declines an offer to purchase natural gas released from an existing contract pursuant to its right of first refusal, such a pipeline must transport those volumes. Thus, if the producer of the natural gas finds a new buyer, the pipeline would be obligated to transport those volumes on a best-efforts basis. Under this proposal, the Commission could order the termination of a transportation arrangement if it determines that the transportation would disrupt existing transmission and distribution systems or would be contrary to the public interest.¹⁶⁹ The rate charged for transportation by an interstate pipeline under this section would be either a rate agreed to by the parties or a just and reasonable rate set by the Commission.¹⁷⁰

B. State Legislative Proposals

Several states also have addressed the common carriage issue. Foremost has been West Virginia's enactment of a comprehensive utility regulatory reform bill.¹⁷¹ That law significantly alters the way in which local distribution companies and intrastate natural gas pipelines purchase and sell natural gas supplies in the state.¹⁷² It includes the following common carrier provision:

The [Public Service Commission of West Virginia] may by rule or order, authorize and require the transportation of natural gas in intrastate commerce by intrastate pipelines, by interstate pipelines with unused or excess capacity not needed to meet interstate commerce demands or by local distribution companies for any person for one or more uses, as defined, by rule, by the commission in the case of:

- (1) Natural gas sold by a producer, pipeline or other seller to such person; or
- (2) Natural gas produced by such person.¹⁷³

Kansas has considered bills that would make all natural gas pipelines operating within the state common carriers up to their excess capacity if the pipeline had been operating at less than seventy-five percent of its design capacity in excess of two consecutive years.¹⁷⁴ The New York legislature passed a bill that would have imposed common carrier status on natural gas utility systems within the state, but the governor vetoed the legislation in August 1983.¹⁷⁵ The Illinois Commerce Commission also has proposed a

(3) the transportation would not adversely affect any use or user described [above] . . .

169. See *id.* § 104(a). In addition, this proposal would further limit the impact of contract carriage by limiting the duration of the pipeline's obligation to transport gas under this section to the remaining term of the original contract. *Id.*

170. *Id.* For intrastate pipelines, the rate will be either the rate agreed to by the parties, or, if required by a state regulatory authority, a rate determined by that authority.

On July 29, 1983, by a 10-9 vote, the subcommittee adopted the Shelby/Corcoran Amendment to the Committee Print. The revised Committee Print was then referred to the full House Energy and Commerce Committee for action. The amendment substantially revised section 401 of the Committee Print.

171. Act of March 12, 1983, S. 117 (codified at W. Va. Code §§ 11-24-11; 24-1-1, 7; 24-2-3, 4a-c, 11, 16; 24-2A1, 2; 24-28-1, 2; 24-3-2, 3a, 7, 8).

172. See generally 1983 House Hearings, *supra* note 4 (statement of Rep. Harley O. Stagger, Jr.).

173. W. Va. Code § 24-3-3a(b).

174. 1983 Kan. Sess. Laws S.23; H.2426. The Kansas legislature did not act on these bills in its 1983 legislative session. The bills will be held over until the 1984 session.

175. 1983-1984 N.Y. Sess. Laws Assembly Bill No. 7649-A (Apr. 26, 1983). In vetoing this bill,

comprehensive "Consumer Access Plan" to Congress calling for an immediate change in the status of natural gas pipelines to common carriers.¹⁷⁶

VI. ISSUES AND POLICY CONCERNS

It's lovely to be silly at the right moment

Horace¹⁷⁷

A. Problems and Proposals Revisited: An Analysis

As already observed, natural gas pipelines are both transporters and buyer-sellers of natural gas. As transporters, interstate natural gas pipelines operate as contract carriers serving natural gas owners, typically industrial users.¹⁷⁸ As resellers of the natural gas that they purchase and transport, pipelines are the link between producers and end-users. In this role, pipelines essentially function as brokers¹⁷⁹ because they effectively match demand with available supplies.

Governor Cuomo noted that he favored the contract carriage provisions, but vetoed this comprehensive legislation because he believed the bill's provision allowing abrogation of take-or-pay clauses was unconstitutional because interstate gas contracts are under federal jurisdiction.

The constitutionality of the states' assertion of jurisdiction over interstate pipelines operating in West Virginia is an interesting question. Congress clearly occupied the field of natural gas regulation by enacting the NGA in 1938. *See Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 519-24 (1947). Nevertheless, Congress has not addressed affirmatively common carrier status for interstate pipelines. Even in the absence of congressional legislation, however, "the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 652 (1981) (footnote omitted). Whether or not state regulation in this area is forbidden would be determined by considering the nature of the state regulation involved, the objective of the state, and the effect of regulation on the national interest in commerce. *See Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Comm'n*, 103 S. Ct. 1905 (1983).

176. Because few intrastate natural gas pipelines operate in Illinois, no bill has been introduced in that state's legislature that would affect intrastate pipelines. Rather, the Illinois "Consumer Access Plan" has been introduced as S. 1119 by Senators Dixon and Percy and as H.R. 2565, by Representative Corcoran. *See supra* notes 157 and 162. Under these bills, pipelines would be required to transport natural gas without discrimination for a period of at least six months upon request by the owner of such gas. The request would be subject to a minimum tender of 250/Mcf per day, available capacity, and compensation in accordance with rates established by the Commission. With respect to intrastate natural gas pipelines, the Commission's administrative responsibilities would be delegated to the appropriate state commissions.

177. *New Yorker*, Aug. 8, 1983, at 5.

178. The Commission has promulgated regulations designed to facilitate such transactions, and, in effect, has encouraged this type of contract carriage. *See supra* notes 20 & 54; 18 C.F.R. pts. 3 and 157 (1983).

179. The Commission has acknowledged that parties other than pipelines may serve this brokerage function on behalf of "industrial customers seeking to purchase and the producers wanting to sell natural gas supplies They charge a fee for the various types of services performed, such as, planning, purchasing, contracting for gathering systems, negotiating transportation agreements, and fulfilling administrative requirements." Amendments to Policy Regarding Certification of Pipeline Transportation Agreements, 43 Fed. Reg. 5362, 5368 (1978) (amending 18 C.F.R. § 2.79). The Commission will determine, however, whether a particular brokerage transaction is in the public interest on a case-by-case basis, considering the cost that brokerage adds to the cost that the consumer pays for natural gas. *Id. See also* Natural Gas Pipeline Co. of America, 18 FERC (CCH) ¶ 63,085 at 65,230 (Mar. 26, 1982) (Initial Decision on Applications for Certificates of Public Convenience and Necessity) (all brokerage arrangements are not contrary to public interest; issue is whether particular brokerage arrangement, under existing circumstances, is against public interest).

The NGPA added new complexities and risks to the brokerage function of interstate natural gas pipelines. Prior to passage of the NGPA, the brokerage function entailed relatively few risks. Interstate natural gas pipelines had access to supplies of natural gas at artificially low prices. Consumers seldom balked at the price of natural gas because it was low in comparison to the cost of alternative fuels.

Partial deregulation of the wellhead price of natural gas under the NGPA, however, has increased the number of risks involved in natural gas marketing. As natural gas prices rise and surpass alternative fuel prices, natural gas consumers with fuel-switching capability will attempt to abandon natural gas as an energy source.¹⁸⁰ This customer loss creates excess deliverability, and forces pipelines to spread fixed costs among even fewer consumers in the form of higher rates. Natural gas consumers faced with rising prices and producers faced with a market of oversupply have questioned whether pipelines have adequately performed their brokerage function, and support legislation that would allow them to move directly into the market themselves.

Current legislative proposals could resolve these problems in part by making pipelines mandatory "contract carriers" or common carriers.¹⁸¹ Contract carrier proposals would require a pipeline to use its available capacity to transport natural gas owned by others on a pro rata basis at a reasonable rate. Proposed legislation, however, does not contemplate that contract carriage gas would preempt capacity necessary to meet the requirements of the pipeline's customers which purchase natural gas under the contract carriage proposals. Furthermore, the legislative proposals would give the regulatory authority discretion to establish rates for each transportation arrangement.¹⁸²

Each legislative proposal to alter the present status of natural gas pipelines focuses explicitly or implicitly on the brokerage function. In theory, any party could act as a broker by providing an information exchange, presenting data on potential and available supplies, demand, price, and transportation availability. Currently, as the institutional broker, pipelines execute this function as part of their overall service. There is, however, a cost associated with this brokerage function. Certain economies of scale favor the pipeline broker who, in making hundreds of separate purchases and sales in a year, has accumulated knowledge that lowers the cost of additional brokerage transactions.¹⁸³ In addition, because large interstate pipelines deal with such large volumes of natural gas, they have flexibility to create both sale and purchase packages to meet a natural gas purchaser's needs even though these needs do not match identically with a particular producer's supply. If others were to perform the brokerage function, they would necessarily encounter costs that would be passed on to the end-user.

180. Many large industrial facilities have dual fuel capability and can switch quickly from natural gas to an alternative fuel, usually fuel oil. *See supra* notes 38-40 and accompanying text.

181. *Compare* S. 615, 98th Cong., 1st Sess. (1983) (mandatory contract carriage), *with* S. 1119, 98th Cong., 1st Sess. § 2 (1983) (common carriage). *See supra* note 12.

182. *See infra* notes 199-201 and accompanying text.

183. *See generally* D. Cohn & R. Means, *Contract Carriage of Natural Gas: A Preliminary Analysis of the Issues 3-8* (May 1983) (unpublished preliminary draft) (discussion economies of scale in natural gas industry) [hereinafter cited as Cohn & Means].

The legislative proposals to establish common carriage for interstate pipelines, therefore, raise the issue of whether a new brokerage system would cost more or less than the present system.

Proponents of common carriage claim that such systems would create freer access to the marketplace, and promote competition that would benefit everyone.¹⁸⁴ They contend that because producers and end-users would receive market signals directly, the market would function more effectively. Producers and some pipelines also contend that certain producing areas should not become the exclusive supply preserve of one or two pipelines. Although monopsony power of pipelines over producers does not now appear to be a widespread problem,¹⁸⁵ common carriage could assure that one interstate pipeline would not dominate a production area.

Large industrial users of natural gas generally favor common carriage proposals,¹⁸⁶ believing they would be able to secure a constant supply of natural gas at lower prices.¹⁸⁷ Although large end-users may purchase relatively inexpensive natural gas in the current surplus market, they are unable to have the gas transported to their plants because their pipeline-suppliers would rather sell their own supplies of more expensive gas. For example, a large ammonia plant, which attributes 85% of its operating costs to natural gas, predicts that it could ensure profitability by acquiring low-cost gas directly from the producer and compelling transportation under a common carriage structure.¹⁸⁸ Distribution companies also contend that they could lower the cost of natural gas to their consumers under a common or contract carriage system.¹⁸⁹ In contrast, greater

184. For example, the Association for Equal Access to Natural Gas Markets and Suppliers (NGEA), *see supra* note 10, has testified before Congress that "the only viable long-term solution [to current problems in the natural gas industry] is to put the purchasing decisions where they belong—in the hands of the end-user or at least closer to the end-user," thereby creating a "truly national market for gas." 1983 Senate Hearings, *supra* note 3, at 6 (statement of Daniel W. Wilson, President NGEA) (Mar. 11, 1983).

185. *See* Cohn & Means, *supra* note 183, at 5-6 (pipeline competition appears to be reasonably effective).

186. *See, e.g.*, 1983 Senate Hearings, *supra* note 3, at 8 (statement of Patrick H. McNamara, Petrochemical Energy Group) (Mar. 10, 1983) (allowing customers of pipelines to purchase directly from producers and compel transportation is a remedy more flexible and effective than additional regulation); 1983 House Hearings, *supra* note 4, at 7 (statement of James D. Beatty on behalf of the Chemical Manufacturers Association) (Mar. 10, 1983) (discussion of how contract provisions can keep prices low).

187. *See supra* notes 14-16.

188. *See* 1983 Senate Hearings, *supra* note 3, at 14-15 (statement of George W. Haney, Chairman, Oklahoma Fertilizer Manufacturers' Association) (Mar. 28, 1983).

189. *See* 1983 Senate Hearings, *supra* note 3, at 35 (statement of George H. Lawrence, President, American Gas Association) (Mar. 11, 1983); *but see id.* at 3-4 (statement of John C. Abram, Chairman, Southern California Gas Company) (Mar. 12, 1983) (contract carriage will increase consumer costs); 1983 House Hearings, *supra* note 4, at 4-5 (statement of William F. Ryan, President, South Jersey Gas Company) (Apr. 12, 1983) (opposing common carrier status for pipelines).

Although distributors originally opposed mandatory common carriage for pipelines because it threatened security of supply and corresponding financial stability, they have supported contract carriage proposals that do not significantly alter the pipelines' brokerage functions. The president of the American Gas Association has endorsed H.R. 2508, which does not mandate common carriage, but obligates a pipeline, if a purchaser, to transport the limited quantity of natural gas freed by the bill's market-out provisions. *See* Oil & Gas J. 32 (May 23, 1983). The AGA has also supported the Bradley Amendment, which includes special

access to producers for distribution companies and other end-users will put pipelines at risk of losing significant sales.¹⁹⁰ Common carriage is likely to increase competition and reduce wellhead supplies and demand at the pipeline's points of resale.

Proponents of common carriage must be aware, however, that certain costs and risks will attend their entry into the marketplace. First, there is an undefined cost of brokerage. Most natural gas consumers are not suited to find, assess, and purchase adequate supplies of natural gas. They will be at a further disadvantage when the current natural gas surplus no longer exists. Second, those most skilled at locating and contracting for low-cost gas may command a premium in the marketplace because the supply of lower priced natural gas is limited. One class of consumers, such as large well-financed industrial users, may then develop significantly better resources than another class, such as local distribution companies, and new inequities may develop. For example, residential consumers who are served by local distribution companies may be forced to pay even higher prices than are currently charged.¹⁹¹ Third, there will be the additional costs for transportation. Fourth, and perhaps most importantly, an end-user may find it impossible to acquire production and reserves that match its particular requirements. For example, a gas well's production generally cannot be tailored to meet precisely the operations of an industrial plant's usage, which fluctuates according to production schedule—time of day and days of week.

In summary, legislatively mandated contract carrier status could provide assistance in resolving the current market disorder. This alone, however, will not solve or even address all the problems in the natural gas industry. Mandated contract carriage or common carriage will remove artificial barriers to competition in the marketplace. Greater access to supplies and competition, however, will not guarantee a significant reduction in natural gas prices.

B. Specific Legislative Issues

In addition to the general policy question of whether to impose common carrier obligations on natural gas pipelines, Congress must consider important issues raised by different proposals. First, it must consider the administrative aspects of mandating contract carriage for natural gas pipelines. A second concern is a determination of fair compensation for pipelines compelled to transport natural gas. Third, Congress must decide what authority the Commission will have over intrastate pipelines. Finally, Congress must consider the effect that the imposition of common or contract carrier status will have on

language designed to avoid local distribution company load loss. *See id.* at 34, 36.

190. The president of the Interstate Natural Gas Association of America has not specifically opposed contract carriage, but has stated that the association's pipeline members view the Bradley Amendment "with some apprehension." *See Substitute Gas Decontrol Bill Proposed*, Oil & Gas J. 34, 36 (May 23, 1983).

191. Representative Phil Sharp, Chairman of the House Energy and Commerce Committee's Subcommittee on Fossil and Synthetic Fuels, has voiced this concern. *See Inside F.E.R.C.* (Mar. 28, 1983). *See also* 1983 Senate Hearings, *supra* note 3, at 4 (statement of John C. Abram, Chairman, Southern California Gas Company) (Mar. 12, 1983). Mr. Abram stated: "we will be forced to compete with our own customers and our own pipeline suppliers and thousands of other new buyers in the gas market. So, again our residential and small business customers will be left holding the bag of high-cost, new gas."

local distribution companies.

1. The process of obtaining mandated contract carriage

Mandatory contract carriage proposals generally vest the Commission with the authority and discretion to order interstate pipelines to transport natural gas as a contract carrier. The Administration's proposal (S. 615) provides that upon petition to the FERC, the Commission could order transportation only if it found that: (1) the pipeline had available capacity; (2) "no undue burden" would be placed on the pipeline; (3) no construction of new facilities would be required; and (4) the transportation would not impair the ability of the pipeline to render adequate service to its existing customers.¹⁹²

Under the Administration's proposal, the party requesting transportation service must persuade the Commission that all four factors are met. Other bills have placed the burden of demonstrating lack of capacity on the pipeline.¹⁹³ During mark-up of S. 615, the Senate Energy and Natural Resources Committee substituted the Bradley Amendment for S. 615's common carriage proposal, placing the burden of demonstrating lack of capacity on the pipeline, and modified S. 615's four-factor test.¹⁹⁴ The Bradley Amendment created a presumption that a pipeline had excess capacity and an explicit requirement that parties negotiate in good faith for use of that capacity before coming to the FERC. Thus, the Bradley Amendment encourages voluntary contract carriage, reducing the administrative burden on the Commission. Rather than mandating a full hearing, the Bradley Amendment establishes a pipeline protest procedure in which the pipeline can demonstrate that if it rendered the requested service, the pipelines' other customers would not be adequately served or that the seller or purchaser did not negotiate in good faith with the pipeline. Finally, the Bradley Amendment mandates expeditious treatment of the protest within ninety days.¹⁹⁵

A related issue is mandatory construction of new facilities, which some new transportation agreements might necessitate. For example, the Administration's proposal precludes the transaction if it requires construction while other bills give FERC authority to order extensive construction of facilities.¹⁹⁶ The Bradley Amendment provides that the Commission may order construction of only minor facilities not involving substantial costs that are necessary for contract carriage transportation if the person requesting the transportation and subsequent construction pays for its cost and operation.¹⁹⁷

192. S. 615, 98th Cong., 1st Sess. § 317 (1983).

193. *E.g.*, H.R. 2182, 98th Cong., 1st Sess. (1983) (proposed § 316(f) of NGPA).

194. *See* S. 1715, *supra* note 159 (proposed § 321(a) of NGPA).

195. *Id.* (proposed § 321(K)(4)).

196. *See, e.g.*, H.R. 2182, 98th Cong., 1st Sess. (1983) (proposed § 316(0)(6) of NGPA). One problem with these proposals is that the Commission could compel construction of facilities for a transaction limited to a short period, such as two years. Such a brief period could be inadequate for a pipeline to recover its capital costs for facilities that could cost millions of dollars. Then, because the "new" facilities would go unused, the pipeline's customers might be forced to absorb these costs.

197. *See* S. 1715, *supra* note 159 (proposed § 321(g) of NGPA).

2. Compensation

If Congress compels natural gas pipelines to render transportation service, Congress must ensure fair compensation for this service. Compensation should be sufficient to furnish an incentive for pipelines to provide the service. Some proposals have suggested a fixed rate plus the cost of transportation,¹⁹⁸ while other bills allow for only a "just and reasonable" rate.¹⁹⁹ The Bradley Amendment merges the two approaches. The Bradley Amendment would entitle pipelines that voluntarily agree to transport contract carriage volumes to "an incentive allowance of up to \$0.05 per million Btu's (in excess of the just and reasonable rate for such transportation as established by the Commission)" unless the Commission determined that another amount is reasonable.²⁰⁰ If the pipeline is performing the transportation upon the Commission's order, the Commission will determine the just and reasonable rate for transportation, not to exceed \$0.05 MMBtu. The nickel per MMBtu should provide adequate incentive for pipelines to accept contract carriage voluntarily, even in a situation in which more than one pipeline is involved in the transportation and the nickel is divided.²⁰¹

3. Commission jurisdiction over intrastate pipelines

The Commission presently has no jurisdiction over intrastate natural gas pipelines,²⁰² even though they are an important component of the nation's natural gas transmission system. Only a portion of the total number of natural gas wells are connected directly to interstate natural gas pipelines, so in a mandatory contract carriage arrangement, an intrastate pipeline might be required to complete the transaction. A comprehensive common carriage bill, therefore, should grant a governmental body authority to order an intrastate natural gas pipeline to provide common carrier service.

Commission jurisdiction over intrastate pipelines, however, may create a conflict with state regulatory agencies. Some bills do not encompass intrastate natural gas pipelines, and other bills have treated both classes of pipelines identically.²⁰³ The Bradley Amendment provides that an application for intrastate pipeline contract carriage must first be filed with the appropriate state agency.²⁰⁴ Only if the state agency does not act within a "time certain" could the Commission order the intrastate pipeline to haul the subject natural gas. The

198. *E.g.*, S. 615, 98th Cong., 1st Sess. § 317 (1983) (proposal of rate of \$0.05 MMBtu plus cost of transportation).

199. *E.g.*, S. 996, 98th Cong., 1st Sess. § 106 (1983).

200. S. 1017, 98th Cong., 1st Sess. § 3(a), 129 Cong. Rec. S4406-08, 4407 (1983). *Accord* S. 1715, *supra* note 159 (proposed § 321(f)(2) of NGPA).

201. *See id.* (proposed § 321(f)(4)).

202. The Commission may, however, exercise limited jurisdiction over intrastate pipelines to facilitate interstate commerce pursuant to sections 311 and 312 of the NGPA. 15 U.S.C. §§ 3301-3432 (Supp. V 1981). *See generally* *Oklahoma v. FERC*, 661 F.2d 832, 837-38 (10th Cir. 1981) (enactment of NGPA is constitutionally acceptable exercise of Congress' commerce clause power), *cert. denied*, 102 S. Ct. 2902 (1982).

203. *E.g.*, H.R. 2182, 98th Cong., 1st Sess. (1983); H.R. 2565, 98th Cong., 1st Sess. (1983).

204. *See* S. 1715 *supra* note 159 (proposed § 321(b)).

Commission also has limited jurisdiction over intrastate pipelines for the purpose of establishing an equitable transportation rate for common carriage transactions.²⁰⁵

4. Local distribution company load loss

Local distribution companies sell and deliver gas directly to end users that are not connected to interstate pipelines. State or municipal public service commissions generally regulate distributors as public utilities and apportion fixed costs among their various customers, which include both large commercial and industrial users and residential customers. If a large user of natural gas leaves a distributor's system, the remaining customers must absorb that portion of the distributor's fixed costs of operation through increased rates.

The Senate Energy and Natural Resources Committee has proposed adopting the concept of historical service to prevent load loss problems for distribution companies.²⁰⁶ The Committee concluded that an industrial user has been "historically served" if it received natural gas from a local distribution company after January 1, 1980. If a pipeline has been historically served, it must acquire contract carriage volumes through its local distribution company, unless: (1) the facility's volume of gas to be transported exceeds its average annual deliveries within four years prior to the date of enactment; (2) the facility was not in existence prior to date of enactment; (3) the facility has a direct purchase contract with an interstate pipeline; or (4) the facility attempts unsuccessfully for three years following the date of enactment to have the local distribution company transport its contract carriage volumes.²⁰⁷

Another issue involved in the load loss amendment is the potential conflict between the jurisdiction of state public service commissions and FERC. The Committee's proposal authorizes FERC to order a local distribution company to perform contract carriage transportation only if the state commission has no jurisdiction over the local distribution company under state law and fails to act within a "time certain." If, however, the state commission's final action results in no transportation service, the FERC finds that the action was arbitrary, capricious, or an abuse of discretion, FERC may then order the requested transportation.²⁰⁸

Large industrial users of natural gas that decide to depart for a limited time from the local distribution company's system still face two significant hurdles. First, the transaction must receive a certificate of public convenience and necessity from FERC.²⁰⁹ Second, industrial customers do not have the right of

205. *Id.*

206. The Committee incorporated its proposal in S. 1715, *id.* (proposed § 321(c)(4)).

207. *Id.* (proposed § 321(c)(4)(C)).

208. The Senate Report stressed that this procedure was not an appeal per se. Nevertheless, a party denied transportation by a state agency or in a state court could receive the requested contract carriage service from the Commission if the federal agency found the state agency's action to be arbitrary and capricious. *See* S. Rep. No. 205, 98th Cong., 1st Sess. 36 (1983).

209. *See supra* note 23 and accompanying text.

eminent domain to facilitate a direct connection to a pipeline.²¹⁰ These legal obstacles, their expense, and the expense of constructing a new line reduce the likelihood that industrial customers historically served by distribution companies will wish to leave that system.

CONCLUSION

[T]he final enemy is not chaos, but organization

Trevarian²¹¹

The issue of mandatory contract or common carriage status for interstate natural gas pipelines is not new. Recent legislative proposals echo earlier proposals that were never enacted. Rejection of those earlier legislative proposals, however, does not mean that the present ones are inappropriate. The appropriateness of imposing contract or common carriage on natural gas pipelines at this time must be assessed by determining how effective a new status for interstate pipelines will be in achieving significantly lower prices for consumers.

The reduction of natural gas prices as a result of congressionally imposed common carrier obligations on interstate natural gas pipelines is unlikely because of institutional factors in the natural gas industry. These factors include the history of dealings between producers and interstate pipelines, the personal relationships between sellers and buyers, the proximity of pipelines and gathering systems to production, and the ability of pipelines to buy large volumes of natural gas over a sustained period from several different production areas. In contrast, consumers, such as large petrochemical companies or distribution companies, generally have none of these advantages or the in-house ability to assess independently such questions as the deliverability rates, reserve life, or quality of the natural gas offered for sale. In addition, gas may not be available in the right location, and transportation costs paid to a network of interstate pipeline companies may eliminate any price advantage that the consumer might have gained from a direct purchase from a producer.

On balance, common carrier obligations, if imposed on all interstate and intrastate pipeline companies, should be mandated by Congress because it would give large consumers decisionmaking flexibility and an alternative to being captive of a single supplier for its fuel or raw material. Thus, common carriage would introduce new elements of competition into the natural gas industry. Common carriage contains certain risks and costs for the end-user of natural gas which seeks to establish contract carriage service, but it may yield favorable results. In practice, a common carriage requirement for natural gas pipelines may result in lower rates for certain consumers because pipelines may be compelled to reduce rates in order to deter customers from buying gas directly from producers.

210. See *supra* notes 118-22 and accompanying text.

211. Trevarian, Shibumi 366 (1979).