PHILLIPS AND THE NATURAL GAS ACT

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Should federal regulation encompass sales of natural gas to interstate pipe-line companies by "independent producers and gatherers"—those whose natural-gas activities exclusively consist of one or more of the functions of producing, moving, processing, and selling in or near the field? Or for that matter, should any sales to interstate transporters be federally regulated if made during the course of production and gathering?

The sporadically impending threat of federal regulation in this area has been a matter of growing concern to the oil and gas industry on one side and to thousands of consumers on the other, with the Federal Power Commission (Commission) in the middle. Many hundreds of producers and gatherers have been disturbed off and on for nearly fifteen years, lest they be regulated as a business "affected with a public interest" within the utility framework of the Natural Gas Act (Act).¹ The possibility of a sharp rise in price, stemming from an authoritative declaration that such regulation either could not or would not be invoked, has been a corresponding concern of consumers supplied from out-of-state reserves.

All these fears focus on the meaning to be given to the "production or gathering" exemption in Section 1(b) of the Act:

The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but *shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or *to the production or gathering of natural gas*.²

If a company engages in "transportation of natural gas in interstate commerce" or in the "sale in interstate commerce of natural gas for resale," these activities come literally within the affirmative coverage of Section 1(b), and the company would thereby appear to become in all cases a "natural-gas company" within the definition

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¹ 52 STAT. 821-823 (1938), 56 STAT. 83-84 (1942), 61 STAT. 459 (1947); 15 U. S. C. §§717-717W (Supp. 1952). Section 1(a) declares that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

² Italics and parenthetical material in quoted matter herein will be supplied unless otherwise noted.

of that term in Section 2(6) of the Act.³ But if these activities take place within the physical limits of the production and gathering field, the question arises whether either such activity can then be regulated under the Act, since Section 1(b) states that the Act's provisions shall not apply to "production or gathering." Neither "production" nor "gathering" is defined in the Act, and the problem is whether these exempted activities can be administratively and judicially defined to include the transportation or sale of natural gas by "independent producers and gatherers."

This question, the Commission answered affirmatively in its recent landmark decision in *Re Phillips Petroleum Company*, which at this writing is pending review in the Supreme Court.⁴ The history of this particular case dates back to a request made in 1946 by the City of Detroit in another Commission proceeding, *Re Michigan-Wisconsin Pipe Line Co.*⁵ There, Michigan-Wisconsin sought a certificate of public convenience and necessity to build a pipe line from Oklahoma to serve the City of Detroit, among other communities. Phillips was to be the sole supplier of natural gas for Michigan-Wisconsin's proposed pipe line. Detroit, an intervenor, urged that Phillips be joined as a party and be declared to be a "natural-gas company," thus being required to apply for certificates of public convenience and necessity to construct facilities for the proposed delivery and sale to Michigan-Wisconsin.⁶ However, the Commission dismissed Detroit's request, and in its 1947 *Michigan-Wisconsin* certificate opinion declared that a determination whether Phillips is a "natural-gas company," if necessary, should be made in a separate proceeding "after a thorough investigation of Phillips' operations."⁷ Such a separate proceeding was initiated by Commission order on October 28, 1948.⁸

I

EARLY DECISIONS

Long before this, however, the question of regulation of "independents" had been hesitantly decided four-to-one in a formal Commission proceeding,⁹ and had become a focal point in a general investigation of the natural gas industry initiated by the Commission.¹⁰ Indeed, before *Phillips* was decided, a series of incidents ballooned the question into a *cause célèbre*, splitting the Commission, pitting consumer interests against the oil and gas interests, fomenting a scorching battle in Congress as it hammered out a legislative answer, and finally precipitating a presidential veto.¹¹

Since *Phillips* is merely the latest chapter in a long controversy, necessity compels us to summarize prior chapters to make possible a full appreciation of the

³ Section 2(6): "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

⁴ 10 F. P. C. 246 (1951); see *infra*, pp. 408-409. ⁵ 6 F. P. C. 1 (1947).

⁶ *Id.* at 25-26.

⁷ *Id.* at 25.

⁸ 7 F. P. C. 983 (1948).

⁹ *Re Columbian Fuel Corporation*, 2 F. P. C. 200 (1940).

¹⁰ FEDERAL POWER COMMISSION, NATURAL GAS INVESTIGATION, DOCKET NO. G-580, initiated by order of Sept. 22, 1944, 4 F. P. C. 725 (1944); 9 FED. REG. 11810 (1944).

¹¹ See *infra*, pp. 386-391.

importance of *Phillips* and its significance in relation to the general question of jurisdiction over "independent producers and gatherers."

In 1940, two years after enactment of the Natural Gas Act, the Commission found itself faced with the jurisdictional problem in a proceeding involving a proposed change in a rate which had been voluntarily filed shortly after the Act was passed (*Re Columbian Fuel Corporation*).¹² In dismissing the proceeding on motion of the company, the Commission held that the Act did not extend to "all persons whose only sales of natural gas in interstate commerce, as in this case, are made as an incident to and immediately upon completion of such person's production and gathering. . . ."¹³ But it added that if further experience with administration of the Act revealed large initial sales by producers and gatherers which maintain an "unreasonable price despite the appearance of competition," the Commission would decide whether it could "assume jurisdiction" or should recommend legislation "to close this gap in effective regulation."¹⁴ Later in the same year, the principles announced in *Columbian* were applied by the Commission in status-determination proceedings in *Re Billings Gas Company, et al.*¹⁵

In February 1942, the Commission's *Columbian* decision elicited a disapproving frown from the United States Court of Appeals for the District of Columbia Circuit in *Peoples Natural Gas Company v. Federal Power Commission*.¹⁶ Sustaining Commission authority to issue a *subpoena duces tecum* for certain company records, the court described as within the Act's coverage certain sales in Pennsylvania by Peoples to an affiliate which transported the gas to New York and sold it to others for resale. In so doing, the court referred to the Commission's *Columbian* decision, saying:¹⁷

We cannot disregard the plain language of the statute because the Commission at one time interpreted it narrowly. . . .

About a year later, while the memory of *Peoples* was still fresh, the Commission was confronted by a contention, made in express reliance on *Columbian*, that Section 1(b) exempted sales claimed to be made as an incident to the seller's gathering process (*Re Interstate Natural Gas Company, Inc.*)¹⁸.

With an imprecision betokening little expectancy of the jurisdictional storms that were to ensue upon judicial review of its decision, the Commission's formal findings failed to mark the end of gathering, and its narrative descriptions of Interstate's operations did not finely draw the division line, the Commission saying:¹⁹ Interstate purchases gas from others operating in the Monroe Field in Louisiana, "which first gather and transport the gas to specified central delivery points for sale to Interstate." This purchased gas it commingles with other gas it "has pro-

¹² 2 F. P. C. at 200 (1940).

¹³ *Id.* at 208.

¹⁴ 127 F. 2d 153 (D. C. Cir. 1942), *cert. denied*, 316 U. S. 700 (1942).

¹⁵ *Id.* at 155.

¹⁶ 3 F. P. C. 416 (1943), *aff'd*, 156 F. 2d 949 (5th Cir. 1946), *aff'd*, 331 U. S. 682 (1947).

¹⁷ 3 F. P. C. at 420.

¹⁸ *Ibid.*

¹⁹ 2 F. P. C. 288 (1940).

duced and gathered" in the same field. It then "transports this commingled gas to the points of sale" in Louisiana to purchasers who transport it out-of-state for resale.

Taking cognizance of the fact that Interstate had successfully resisted regulation by the Louisiana Public Service Commission by contending in a federal court that its sales were sales in interstate commerce and omitting any reference to its *Columbian* decision, the Commission rejected Interstate's claim that Section 1(b)'s production and gathering exemption precluded federal regulation of its sales, commenting that:²⁰

The negative language in section 1(b) upon which the Interstate Company relies for its claimed exemption involving these sales provides that the Commission shall not have jurisdiction over "the production or gathering of natural gas." When the distinction between *production and gathering* of natural gas, and the *sale* of such gas in interstate commerce is kept in mind, effect is given to the Congressional objective.³ The Com-

³ For the distinction between production of a commodity and sales of such commodity in interstate commerce, see *Carter v. Carter Coal Co.*, 298 U. S. 238, 302-4. (Commission's italics.)
mission is bound to obey the command of Congress to regulate these sales in interstate commerce for resale to the three pipe line companies. Such is clearly the implication of the decision of the Circuit Court of Appeals in *Peoples Natural Gas Co. v. Federal Power Commission*. . . .

In rejecting the same arguments by Interstate, the United States Court of Appeals for the Fifth Circuit, with one judge vigorously dissenting on the jurisdictional point, sustained the Commission, saying:²¹

We think petitioner's difficulties in construction and interpretation arise out of the fact that, treating unlike things as alike, it tries to read the exception with respect to production or gathering as an exception with respect to sales. There is no warrant in the Act for so doing. It is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction, a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out. No conflict with them will, therefore, be found unless the conflict is clear and inescapable and then only in the precise point of the conflict. *Cf. Hartford v. Federal Power*, 2 Cir., 131 F. 2d 953. Here the statute was drawn to regulate, it picked out for inclusion "sale in interstate commerce of natural gas for resale for ultimate public consumption." It excluded from the scope of the act sales other than of this kind. It includes transportation in interstate commerce. It excluded local distribution of natural gas.

Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply "to the facilities used for such [i.e. local] distribution or to the production or gathering of natural gas." (court's brackets).

When it filed in the Supreme Court its brief in opposition to Interstate's petition

²⁰ *Id.* at 420, 421.

²¹ *Interstate Natural Gas Co. v. Federal Power Commission*, 156 F. 2d 949, 951 (5th Cir. 1946).

for certiorari, the Commission quoted with approval from the language of the lower court, set out above, and said further:²²

The Act clearly provides that a sale in interstate commerce of natural gas for resale for ultimate public consumption is a transaction to which the Act "shall apply" whereas the actual production or gathering of natural gas is an activity to which the provisions of the Act "shall not apply." To give effect to the whole, as the principles of construction require, the two activities must be interpreted as being mutually exclusive and not that the second nullifies the first.

On January 6, 1947, the Supreme Court denied certiorari,²³ but on February 10, 1947, the denial was vacated and the petition was granted,²⁴ following the filing of a petition for rehearing by Interstate, supported by the States of Oklahoma and Texas, the Independent Natural Gas Association of America, the American Petroleum Institute, the Independent Petroleum Association of America, and the Mid-Continent Oil and Gas Association.²⁵

It is also significant to note that, when the Commission filed its brief on the merits in *Interstate* in April, 1947, there was no repetition of the interpretation of Section 1(b) formerly urged in its December 1946 opposition to certiorari, quoted above. Instead, there was emphasis upon the substance of the Commission's findings that Interstate "was engaged in transporting the gas here involved *after* it had been gathered but prior to the sale"; that one of the disputed sales was to an affiliate; that Interstate was admittedly a "natural-gas company" by reason of sales other than those in dispute and thus subject to Commission regulation anyway; and that these considerations distinguish *Interstate* from the decisions in *Columbian*, *Billings*, and *Peoples*, the brief concluding that:²⁶

A careful analysis of the facts of these three cases and of the present case shows that the Commission has never sought to extend its jurisdiction over the sales of natural gas made by independent producers and gatherers, but only over sales made by one otherwise a natural-gas company or where affiliation between seller and purchaser is involved or where there is transportation in interstate commerce by the seller after completion of gathering prior to the wholesale sale.

II

IMPACT OF THE *Interstate* DECISION

Meanwhile, growing realization of the full impact of the Fifth Circuit's embrace *Interstate* opinion engendered mounting fears among "independent producers and gatherers," so far untouched by Commission regulation. In turn, came a rapid succession of allaying moves.

Thus, in February 1947, several bills were introduced in Congress which, generally speaking, would have nullified the effect of the Fifth Circuit's opinion by

²² Brief for the Federal Power Commission in Opposition, No. 733, Oct. Term, 1946, pp. 12-13.

²³ 329 U. S. 802 (1947).

²⁴ 330 U. S. 852 (1947).

²⁵ See Briefs in Support of Petition for Rehearing, filed in No. 733, Oct. Term, 1946.

²⁶ Brief for Respondent, Federal Power Commission, No. 733, Oct. Term, 1946, pp. 30, 35, 43.

amending the Natural Gas Act so as, among other things, to preclude attachment of jurisdiction to companies engaged only in the production and gathering of natural gas and its sale to companies transporting for resale out-of-state.²⁷

Shortly thereafter, on March 6, 1947, the Commission released for industry comments certain portions of the report prepared by a special staff in the Commission's *Natural Gas Investigation*, Docket No. G-580. One of these dealing with Section 1(b)'s exclusion of production and gathering stated:²⁸

The exemption [in §1(b)] is complete and would clearly seem to exclude from regulation under the Act sales made incident to or immediately upon the completion of production or gathering and before interstate transportation begins.

This section of the report recommended that the Commission adopt an administrative rule "to relieve the doubts and fears now prevailing" regarding the Commission's view of its jurisdiction over production and gathering sales, thereby making certain that:²⁹

All activities, including sales made at arm's length, by those who only produce, gather or process natural gas prior to its transportation or sale by others for resale in interstate commerce are exempt from the jurisdiction of the Federal Power Commission under the provisions of the Natural Gas Act.

On April 10, 1947, the Commission submitted to Congress its reports³⁰ on the aforementioned bills introduced in February, 1947, saying that their enactment at that time would be premature since some of the G-580 special staff reports had been released for industry comments, since others had not been completed, and since the views of the Commission had not yet been formulated with respect to the matters being investigated. It was also pointed out that the *Interstate* case was pending in the Supreme Court.

During May, 1947, while the foregoing proposed amendments of the Act were pending in Congress and with relevant House and Senate hearings partly completed, the Commission acted in several jurisdictional proceedings, some pending for years.³¹ Each of its orders disavowed jurisdiction over arm's-length sales by producers and gatherers to unaffiliated interstate pipe-line companies. One of them expressly relied on *Columbian* and distinguished *Interstate*, but made no reference to *Peoples*.³²

Hand-in-hand with these actions, on May 27, 1947, the Commission issued a

²⁷ H. R. 2185, H. R. 2235, H. R. 2292, and S. 734, all 80th Cong., 1st Sess. (1947). For a listing of subsequently introduced bills and relevant hearings, see *Re Phillips Petroleum Co.*, 10 F. P. C. 246, 268 n. 32 (1951).

²⁸ STAFF REPORT, F. P. C. DOCKET NO. G-580, PRACTICES AND PROBLEMS IN PRODUCING, GATHERING, AND PROCESSING NATURAL GAS 3 (mimeo.) (1947).

²⁹ *Id.* at 41.

³⁰ *Hearings before the House Committee on Interstate and Foreign Commerce, on H. R. 2185 et al.*, 80th Cong., 1st Sess. 10-12 (1947).

³¹ *Re The Fin-Ker Oil and Gas Production Company*, 6 F. P. C. 92 (1947); *Re Kansas-Nebraska Gas Co., Inc., et al.*, 6 F. P. C. 664 (1947); *Re R. J. and D. E. Whelan*, 6 F. P. C. 672 (1947); *Re Tennessee Gas and Transmission Company and The Chicago Corporation*, 6 F. P. C. 98 (1947).

³² *Re The Fin-Ker Oil and Gas Production Company*, 6 F. P. C. 92, 95-97 (1947).

notice of proposed rule making, whereby Section 1(b) would be interpreted as exempting from its jurisdiction arm's-length sales made by producers and gatherers to interstate transmission pipe-line companies.³³

Not long afterwards, on June 16, 1947, the Supreme Court handed down its decision in *Interstate*, unanimously affirming the Commission's jurisdiction over that company's sales.³⁴ The issue before it, said the Court, involved:³⁵

. . . the jurisdiction of the Federal Power Commission to regulate sales made in the field by petitioner to three pipe-line companies each of which transports the gas so purchased to markets in States other than Louisiana.

Having rejected an argument by *Interstate* that its sales were not "in" interstate commerce,³⁶ the Court turned to *Interstate's* claim that Section 1(b)'s exemption of production and gathering precluded federal regulation of the sales. It took note of *Interstate's* avoidance of regulation by Louisiana in a federal district court proceeding, *Interstate* there claiming that state jurisdiction could not extend to sales in interstate commerce,³⁷ and the Supreme Court said it was not the purpose of the Section 1(b) exemption "to free companies such as petitioner from effective public control." Its purpose, said the Court, was "to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act," adding:³⁸

Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interest of conservation or of any other consideration of legitimate local concern. [Citing *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 602-603.] It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.¹⁸

¹⁸ The Federal Power Commission has not asserted jurisdiction over all sales taking place in the natural gas fields even though in interstate commerce for resale for ultimate public consumption. In *the Matter of Columbian Fuel Corp.*, 2 F. P. C. 200; *In the Matter of Billings Co.*, 2 F. P. C. 288. We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases.

As to *Interstate's* claim that its sales were part of its gathering process and respecting subsidiary questions such as "whether the gathering process continued to the points of sale or was, as the Commission found, completed at some point

³³ *Re an Interpretative Statement of the Commission's Jurisdiction under Section 1(b) of the Natural Gas Act with Reference to "Production or Gathering,"* Docket No. R-106; 12 FED. REG. 3679 (1947).

³⁴ *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682 (1947).

³⁵ *Id.* at 684.

³⁶ *Id.* at 686-688.

³⁷ *Id.* at 686 n. 9 and 689-690. The case referred to is *Interstate Natural Gas Co. v. Public Service Commission*, 33 F. Supp. 50 (E. D. La. 1940); *id.*, 34 F. Supp. 980 (E. D. La. 1940).

³⁸ 331 U. S. at 690.

prior to surrender of custody and passage of title," the Court said it was unnecessary to resolve these issues, pointing out that:³⁹

By the time the sales are consummated, nothing further in the gathering process remains to be done.

If this means that sales made beyond the point where gathering is found to be completed are unaffected by the Section 1(b) exemption, as the Commission later concluded,⁴⁰ then the Court's discussion of that exemption is not material to the point decided. Be that as it may, soon after its issuance this decision was interpreted by many as sustaining Commission jurisdiction over sales by independent producers and gatherers.⁴¹

Within a week after the *Interstate* decision, the Commission on June 23, 1947, unanimously submitted to Congress a proposal to exempt those engaged only in the production and gathering of natural gas and sale thereof to transporters in interstate commerce.⁴² A week later, in analyzing a committee print of proposed amendments based on one of the bills introduced in February, H. R. 2185, which contained a number of provisions additional to those exempting independent producers and gatherers, the Commission on July 1, 1947, urged postponement of action "except with respect to the one pressing matter of independent production and gathering."⁴³

A few days afterwards, H. R. 4099, with provisions substantially the same as those contained in the Commission's proposal, was introduced by Congressman Priest on July 7, 1947.⁴⁴ Three days later, the Commission unanimously urged enactment of this bill "to make it perfectly clear that independent producers and gatherers of natural gas are exempt from the provisions of the Natural Gas Act," dispelling the uncertainty "created following the recent decision of the Supreme Court in the *Interstate* Case."⁴⁵ On the following day, July 11, 1947, the House passed H. R. 4051, a modified version of the bills originally introduced in February,⁴⁶ having on the floor rejected H. R. 4099 as a substitute.⁴⁷ But further action failed when the Senate Committee on Interstate and Foreign Commerce refused to report out S. 734, one of the bills introduced in February, and a companion bill to H. R. 2185.

On August 7, 1947, by general rule in Order No. 139, the Commission evidenced a forlorn hope that it might calm the storm administratively, saying:⁴⁸

³⁹ *Id.* at 692.

⁴⁰ See *infra*, pp. 398-399.

⁴¹ See e.g., *Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, on H. R. 4051, 80th Cong., 2d Sess. 570 (1948); *id.* on S. 1498, 81st Cong., 1st Sess. 500-501 (1949). But cf. *id.* on H. R. 4051, 80th Cong., 2d Sess. 108-109 (1948).

⁴² See *Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce* on H. R. 79 *et al.*, 81st Cong., 1st Sess. 4-5 (1949).

⁴³ See *Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce* on S. 734, *et al.*, 80th Cong., 1st Sess. 95 (1947).

⁴⁴ 80th Cong., 1st Sess. (1947).

⁴⁵ See *Hearings*, *supra* note 42, at 5.

⁴⁶ 93 CONG. REC. 8751 (1947).

⁴⁷ *Id.* at 8749 (1947).

⁴⁸ F. P. C. Docket No. R-106; *Hearings* on H. R. 4051, *supra* note 41, at 105; the full text of the order is printed in these hearings at pp. 104-106.

For the purpose of administering the Natural Gas Act, the Commission will construe the exemption contained in Section 1(b), to the effect that the provisions of the Act shall not apply to the "production or gathering" of natural gas, as including arm's-length sales of natural gas by independent producers and gatherers, made during the course or upon completion of production and gathering. The Commission, consistent with this construction, will not assert jurisdiction over such producers and gatherers who might be subject to jurisdiction solely because of such sales.

In a lone dissent referring to *Interstate* and admonishing the Commission that it "should hesitate to do by rule what the Congress had failed to do by law," Commissioner Draper said:⁴⁹

Interstate commerce is the field in which this Commission has jurisdiction, and no part of that jurisdiction may be eliminated except by act of Congress or by interpretation of the Courts to which this Commission owes allegiance.

By February of 1948, this three-to-one split in the then four-member Commission⁵⁰ had been replaced by a two-to-two division. This became apparent during the second session of the Eightieth Congress in hearings held on H. R. 4051, the bill passed by the House, before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce.⁵¹ Commissioners Smith and Wimberly subscribed to certain proposed amendments of the Act which, among other things, would make clear the exemption of independent producers and gatherers.⁵² Commissioners Draper and Olds, on the other hand, took the view that no amendment of the Act was needed and further that jurisdiction over interstate sales by independent producers and gatherers was clear and should be retained and exercised when warranted by unreasonable rate charges to interstate transporters.⁵³

A few months later, on April 28, 1948, the Commission published two reports on its G-580 Natural Gas Investigation,⁵⁴ the one subscribed to by Commissioners

⁴⁹ *Hearings* on H. R. 4051, *supra* note 41, at 106.

⁵⁰ The vacancy created by the resignation of Commissioner Sachse on May 2, 1947, left the five-member Commission with four members until July 14, 1948. On May 5, 1947, the director of the special staff conducting the G-580 investigation, Mr. Burton N. Behling, was nominated to fill this vacancy, but the Senate did not act on his nomination by the close of the first session of the 80th Congress. His nomination was again submitted on January 9, 1948, but withdrawn on March 19, 1948. On April 15, 1948, Mr. Thomas C. Buchanan was nominated to fill the same vacancy. The 80th Congress having concluded its second session without acting on this nomination, Mr. Buchanan took his seat following an interim appointment on July 14, 1948, and he was eventually confirmed by the Senate on June 6, 1949.

Commissioner Leland Olds' term expired on June 22, 1949. Following Senate rejection of his nomination for an additional term, Mr. Mon Wallgren was nominated to this vacancy, and assumed office on November 2, 1949.

Thus, when *Phillips* was decided on August 16, 1951 (see *infra*, pp. 395-401), the Commission consisted of Commissioners Wallgren (Chairman), Buchanan, Draper, Smith, and Wimberly.

⁵¹ Agreeing that the Commission was divided two-to-two, Commissioner Olds said, "We are divided on the question as to whether, in the regulation of pipe line interstate transportation of gas the utility part of the business is to be chopped off where the production and gathering ends." See *Hearings, supra* note 41, at 200.

⁵² *Hearings, supra*, note 48 at 98, 131-132.

⁵³ *Id.* at 148, 150, 198-201.

⁵⁴ FEDERAL POWER COMMISSION, NATURAL GAS INVESTIGATION (DOCKET No. G-580): one volume, Report of Commissioners Smith and Wimberly; one volume, Report of Commissioners Olds and Draper—Government Printing Office (1948).

Smith and Wimberly which generally agreed with the views of the special staff which conducted the investigation, and the other by Commissioners Olds and Draper which disagreed, among other things, as to the exemption of independent producers and gatherers and the need for amending the Act in other respects.

By and large, these reports laid down the basic positions of both sides of the growing controversy. They were published separately as government documents, received the detailed attention of congressional committees, and were later noticed by the Supreme Court.⁵⁵ Depending upon the individual commissioners in office during the period of controversy, the majority subscribed to one or the other of these positions.⁵⁶ The Commission's shifting view with regard to jurisdiction over producers and gatherers was emphasized in the hearings as evidence of the need for legislative clarification.⁵⁷ One senator later said in debate on the floor:⁵⁸

I grant indeed that the Federal Power Commission has wobbled all over the face of the earth with respect to this problem.

Legislative efforts having failed in the Eightieth Congress, little time was lost in resumption of the battle in the Eighty-First Congress.⁵⁹ A number of different bills received attention, including Senate hearings on the so-called Kerr bill, S. 1498.⁶⁰ Finally, there was favorably reported an amended version of the bill which would clearly exempt independent producers and gatherers.⁶¹ On March 29, 1950, this bill finally passed the Senate by a vote of 44 to 38 as an amendment to H. R. 1758.⁶² And on March 31, 1950, the House passed H. R. 1758 as amended by the Senate with a margin of only two votes—176 to 174.⁶³

But on April 15, 1950, it was vetoed by the President.⁶⁴

III

THE *Panhandle* CASE AND SECTION 1(B)

Meanwhile, during the congressional consideration of legislation to settle the jurisdictional question, the Supreme Court on June 20, 1949, decided a case directly interpreting the production and gathering exemption—*Federal Power Com-*

⁵⁵ See note 54 *supra*; *infra*, pp. 393-394.

⁵⁶ See *supra* note 50. Commissioner Buchanan agreed generally with the position taken in the Olds-Draper G-580 report, giving that view a majority from July 14, 1948 until the end of Commissioner Olds' term on June 22, 1949. Following four additional months of a two-to-two split, Commissioner Wallgren assumed office on November 2, 1949, and concurred in the Smith-Wimberly position in deciding *Phillips*.

⁵⁷ See e.g., *Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1498*, 81st Cong., 1st Sess. 218, 423, 516-517 (1949).

⁵⁸ 96 CONG. REC. 4110 (1950).

⁵⁹ See Comment, 59 YALE L. J. 1468, 1481-1484 (1950).

⁶⁰ See *Hearings*, *supra* note 57. See also *Hearings*, *supra* note 42, and *Supplemental Hearings*, *ibid.* (1949).

⁶¹ SEN. REP. NO. 567, to accompany S. 1498, 81st Cong., 1st Sess. (1949). See also H. REP. NO. 1140, to accompany H. R. 1758, 81st Cong., 1st Sess. (1949).

⁶² 96 CONG. REC. 4304 (1950).

⁶³ *Id.* at 4567-4568 (1950).

⁶⁴ H. Doc. No. 555, 81st Cong., 2d Sess. (1950); 96 CONG. REC. 5304 (1950).

*mission v. Panhandle Eastern Pipeline Co.*⁶⁵ While the point there in issue was not the Commission's authority to regulate sales of gas by independent producers and gatherers, the opinion has intriguing interest here, and the Commission expressly reacted to its influence in deciding *Phillips*, as we shall later see.⁶⁶ The Commission in *Panhandle* endeavored by injunction to prevent Panhandle, a "natural-gas company" subject to its jurisdiction, from disposing of reserves of natural gas pending the Commission's determination whether disposition should be allowed. In applying for certificates of public convenience and necessity in earlier proceedings, Panhandle had placed record reliance on these same reserves, along with others, to show its ability, and certificates had been issued upon Commission findings that the expansion was warranted.⁶⁷ Thereafter, the cost of their maintenance had been included in the rate base and borne by consumers.⁶⁸

Answering Panhandle's objection that the Commission lacked jurisdiction to prevent the proposed transaction because of Section 1(b)'s exemption of production and gathering, the Commission asserted that the exemption covered the physical activities of production and gathering, such as well-spacing and drilling, but did not cover facilities, such as gas reserves and leases. It argued further that the reserves had been "dedicated" to interstate service for which certificates had been issued, had been maintained in the rate base at the cost of the consumers, and could not be abandoned without Commission approval under the provisions of Section 7(b) of the Act.⁶⁹

With Justices Black, Douglas, and Rutledge dissenting and Justice Murphy not participating, the Supreme Court held that gas leases are an essential part of production and clearly beyond the Commission's authority to regulate.⁷⁰ The Court referred in detail to the Act's legislative history,⁷¹ relying on the same portion of that history in determining the scope of the production and gathering exemption which the Commission previously in the *Interstate* case in the Fifth Circuit had successfully argued was not authoritative,⁷² which *Interstate* had relied upon to no avail when that case reached the Supreme Court,⁷³ and which the dissenters alone had leaned heavily upon in *Canadian River Gas Co. v. Federal Power Commission*,⁷⁴ In so doing, the Court quoted at length from hearings on H. R. 11662, one of the Act's predecessor bills, including statements by the then Commission Solicitor, Mr. DeVane, that the Commission would not have jurisdiction over "gathering rates or the gathering business."⁷⁵ Referring to its prior decision in *Canadian River*, the Court in *Panhandle* said it had there held the Commission authorized to "include the fair value of the producing and gathering facilities" in the rate base, and then cautioned:⁷⁶

⁶⁵ 337 U. S. 498 (1949).

⁶⁶ 337 U. S. at 507.

⁶⁷ *Id.* at 504, 507-509.

⁶⁸ *Id.* at 502-505.

⁶⁹ Brief for Petitioner, *Interstate Natural Gas Co. v. Federal Power Commission*, No. 733, Oct. Term, 1946, pp. 33-39.

⁷⁰ 324 U. S. 581, 615-625 (1945); see *infra*, pp. 394-395.

⁷¹ 337 U. S. at 505 n.7.

⁶⁶ See *infra*, pp. 400-401.

⁶⁸ *Ibid.*

⁷⁰ *Id.* at 505-506, 515.

⁷² See *infra*, note 114.

⁷³ *Id.* at 506.

The use of such data [production and gathering costs] for rate making is not a precedent for regulation of any part of production or marketing.

After discussing several sections of the Act cited by the Commission as giving it certain authority with regard to phases of production and gathering, the Court said:⁷⁷

Although these sections bear evidence of congressional consideration of the relationship of production properties to other elements of the natural-gas business, they do not even by implication suggest to us an extension of the regulatory provisions of the Act to cover *incidents connected with the production or gathering of gas.*

Correspondingly, the Court later concluded:⁷⁸

As we have held above that the transfer of undeveloped gas leases is an *activity related to the production and gathering of natural gas and beyond the coverage of the Act*, the authority of the Commission cannot reach the sales.

Noting that the legislative history is replete with evidence of the care taken by Congress "to keep the power over the production and gathering" within the states, the Court continued:⁷⁹

This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. . . . Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views.

Worthy of mention also is the fact that, in commenting that if the Commission thought it should have power to control disposition of leases it could so inform the Congress, the Court characterized as "an analogous situation" the uncertainty of opinion in the Commission as to the "reach of the Act toward sales by independent producers and gatherers."⁸⁰ It then quoted in full the following paragraph from the G-580 report of Commissioners Smith and Wimberly, while allowing a mere "see also" for the opposing report of Commissioners Draper and Olds:⁸¹

No reasonable basis is found in the Act or its legislative history for a conclusion that, although the "activities" of production and gathering are exempt under Section 1(b), sales of natural gas which are made at arm's length by producers and gatherers who do not thereafter transport it in interstate commerce may be regulated. Unless such a distinction is specifically disclaimed, doubts and uncertainties will continue to be felt and expressed regarding the possible jurisdiction under the Natural Gas Act of those who only produce and gather natural gas and then sell it to others transporting such gas in interstate commerce. Pp. 38-39.

In view of the present unsettled state of this matter, it is desirable, as the Commission has heretofore recommended, that the Congress should adopt appropriate amendatory legislation to make it clear that independent producers or gatherers of natural gas, and

⁷⁷ *Ibid.*

⁷⁹ *Id.* at 512-513.

⁸¹ *Id.* at 516 n. 25.

⁷⁸ *Id.* at 515.

⁸⁰ *Id.* at 515-516.

their sales thereof to interstate pipe lines, are not subject to the provisions of the Natural Gas Act. Such action will confirm what clearly appears to have been the original intent of Congress when it enacted the Natural Gas Act in 1938. Pp. 40-41.

Justice Reed's opinion for the majority in *Panhandle* was joined in by Chief Justice Vinson and Justices Frankfurter, Jackson, and Burton. Two of these, Justices Reed and Frankfurter, together with Justice Roberts, had four years earlier joined Chief Justice Stone in a lengthy dissent in *Canadian River* from the majority's holding that Section 1(b)'s production and gathering exemption does not forbid the Commission to include the cost of a "natural-gas company's" production and gathering facilities in its rate base in fixing rates for its sales subject to the Commission's jurisdiction.⁸² Significance may logically attach to the suggestion, which arises from a mere reading, that the philosophy and reasoning respecting production and gathering which permeates the *Canadian River* dissent, were later woven into and elaborated upon in the majority opinion in *Panhandle*.

For example, referring to the same sections of the Act which *Panhandle* analyzed as unhelpful to the contentions there urged by the Commission, the *Canadian River* dissent had earlier said:⁸³

Nor is the plausibility of the Government's construction aided by reference to the provisions of the Act giving the Commission power to make investigations, to regulate accounts, to gather information and to find values of property of natural gas companies and their depreciation. These provisions are obviously directed at aiding the Commission in the exercise of various powers which are conferred upon it but which are unrelated to the regulation of the production or gathering of natural gas. (Footnote omitted.)

Also like the *Panhandle* majority opinion, the *Canadian River* dissent had quoted extensively from the hearings on H. R. 11662, Mr. DeVane's testimony that the Commission should have no jurisdiction over "rates paid in the gathering field," that is, "gathering rates," which are "fixed by competitive conditions that exist in the field."⁸⁴ And citing to that testimony, the dissent had said:⁸⁵

That the exemption of the production of natural gas from regulation was thought by the regulatory authorities themselves to exclude regulation, by the Commission, of the price of gas in the producing field, appears from the hearings upon the predecessor bill, which contained provisions identical with or substantially equivalent to §§5(b), 6(a), 9(a), and 10(a) of the Act as finally passed, and §1(b) of which declared that the provisions of the bill should not apply "to the production of natural gas." (Footnote omitted.)

and further that:⁸⁶

He said that the unregulated field price was controlling upon the Commission "if the transaction is at arm's length. If the transaction is not at arm's length, of course, its reasonableness may be inquired into, under the decisions of the Supreme Court." (Footnote omitted.)

⁸² *Canadian River Gas Co. v. Federal Power Commission*, 324 U. S. 581, 615-625 (1945).

⁸³ *Id.* at 619.

⁸⁴ *Id.* at 621 n. 2.

⁸⁵ *Id.* at 621.

⁸⁶ *Id.* at 623.

Similarly, the dissent had adverted to situations where "a regulated utility procures from an *unregulated source* the product which it distributes" and to the standards of value prevailing in "an *unregulated business* when it is conducted at arm's length," and then concluded.⁸⁷

If it be thought that petitioner's profits from production of gas are too great because they are unregulated, and if it be thought to be important that they be reduced it is immensely more important that that be not accomplished by lawless action.

Still another Supreme Court decision merits passing notice here and more detailed comment later.⁸⁸ After the decisions in *Interstate* and *Panhandle*, the Court in 1950 held in *Cities Service Gas Co. v. Peerless Oil and Gas Company*⁸⁹ that, without benefit of any enabling federal legislation, a state is constitutionally competent, in the interest of conservation, to regulate the well-head price for gas which a producer sells interstate.

If all of the foregoing suggests a somewhat tumultuous growth of the problem and the pressures confronting the Commission when it came to decide *Phillips*, the present purpose has been sufficiently and accurately served, even if an unexpurgated account might hold more sensational interest in tracing the bitter battles waged in the halls of Congress and the Commission, in the newspapers, and elsewhere. In any event, two things become clear: first, the Commission in the thirteen years prior to *Phillips* had never actually asserted jurisdiction over sales by a producer or gatherer found to be made during the course of gathering or at the termini of gathering facilities; and second, concern nevertheless grew in the industry as the Commission moved from *Columbian* to an apparent embracing of *Peoples* in deciding *Interstate*, and as the views of its changing membership expressed outside formal Commission proceedings carried an impending threat of a formal assertion of jurisdiction.

IV

THE COMMISSION'S OPINION IN *Phillips*

Against the foregoing background, there appears little room for doubt that the Commission viewed *Re Phillips Petroleum Co.*⁹⁰ as a means for resolving the general question of its jurisdiction under the Act with respect to "independent producers and gatherers." Abundant warrant for this conclusion exists in the history

⁸⁷ *Id.* at 623-624.

⁸⁹ 340 U. S. 179 (1950).

⁸⁸ See *infra*, pp. 399-401.

⁹⁰ 10 F. P. C. 246 (1951). Four commissioners agreed that *Phillips* was not a "natural-gas company" under the Act and joined in the order terminating the proceeding—Wallgren (Chairman), Draper, Smith, and Wimberly. As will be developed in the text, the majority opinion held (1) that *Phillips'* sales were a part of or incidental to gathering and thus excepted by §1(b)'s exemption of production and gathering, and (2) that regulation of those sales would conflict with the exercise of state regulatory functions, exemption following under the *Interstate* test. Commissioner Draper's separate concurrence in the majority result rested solely on the second ground (pp. 283-284). In a comprehensive dissenting opinion, Commissioner Buchanan took the position that as a matter of law sales cannot be exempted as a part of or incidental to gathering, that as a matter of fact *Phillips* was engaged in jurisdictional transportation after which its sales were made, and finally, that there was no evidence of federal-state conflict (pp. 284-321).

of the problem, already discussed, and facts involved in the case, to which a summary reference here will suffice.⁹¹

Phillips was a large integrated unit in the petroleum industry, owning properties in the Mid-Continent, Illinois, West Texas and New Mexico, Rocky Mountain, and Gulf Coast areas. It owned or controlled by contract over 15 trillion cubic feet of gas reserves and over 1,247 million barrels of proved reserves of crude oil, natural gasoline, and other natural-gas liquids. Thus, although natural gas contributed less than 5 per cent of its gross operating revenues, Phillips was a giant among producers of natural gas, its annual sales exceeding 400 million Mcf. Over half of this total was sold to transporters admittedly subject to Commission jurisdiction.

In large measure, the gas produced or purchased by Phillips flowed through its own lines for processing and disposition at processing plants owned and operated by Phillips. It owned about 4,380 miles of gathering, residue, and other gas lines in Arkansas, Kansas, Oklahoma, Texas, and New Mexico. It also owned and operated 25 natural gasoline plants—19 in Texas, 4 in Oklahoma, and 2 in New Mexico. Additionally, it had a part interest in 10 others, 3 of which it operated.

Typically, gas flowed from the wells through one of Phillips' several pipe-line systems to one of its several processing plants in the field. Each of such systems was composed of a network of converging pipe lines of increasingly larger size, and thus Phillips collected gas from the wells to common points in or relatively near the processing plants. Operations in the plants were conducted either to make the gas salable or to recover extractable products, or for a combination of these purposes. Thereafter, the gas was moved a few hundred feet or yards, depending on the plant and sale involved, to points of sale to the transporters who carried it to consumers and distributors in fourteen states.

Although the *Phillips* proceeding involved a rate investigation, the Commission soon indicated its determination to employ the case as a vehicle to test the jurisdictional question. While the hearing was in early progress, the Commission issued an order postponing for later determination other issues and restricting matters presented to only those relating to whether Phillips was a "natural-gas company."⁹²

The Act made it one by definition if it engaged either "in the transportation of natural gas in interstate commerce" or in the "sale in interstate commerce of such gas for resale."⁹³ By Section 1(b), the provisions of the Act are made to apply to such "transportation" and such "sale," but are made expressly inapplicable to, among other things, the "production or gathering" of natural gas.⁹⁴ The Commission in its opinion observed that Phillips "correctly concedes that the sales involved here are sales in interstate commerce for resale" and that there could be no doubt "that Phillips' movement of that gas from the points of production to the points of sale constitutes transportation in interstate commerce as a matter of con-

⁹¹ This summary derives from the statement of facts in the Commission's opinion. 10 F. P. C. at 249-261.

⁹² *Id.* at 248.

⁹³ §2(6); see *supra* note 3.

⁹⁴ For the full text of §1(b), see *supra*, p. 382.

stitutional law," adding that the latter conclusion is "in part implicit in Phillips' concession respecting the sales."⁹⁵ Clearly, therefore, Phillips was a "natural-gas company" and subject to regulation unless saved by Section 1(b)'s exemption of production and gathering.

Two distinctly separate considerations are necessarily involved in testing the applicability of that exemption—one a conclusion of law and the other a question of fact. The legal problem is whether Section 1(b)'s exemption of production and gathering can be so construed as to except from the coverage of the Act "transportation" and "sales" of the very types to which the affirmative part of Section 1(b) says that the provisions of the Act shall apply.⁹⁶ If the answer be negative, Phillips would be a "natural-gas company" and nothing further would remain to be settled to fix its status. But if the answer be affirmative, its status would depend upon a factual determination yet to be made. For after meaning has been ascribed to the words "production" and "gathering"—which are undefined in the statute—status would hinge on a factual determination whether, in point of time and place, Phillips' movement and sales of gas come within or outside the defined compass of production and gathering. Only if they come within that compass, would exemption result.

As to the question of law, the Commission employed a functional approach and concluded that, by the exemption in Section 1(b), Congress had denied it jurisdiction over the "business" of production and gathering, and that transportation and sales occurring during the "process" of gathering are exempt as a part of that business.⁹⁷ In addition, for reasons to which we shall refer later, it construed the exemption to include "incidents connected with" and any "activity related to production and gathering."⁹⁸ Then, on the basis of voluminous evidence,⁹⁹ the Commission made specific narrative and formal findings of fact that Phillips' transportation and sales constitute a part of its gathering business, or are incidents connected with or activities so related to its gathering process as to require exemption.¹⁰⁰

The foregoing interpretation of Section 1(b) followed an extensive review in the opinion of the legislative history of the Act, of relevant administrative actions, and of pertinent judicial opinions. While sufficient reference has already been made herein to these general considerations, the Commission's view of the impact of three decisions of the Supreme Court is worthy of particular note.¹⁰¹

⁹⁵ 10 F. P. C. at 262.

⁹⁶ See *supra*, p. 382.

⁹⁷ 10 F. P. C. at 276-277.

⁹⁸ *Id.* at 277; see *infra*, pp. 400-401.

⁹⁹ Hearings began on April 3, 1951, and concluded on May 23, 1951. There were some 6,000 pages of transcript, plus many additional thousands of pages in some 196 exhibits received in evidence. 10 F. P. C. at 248.

¹⁰⁰ *Id.* at 277-278, 282-283.

¹⁰¹ Also worthy of note is the apparent abandonment by the Commission of a curious jurisdictional concept to which it had previously adhered.

In its 1940 disavowal of jurisdiction over sales made at the termini of gathering lines, the Commission had asserted that "it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons whose only sales of natural gas in interstate commerce, as in this case,

In the first place, of course, the Commission had to face up to the *Interstate* case, referred to above.¹⁰² In passing quickly over the Fifth Circuit's split decision that the exemption of "production or gathering" comprehended "activities" but not "sales,"¹⁰³ the Commission merely noted that its order had been sustained by that court in sweeping terms.¹⁰⁴ It then observed the Supreme Court's conclusion that *Interstate's* sales were "sales 'in interstate commerce'" and proceeded to quote that part of the *Interstate* opinion which follows a discussion of the purpose of Section 1(b) to give states full freedom in the areas of production and gathering in which they are constitutionally competent to act, the Court saying:¹⁰⁵

Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.

Now if this be a part of the actual holding of *Interstate*, it is undeniably plain that the Commission has authority to regulate all sales made during the course

are made as an incident to and immediately upon the completion of such person's production and gathering of said natural gas and *who are not otherwise subject to the jurisdiction of the Commission.*" *Re Columbian Fuel Corporation*, 2 F. P. C. 200, 208 (1940). In the same vein, the Commission then thought that Congress intended Commission regulation to include companies whose "main" function was to transport interstate and sell at city gates for resale, adding that it was assumed that production and gathering would "enter the field of regulation" only to the extent that pipe-line companies controlled these functions directly or through affiliates. 2 F. P. C. at 207. The Commission then concluded by indicating that if it later found that producing and gathering companies, "through affiliation, field agreement, or dominant position in a field," could maintain "an unreasonable" price despite the appearance of competition, it would decide whether it could "assume" jurisdiction over "arbitrary field prices" or should refer the matter to Congress. 2 F. P. C. at 208.

The foregoing suggests that the power to fix the rate for a sale during or at the completion of gathering might somehow turn on whether the seller was "otherwise" a "natural-gas company" or whether the sale was made at arm's length. It seems a bit difficult, however, to bottom these suggestions on the language of §1(b), despite the clear authority of the Commission to ignore the contract rate for such a sale not at arm's length and instead to make an appropriate allowance on a cost basis in fixing the rate at which the *purchasing company* resells.

In any event, both of these suggestions were specifically continued in 1947 in *Re The Fin-Ker Oil and Gas Production Company* (6 F. P. C. 92; see *supra*, p. 387), the Commission saying that "where a person not *otherwise* subject to the jurisdiction of the Commission, is engaged in the production or gathering of natural gas exclusive of its transportation in interstate commerce and makes *arm's-length sales* and deliveries of natural gas in interstate commerce as an incident to or upon the completion of that person's production or gathering, the provisions of the Natural Gas Act do not apply." See also F. P. C. Order No. 139, Aug. 7, 1947, Docket No. R-106, and *supra*, pp. 387-388.

In *Phillips*, the Commission was again confronted with sales which where consummated, in point of time and place, similarly to those in the foregoing cases. But there appears in *Phillips* no jurisdictional dependence on the fact that Phillips was not "otherwise" a "natural-gas company" subject to regulation by the Commission. Nor is the exemption tied to an arm's-length" characterization of the sales.

Instead, in its seemingly deliberate abandonment of these dubious concepts, the Commission posed *Phillips* in sharper focus as a case testing the basic question whether sales made during or at the conclusion of gathering are placed beyond its jurisdiction by §1(b)'s exemption.

¹⁰² *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682 (1947); see *supra*, pp. 388-389.

¹⁰³ *Interstate Natural Gas Company v. Federal Power Commission*, 156 F. 2d 949, 951 (1947); see *supra*, p. 385.

¹⁰⁴ 10 F. P. C. at 272.

¹⁰⁵ 331 U. S. at 690, quoted at 10 F. P. C. 272.

of production and gathering other than those proscribed by the judicially composed ban, quoted above. But in its *Phillips* opinion, the Commission took an unequivocal position¹⁰⁶ that this language is *dicta* and that *Interstate* does no more than uphold its jurisdiction over sales made outside the gathering process, the Commission pointing to the Court's statement that:¹⁰⁷

By the time the sales are consummated, nothing further in the gathering process remains to be done.

For its position that *Interstate* cannot be viewed as holding that its jurisdiction attached to all interstate sales made during the course of production and gathering except where the indicated federal-state conflict occurs, the Commission looked for support to the Supreme Court's later decision in *Cities Service Gas Co. v. Peerless Oil and Gas Co.*¹⁰⁸ There, the Commission noted,¹⁰⁹ state power to regulate interstate sales at the well-head was upheld in the absence of enabling federal legislation, the Court expressly relying on constitutional principles laid down in cases decided long before the passage of the Natural Gas Act. The Commission viewed this as showing that a state suffers no constitutional disability to regulate at least interstate sales made at the well-head during the course of production and gathering. *Interstate* had said that, to foreclose the attachment of Commission jurisdiction under the Natural Gas Act, the indicated federal-state conflict must be "clearly shown"—plainly connoting federal preemption by that Act as to all sales where that conflict is not shown. But in dealing with sales coming within the category apparently preempted in *Interstate*, *Cities Service* nonetheless spoke in terms of the "quiescence of federal power" and of the settled rule that a state may regulate matters of local concern over which "federal authority has not been exercised," despite a resulting impact on interstate commerce. And finally, instead of requiring that the conflict be "clearly shown," the Court in *Cities Service* conversely noted the absence of a contention that the state orders involved a "conflict" with federal authority. This seeming switch in substantive view might be explained away if it could be said that in *Cities Service* the Court was unaware of the Natural Gas Act. But the

¹⁰⁶ 10 F. P. C. at 272.

¹⁰⁷ 331 U. S. at 672, quoted at 10 F. P. C. 273. This obscure and variously interpreted pronouncement of the Supreme Court would, of course, apply to a sale made at any point between wherever gathering ends and the consumer's burner tip. And taken alone, therefore, does not dispose of the question of whether a sale consummated at the termini of gathering facilities does or does not constitute a part of the gathering process. Indeed, this statement is preceded by the Court's reference to *Interstate's* claim that §1(b) precludes the Commission from regulating its sales, the Court asserting that it was unnecessary to resolve such subsidiary issues as "whether the sales were made from petitioner's 'gathering' lines or from petitioner's 'transmission' lines and whether the gathering process continued to the points of sale or was, as the Commission found, completed at some point prior to the surrender of custody and passage of title." 331 U. S. at 692. Correspondingly, the Commission brief in the Supreme Court had emphasized that, on the basis of Commission findings, *Interstate* was engaged in "transporting" the gas *after the completion of gathering and prior to the sales*. See *supra*, p. 386.

All of this together, at the very least, permits the argument that considerations respecting the "gathering" exemption are irrelevant to the actual holding in *Interstate*.

¹⁰⁸ 340 U. S. 179 (1950).

¹⁰⁹ 10 F. P. C. at 274-276.

contrary is shown by the following statement in *Cities Service*, of which the Commission's opinion took express cognizance:¹¹⁰

Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states, is not before this Court.

If it be proper to view *Interstate* as actually holding that Commission jurisdiction attaches to all interstate sales for resale made during the course of production or gathering except upon a "clear showing" of the indicated federal-state conflict, the holding in *Cities Service* is at least difficult to understand, if not irrational,¹¹¹ and the Commission concluded that the question before it in *Phillips* was left undecided by either of those decisions.

The third Supreme Court decision of which the Commission took particular account was *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, also referred to earlier herein.¹¹² And its *Phillips* decision may well stand or fall on whether the Commission accurately assessed the Court's temper in *Panhandle* which directly interpreted the production and gathering exemption. As already noted,¹¹³ in respect of production and gathering, the philosophy of the dissenters in *Canadian River* seemingly graduated to become the majority view of the Court in *Panhandle*. The Court in *Panhandle* placed its stamp of approval on testimony by the then Commission Solicitor in connection with one of the Act's predecessor bills, H. R. 11662 (Seventy-Fourth Congress, Second Session), that the Commission would have no jurisdiction over "gathering rates or the gathering business";¹¹⁴ and the Court went far beyond the necessities of treating the issues before it to speak of the "uncertainty of opinion in the Commission as to the reach of the Act toward sales by independent producers and gatherers," quoting extensively from that part of the G-580 report of Commissioners Smith and Wimberly which denied that the Act conferred such jurisdiction, and dismissing the opposing view of Commissioners Draper and Olds in their G-580 report with a "see also."¹¹⁵ Such indicia did not escape the attention of the Commission when it decided *Phillips*.¹¹⁶ Correspondingly, with the sales issue now before it, the Commission complied literally with the Court's interpretation in *Panhandle*, holding that opinion to require exemption not only of production and gathering, but also of all "incidents connected with" and any "activity related to production and gathering."¹¹⁷ Paralleling that conclusion

¹¹⁰ 340 U. S. at 188-189, quoted at 10 F. P. C. 276.

¹¹¹ There is no reference to *Interstate* in *Cities Service*, and presumably the latter did not overrule the former.

¹¹² 337 U. S. 498 (1949); see *supra*, pp. 391-395.

¹¹³ See *supra*, pp. 394-395.

¹¹⁴ 337 U. S. at 505. Earlier, before the United States Court of Appeals for the Fifth Circuit, the Commission in its brief in *Interstate* had objected to the authoritativeness of this part of the history largely because of the differences between H. R. 11662 and the Act as passed, and that court apparently agreed. 156 F. 2d at 952. But the Supreme Court, in expressly legitimizing this part of the history in *Panhandle*, referred to H. R. 11662 as "substantially similar" to the Act. 337 U. S. at 505 n. 7. See also *supra*, pp. 392, 394.

¹¹⁵ 337 U. S. at 262-263 n. 25.

¹¹⁶ 10 F. P. C. at 263-264, 274.

¹¹⁷ 337 U. S. at 506, 515, quoted at 10 F. P. C. 277. In *Re Columbian Fuel Corporation*, the Commission nine years before *Panhandle* had used a somewhat similar phrasing in holding that it did

the findings in *Phillips* determined that all of the company's sales and movements of gas were a part of gathering, or were incidents connected with or activities so related to that function as to require exemption as a matter of law.¹¹⁸

Furthermore, referring specifically to *Interstate*, the Commission additionally and separately found that *Phillips*' sales were made "during the course of production and gathering" and were "so closely connected with the local incidents of that process as to render rate regulation by this Commission inconsistent or a substantial interference with the exercise by the affected states of their regulatory functions."¹¹⁹

From the foregoing, it is evident that the Commission considered the *Phillips* case as a means for testing generally whether the Act conferred upon it jurisdiction over a company whose only interstate sales and movements of gas are found to be a part of its gathering or incidents thereof. After reviewing the language and history of the Act, its thirteen-year administrative refusal to assert jurisdiction over such sales and movements, and relevant judicial indices, the Commission concluded as a matter of law that such sales and movements constitute a part of the gathering business which Congress intended to free from federal regulation by Section 1(b)'s exemption. And it made the factual determinations that, in point of time and place, all of Phillips' sales and movements of gas took place within the compass of gathering as thus defined. In reaching this conclusion, the Commission necessarily determined that the *Interstate* test was contrary to the Act's requirements so far as this test made federal jurisdiction depend on the absence of federal-state conflict. And although it took the unqualified position that the *Interstate* test was not binding since born of *dicta*, the Commission made the precautionary findings appropriate to that test if applicable.

Assuming reviewability and passing the possibility of reversal for procedural error or for want of support for findings of fact, there loomed only one reasonable eventuality that could logically prevent *Phillips* from effectually testing the general jurisdictional question for which the Commission sought resolution. There remained a possibility that the courts might hold that the Commission had authority over sales made at the completion of gathering, without applying principles or employing language to indicate what the result would be as to sales upstream from that point.

V

THE OPINION OF THE COURT OF APPEALS IN *Phillips*

But the perplexing history of this broad jurisdictional problem was destined to become still more confusing, frustrating at least temporarily those seeking a decisive answer. For as we shall shortly see, no reliable criterion is derivable from the first judicial decision in *Phillips*, the court's opinion being susceptible of sharply divergent interpretations. Several petitions for review of the Commission's decision

not have jurisdiction over sales made "as an incident to and immediately upon completion of" production and gathering. 2 F. P. C. 200, 208 (1940).

¹¹⁸ 10 F. P. C. at 277-278, 282-283.

¹¹⁹ *Id.* at 278-279.

were filed in the United States Court of Appeals for the District of Columbia Circuit, producing states and agencies and those representing consumer interests aligning on opposing sides.¹²⁰ After argument before Judges Edgerton, Clark, and Washington on December 12, 1952, judicial resolution of the problem then fourteen years old was again postponed when Judge Washington withdrew from the case. On January 12, 1953, the case was reargued before Judges Edgerton, Clark, and Prettyman.

On May 22, 1953, the court's decision reversing the Commission came down with an opinion by Judge Edgerton,¹²¹ he and Judge Prettyman concluding on the point at issue that Phillips is a "natural-gas company" and further that the Commission "should" fix the rates for its sales; Judge Clark dissented from both their reasoning and conclusions.¹²²

But the opinion disappoints those who viewed *Phillips* as a touchstone for the harassing jurisdictional problem. For it is somewhat difficult to determine specifically the basis upon which the court intended to rest its decision. As we shall shortly see, one dispositive basis seems to be the court's determination that Phillips' sales were consummated *after* the completion of gathering, leaving interpretation of Section 1(b)'s exemption to implication or even immaterial to the decision. Or it could be that the court based its decision on a sweeping view that, as a matter of law, every sale in interstate commerce for resale is jurisdictional without limitation by Section 1(b)'s exemption.

As to the first possible view, there is warrant for concluding that the court substituted its own findings for those made by the Commission. In referring to Phillips' operations in its preliminary statement of the case, the court said:¹²³

Through progressively larger pipelines it *gathers* gas that it produces from its own wells, and other gas that it buys, at common points *in or near* its plants. At these plants it processes the gas to make it salable or to recover extractable products or both. Phillips then *moves* the gas here involved through short lines to points where Phillips sells it. . . .

This tentative but apparent unwillingness to accept the Commission's gathering findings, implicit in the switch from "gathers" to "moves," becomes blunt in the very next sentence:¹²⁴

¹²⁰ Petitions for review were filed by the State and the Public Service Commission of Wisconsin, by the County of Wayne, Michigan, and by the Cities of Detroit, Michigan, Kansas City, Missouri, and Milwaukee, Wisconsin. On the side of the respondent Commission, intervenors included the State and the Oil Conservation Commission of New Mexico, the Corporation Commission of Oklahoma, and the State and the Railroad Commission of Texas, as well as the Phillips Petroleum Company. Wisconsin v. Federal Power Commission, D. C. Cir. No. 11247, *et al.*, 1951.

¹²¹ It was Judge Edgerton who in 1942 had written the opinion for the same Court in the *Peoples* case. See *supra*, p. 384.

¹²² Wisconsin v. Federal Power Commission, 205 F. 2d 706 (1953).

¹²³ *Id.* at 708.

¹²⁴ *Ibid.* If this sentence be an effort by the court to parallel the assertion by the Supreme Court in the *Interstate* case that "By the time the sales are consummated, nothing further in the gathering process remains to be done" (331 U. S. at 692), it overlooks the fact that the *Interstate* assertion is in express harmony with the findings made by the Commission in that case. See *supra*, pp. 388-389.

Thus Phillips sells the gas *after* the time and *beyond* the place where production and gathering are complete and *after* processing has intervened.

These statements appear at the outset of the opinion describing the physical facts and are followed by paragraphs devoted to discussion of legal principles. If they correctly reflect the facts, then reversal of the decision of the Commission should ultimately follow since it made contrary findings as to the same facts. And while much of the remainder of the court's opinion would thereby be rendered surplusage, it does supply evidence that the foregoing quotations do not spring from a careless use of words, but rather denote the thesis underlying the court's disposition of the case.

Thus, it is stated later that the Supreme Court has repeatedly upheld Commission authority to regulate rates at which a "producer and gatherer of natural gas sells it, *after* producing and gathering it. . . ." ¹²⁵ Likewise, the court characterized *Cities Service* as irrelevant since "Phillips' sales are made *after* the gas has been gathered into trunk lines." ¹²⁶ Again, it said, "The exemption of production and gathering does not exempt sales made *after* production and gathering have been completed." ¹²⁷ Finally, having earlier brushed aside the Commission's finding that Phillips' sales are made "during the course of production and gathering" as being "unsupportable"—without attempting to state why—the court flatly asserted the contrary to be the fact—again without stating why. ¹²⁸

The court nowhere discusses the meaning ascribed by the Commission to the critical term "gathering." Nor does it attempt to lay down a definition of its own. Therefore, the court's determinations, quoted above, that Phillips' sales are made after the completion of gathering could possibly be assessed in either of two ways: (1) if the Commission's definition was applied by the court to its own evaluation of the physical operations, then the court's determinations would be a substitution for the findings of the Commission, the court's contrary findings of fact that "Phillips sells the gas after the time and beyond the place where production and gathering are complete and after processing has intervened"; or (2) if the court applied to the facts as it saw them, some undisclosed but different definition of its own for "gathering," the court's determinations would be an unexplained rejection of both the Commission's legal conclusion in defining gathering and its factual application of that definition.

If the court merely substituted its own findings of fact for those of the Commission, it did so without reference to or analysis of the Commission's findings or of

¹²⁵ 205 F. 2d at 709. Apart from the literal accuracy of this statement which does not come to grips with the question of jurisdiction over sales made during or at the completion of gathering, it may be noted that one of the two cases relied on by the court is *Colorado-Interstate (Canadian River)* (*supra*, pp. 394-395), which did not involve a question whether the Commission can regulate sales made during or at the completion of gathering. And as we have seen, it is a matter of dispute whether this question was or was not resolved in *Interstate*, the other case relied on by the court. Not the least of evidences that the question was not decided there inheres in the Supreme Court's statement in the *Interstate* opinion that "We express no opinion as to the validity of the jurisdictional tests employed by the Commission in [the *Columbian* and *Billings* cases]" (see *supra*, p. 388), where that was the question at issue.

¹²⁶ 205 F. 2d at 710 n. 9.

¹²⁷ *Id.* at 711.

¹²⁸ *Id.* at 711 n. 11; *id.* at 712.

the voluminous record upon which they were based. And whether or not it might have shown those findings to be lacking the requisite record support, its failure to undertake this task and its replacement of judicial findings for the traditional products of the administrative process would then constitute a departure from elemental and long-settled principles of administrative law. Indeed, this would be so even if the court's determinations be deemed inextricable admixtures of findings of fact and a conclusion of law in the form of some unstated different definition. For the absence from the Act of a definition made it necessary for the Commission—as the agency charged with and experienced in administering the statute and familiar with its history and the industry affected—to determine initially the meaning of “gathering” and its application to the particular facts before it. And it is settled that a court reviewing the determination made in such a context is limited to deciding whether that determination has “‘warrant in the record’ and a reasonable basis in law.”¹²⁹ Whatever may be the correct explanation for the court's statements that Phillips' sales occur after the completion of gathering, they seemingly render immaterial to the decision the exemption in Section 1(b) since the exception for “gathering” cannot affect jurisdiction over sales made after its completion.

But other parts of the opinion argue against the foregoing as an unqualified explanation of the decision reached by the court. So we turn to consider its other possible underpinning.

If it be correct that, as a matter of law, no interstate sale for resale can be excepted from the Act's coverage by the Section 1(b) exemption, then the result reached by the court is sound. Its opinion suggests the court's inclination toward such a view of the law, but leaves unclear the extent to which the court relies upon such a principle in reaching its decision. Significantly, the court quoted approvingly the Fifth Circuit's rejection in the *Interstate* case of that company's attempt to “read the exception with respect to production or gathering as an exception with respect to sales,”¹³⁰ this apparent concurrence disregarding the fact that the Supreme Court in the same case said that Section 1(b) is to be read as conferring exemption of sales made in the course of production and gathering where their regulation by the Commission results in federal-state conflict.¹³¹ Similarly, the court quoted the Fifth Circuit's reference to *Peoples* as holding that the Section 1(b) exemption of production and gathering “did not limit the commission's jurisdiction over” interstate sales, despite the express recognition in the *Phillips* opinion that the

¹²⁹ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130-131 (1944); *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (1939); *South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251, 260-261 (1940); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 399-400 (1940); *Gray v. Powell*, 314 U. S. 402, 412-413 (1941); *Unemployment Commission of Alaska v. Aragon*, 329 U. S. 143, 153-154 (1946); *Cardillo v. Liberty Mutual Co.*, 330 U. S. 469, 477-479 (1947).

¹³⁰ 156 F. 2d at 951, quoted at 205 F. 2d 710.

¹³¹ See *supra*, p. 388.

"production and gathering" contention was not mentioned in the *Peoples* opinion.¹³² Furthermore, having pointing out that the purpose of the Act was to occupy the field in which states may not act,¹³³ the court observed that the Commission had made an undisputed finding that Phillips' sales were sales in interstate commerce for resale, and then made the unqualified statement that:¹³⁴

It follows that no state can regulate these sales.

From these pronouncements, it would inescapably follow that the correct rule of law, under the court's view, is that Commission jurisdiction attaches to every sale in interstate commerce for resale, without limitation by Section 1(b)'s exemption.

But the whole picture painted by the opinion is by no means so precise as these excerpts suggest. In the first place, such a rule of law would render it totally unimportant whether the sales were made before or after the completion of gathering. Yet time after time, the opinion attributes apparent importance to the fact that, in the court's view, Phillips' sales are made *after* the completion of gathering. Secondly, such a rule's failure to recognize any exception disregards the exemption allowable under the test in *Interstate*, the principal case seemingly viewed by the court as requiring the result it reached in *Phillips*.

But elsewhere the court's opinion indicates an awareness of the exemption allowable under *Interstate*. In this connection, it should be recalled that, in considerable detail, the Commission had analyzed Section 1(b) along with the Supreme Court's

¹³² 156 F. 2d 951-952, quoted at 205 F. 2d 710; *supra*, p. 385. To the sentence referred to in the text, the court appended a note saying that *Peoples'* brief raised the production and gathering contention, and that "We rejected it without mentioning it."

¹³³ 205 F. 2d at 709.

¹³⁴ *Id.* at 710. Two sentences later, the court dropped into a footnote to discuss *Cities Service*, which it said upheld state power to fix the price of gas "sold at the well-head for interstate movement." This description of the sale may constitute an effort to square with *Cities Service* the court's flat statement that no state can regulate sales in interstate commerce for resale. But this would seem a language distinction without a difference. Indeed, at the outset of *Cities Service*, the Supreme Court said the issue there was the power of a state to fix prices at the well-head of gas "sold interstate." 340 U. S. at 180.

An interesting possibility is suggested as to this matter of labels. It is a fact that, in upholding state power to regulate sales to consumers in local distribution, the Supreme Court has been on both sides of the fence in denominating the commerce involved. Having early based such power on the intrastate character of the sales involved, expressly denying that they could in any proper sense be a part of "interstate commerce," and later on their local rather than national character despite the fact that they were expressly held to be in "interstate" commerce, the Supreme Court still later reverted to and now follows the doctrine that such sales are subject to state control because a part of "intrastate" commerce. For a reference to the cases involved and a discussion of this switching of labels, see *Federal Power Commission v. East Ohio Gas Co.*, 338 U. S. 464, 470 n. 10 (1950). This "intrastate" characterization of the sale finally settled upon seems plainly at war with the uninterrupted continuity of movement of the commodity and of the commerce involved, whatever be the decision as to state power to regulate the sale.

It would be a strange repetition of history if, with respect to sales of gas moving interstate and made during the course of production and gathering, state power to regulate some or all of them, should finally be justified judicially by the anomalous label, "intrastate." Some of these sales were described by the *Interstate* language, it will be remembered, as "being technically consummated in interstate commerce," but denied to Commission regulation in event of federal-state conflict and presumably subject to state control. 331 U. S. at 690. A more recent decision of the Court employs language implying that "interstate" commerce begins beyond the point where production and processing have ceased. See *infra*, note 150.

Panhandle opinion as compelling it to exempt anything found to be a part of the gathering business "or" incidents connected with "or" activities related to such business.¹³⁵ On review, the court dissected this as a misapplication of the Supreme Court's *Interstate* test, which it quoted with the following italicization:¹³⁶

. . . where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.

Then, referring to those findings of the Commission which were expressly tied to *Panhandle*, the Court said that the substitution by the Commission of "or" for "and" reverses the sense. But in the very same paragraph, the court dropped into a footnote to quote in its entirety the separate finding made by the Commission where it expressly applied the *Interstate* test, and that finding, in the exact words of *Interstate*, uses "and," not "or."¹³⁷ Furthermore, the view of the Commission that the later *Panhandle* interpretation of Section 1(b) required exemption of "incidents" of gathering—and this is where the "or" was used—was ignored by the court in *Phillips* which dismissed *Panhandle* in a footnote as not in point, without a mention of its possible impact as the most recent and exhaustive interpretation by the Supreme Court of Section 1(b)'s production and gathering exemption.

Finally, an effort to discern the basis on which the court bottomed its result is rendered still more difficult by the following statement of the question appearing in the last paragraph of the opinion:

But the validity or invalidity of the Commission's conclusion that Phillips is not a "natural-gas company" does not turn upon the evaluation of testimony or upon any facts peculiar to this case. It turns upon the generic question whether the exemption of "production or gathering" in §1(b) of the Natural Gas Act covers interstate sales of gas by the corporation that produced and gathered it.¹³⁸

This attachment of significance to whether the sale is made "by the corporation that produced and gathered it" eludes the jurisdictional question presented in *Phillips*. Nowhere did the Commission even suggest that sales would be exempted by Section 1(b) unless, as it found, they are a part of production or gathering or

¹³⁵ 10 F. P. C. at 273-274, 277, 282-283.

¹³⁶ 331 U. S. at 690, quoted at 205 F. 2d 711.

¹³⁷ 205 F. 2d at 711 n. 11. The Commission's finding of conflict of its regulation with the exercise of state regulatory functions the court thought "immaterial," since for unstated reasons the court concluded that Phillips' sales were not "made during the course of production and gathering," thus rejecting the Commission's finding to the contrary, for reasons similarly unstated. For the Commission's treatment of *Interstate*, see 10 F. P. C. at 272-273, 275, 276, 278-280.

¹³⁸ 205 F. 2d at 711. Compare this statement of the question with the court's reliance on *Colorado-Interstate (Canadian River)* where the sales of gas involved were indeed made "by the corporation that produced and gathered it," the issue running not to any claimed exemption of sales as being a part of gathering, but to whether §1(b) precluded the Commission from including the company's producing and gathering facilities in the rate base and its producing and gathering expenses in operating expenses, instead of allowing in operating expenses the "fair field price" for the gas finding its way into the transmission lines, as the company unsuccessfully contended. See *id.* at 710, and 324 U. S. 581, 597-604 (1945).

incidents of or activities related to those processes. Under Section 1(b) and the contentions advanced in *Phillips*, decision turns on whether *in law* sales can be a part of "gathering" and whether *in fact* such sales take place within the defined compass of "gathering"—quite apart from whether they be sales of gas "by the corporation that produced and gathered it." There is no question as to Commission jurisdiction over interstate sales for resale by such a corporation of gas which it produces, gathers, and thereafter transports and sells, as was the case in *Colorado-Interstate (Canadian River)*. The court's statement of the question would thus explain away its otherwise puzzling reliance on *Colorado-Interstate*, referred to above.¹³⁹ Likewise, it was never disputed that the sales of gas in *Interstate*, like those in *Colorado-Interstate*, were made "by the corporation that produced and gathered it." But as we have seen, this misses the point in *Phillips*. Moreover, the court's statement of the issue, as well as its denomination of that issue as one of law rather than fact, is out of harmony with the opinion's pervading preoccupation with the court's determination that Phillips' sales are made *after* the completion of gathering.

For all of these reasons, an attempt to state the rule of the case in the court's *Phillips* decision is somewhat complicated. On the one hand, it is certain that the court determined that the sales occurred after the completion of gathering, and from this would follow its decision, quite aside from whatever its position as to the possible exemption of sales made during gathering. Conversely, though less clearly, the court seems to embrace a view that Commission jurisdiction extends without exception to all sales in interstate commerce for resale, and application of this principle would require the result reached by the court and make immaterial its determination that the sales occurred after the completion of gathering. Whatever the correct view, the opinion left completely suspended the hopes of those who looked to *Phillips* for a definitive answer to the question of jurisdiction over sales made during or at the completion of gathering. Taken as a whole, it might be considered as deciding that Commission jurisdiction in any event includes sales made immediately upon the completion of gathering, but even this is uncertain since the court does not indicate where gathering ends; indeed, any suggestion that it deemed the sales as made at the completion of gathering collides with the inference that it considered gathering as completed "at common points in or near" Phillips' plants and thus at places anterior to the points of sale.¹⁴⁰ At the least, the court decides no more than that Phillips is a "natural-gas company" and that its rates "should" be fixed by the Commission.

VI

LATER RELEVANT DECISIONS

Two months after the court's decision in *Phillips*, the United States Court of Appeals for the Eighth Circuit on July 20, 1953, had handed down its decision

¹³⁹ See *supra*, note 125 and note 138.

¹⁴⁰ See quotation from court's statement of the case set out *supra*, p. 402.

in *Northern Natural Gas Company v. Federal Power Commission*, a proceeding involving a Federal Power Commission order concerning Northern's rates for sales which were concededly subject to Commission jurisdiction.¹⁴¹ Some of the gas so sold Northern produced in the Hugoton field in Kansas. As to production from this field, the Kansas Commission had issued an order requiring that persons taking gas "attribute" for all purposes a value of not less than 8¢ per Mcf at the well-head.¹⁴² In its order, the Federal Power Commission made an allowance for the gas produced in Hugoton on a cost basis and rejected a contention that it was legally bound to follow the Kansas order and allow an "attributed" 8¢, which was approximately 3¢ more than the allowed cost-basis figure. This contention—based on Section 1(b)'s production and gathering exemption, on the Commission's decision in *Phillips*, and on the Supreme Court's decision in *Cities Service*—was likewise rejected by the court when it sustained the Commission's allowance on a cost basis. The court added that it was "not in disagreement with the decision of the Court of Appeals for the District of Columbia in" the *Phillips* case.¹⁴³ It would seem, however, that any question of "agreement" between the two decisions may have little consequence since the difference between the issues in the two cases would appear to require, as a reading of the court's opinion in *Northern* demonstrates, the application of different principles. In *Phillips*, the problem is whether certain sales are excepted from federal regulation by the exemption of production and gathering in Section 1(b); in *Northern*, where the sales were not made during the course of gathering and were admittedly subject to federal regulation, the question is whether the Section 1(b) exemption requires obedience to the State Commission's attribution order by the Federal Commission in its fixing of rates for sales as to which it otherwise is concededly free to regulate on a cost basis. But the *Northern* case continues to be of interest here since at this writing, the Supreme Court having denied certiorari on January 4, 1954,¹⁴⁴ has for over a month refrained from acting on pending petitions for rehearing, possibly because of the pending of *Phillips*.

This same period saw additional developments in *Phillips*. Most of those concerned had from the beginning assumed that the Supreme Court would ultimately decide the case, the issues posed being generally considered extraordinary and important. But for a while it seemed that they reckoned without the Supreme Court. For on November 30, 1953, that Court refused to review the decision of the court below, denying petitions for certiorari filed by Phillips, by the State and the Railroad Commission of Texas, the Corporation Commission of Oklahoma, the State and the Oil Conservation Commission of New Mexico, and the Federal Power Commission.¹⁴⁵

¹⁴¹ 206 F. 2d 690 (8th Cir. 1953).

¹⁴² *Id.* at 702-703.

¹⁴³ *Id.* at 707.

¹⁴⁴ *State Corporation Commission of Kansas v. Federal Power Commission and Northern Natural Gas Company v. Federal Power Commission*, 346 U. S. 922 (1954); a conditional petition by the Commission seeking review of the lower court's remand for additional findings as to rate of return was denied at the same time, *Federal Power Commission v. Northern Natural Gas Co.*, *ibid.*

¹⁴⁵ 346 U. S. 896.

In the wake of these denials of certiorari, it seems not unlikely that the shock of surprise to the Commission and the industry was soon replaced by attempts to reevaluate the *Phillips* opinion by the court below and by a pondering of legislative approaches in a new administration along with a growing consumer interest. And it may well be supposed that little more than a faint hope accompanied the filing in the Supreme Court of petitions for rehearing, which incidentally did not include one filed for the Commission. But the off-again-on-again history of the production and gathering question was to add at least one more rare twist to its already unique record. On January 18, 1954, with Justice Black dissenting, the Supreme Court vacated its November 30, 1953 denials of certiorari in *Phillips* and granted the petitions.¹⁴⁶

As this action turned both sides to the task of briefing *Phillips*, the Supreme Court on February 8, 1954, handed down its decision in *Michigan-Wisconsin Pipe Line Co. v. Calvert*.¹⁴⁷ Combing this opinion, each side in *Phillips* may be expected to seek signs of the Court's inclinations respecting production and gathering. Since each may find indices it views as helpful, the opinion merits notice here.

In separate cases simultaneously decided, Michigan-Wisconsin and Panhandle Eastern Pipe Line Co., both "natural-gas companies" under the Natural Gas Act, attacked what was denominated a Texas occupation tax for the privilege of engaging in the "gathering of gas," principally on the ground that it infringed the commerce clause.¹⁴⁸ Both companies purchased gas from Phillips at the outlet of the latter's processing plants in Texas, the gas flowing thence continuously to points outside Texas for later resale by the purchasers. The tax was measured by the entire volume of gas "taken," and the levy was admittedly designed to avoid taxing the sale. Using what the Court called a "beggared definition" of the term "gathering gas," the tax statute provided that, in the case of gas containing hydrocarbons that are removed, "gathering gas" means the "first taking" after the gas has passed through the outlet of the processing plant.

Respondents in *Phillips* may seek comfort in the total impact of the Court's striking down of the state tax on the ground that the "taking" is not "so separate and distinct from interstate transportation as to support the tax," the Court saying:¹⁴⁹

. . . we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another.

From this, the argument might run: "Taking," as here used, is an integral part of the act of delivery, being the receipt by the purchaser upon transfer from the seller. And delivery is an inseparable ingredient of the sale itself. Therefore, the "sale" is analogously as difficult of segregation as is the "taking," and if state taxing power is

¹⁴⁶ *Phillips Petroleum Co. v. Wisconsin*, 346 U. S. 934 (1954); *Texas v. Wisconsin*, *ibid.*; *Federal Power Commission v. Wisconsin*, 346 U. S. 935 (1954).

¹⁴⁷ 347 U. S. 157 (1954).

¹⁴⁸ Tex. Laws 1951, c. 402, §XXIII.

¹⁴⁹ 347 U. S. at 169.

barred by the commerce clause from attaching to the latter, so also as to the former. *A fortiori*, a direct regulation of the sale by the state is precluded. Whatever the decision under Section 1(b) as to state power over sales made *during* gathering, this argument could theoretically be made as to sales made at the termini of gathering facilities.

But the *Michigan-Wisconsin* opinion itself elsewhere shows the danger in this oversimplification. The lower court followed a "two-step" view, taking and transmission, with interference in between found in title passing and processing. Rejecting this analysis, the Supreme Court noted that the tax was not imposed on processing which was performed by Phillips and occurred before the taking. Then, advertent to the admission that the levy was designed to avoid taxing the sale, the Court thought the incidence must be a "more substantial economic factor" than the taking, as a basis for finding a "separate local activity." It is obvious that less difficulty would be encountered in establishing the entire sale as an adequately "substantial economic factor" than in the case of the mere taking. This at least suggests that the Court would more readily sustain an assertion of state power to tax in relation to the sale than where the taking is the incidence.

Among the aspects of the opinion which the petitioners in *Phillips* may view as helpful is the suggestion that the Court may experience little difficulty in generically considering Phillips' processing as a part of gathering. For example, the Court said:

The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not . . . but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun.¹⁵⁰

Similarly, in referring to *Utah Power & Light Co. v. Pfof*,¹⁵¹ where it had sustained a state license tax on the hydroelectric generation of energy after finding that it was necessary to convert mechanical energy into electrical energy before transmission and that the conversion was completed at the generator where the interstate movement was held to begin, the Court said:¹⁵²

This is analogous to the situation here where the gas is prepared by Phillips for transmission and is then fed into appellants' lines.

¹⁵⁰ *Id.* at 166-167. Later (p. 169), the Court said, "But the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing" (Court's italics). It is not clear whether the phrases, "production and processing have ceased and transmission in interstate commerce has begun," and "taking into interstate commerce *after* production, gathering and processing," impart a suggestion that everything anterior to the point of "taking" may be deemed "intrastate commerce." If so, life is breathed into the possibility that, here again in sustaining state power over a part of an integrated interstate movement in commerce, the Court may resort to labels out of harmony with the physical facts. See note 134 *supra*. Of course, as to sales of gas for interstate transmission consummated *during* gathering, such a result would strip the transactions of their interstate character in law and so place them beyond Commission jurisdiction under §1(b). But it would leave still unclear the matter of jurisdiction over sales consummated at the termini of gathering facilities, since the "taking" in such sales would presumably be held an inseparable part of interstate transportation under *Michigan-Wisconsin*.

¹⁵¹ 286 U. S. 165 (1932).

¹⁵² 347 U. S. at 168 n. 6.

This fortifies the suggestion that Phillips' processing may properly be viewed as a part of its gathering and perhaps implies the validity of state taxing power as applied in relation to all that is encompassed by Phillips "preparation" of the gas for transmission. Whatever this might mean as to sales made during gathering, it would seemingly leave open the question of power to regulate sales made at the termini of gathering facilities. It is interesting to note in this connection that under the Federal Power Act¹⁵³—which is constructed somewhat similarly to the Natural Gas Act and includes an exception for facilities used for generation where Section 1(b) of the Gas Act includes one for production and gathering—it has been held that the Commission has jurisdiction over a company's generating facilities used as aids to a sale of electric energy made inside a generating plant.¹⁵⁴

In sum, while *Michigan-Wisconsin* bears an interesting factual and legal relationship to *Phillips*, its reach falls short of reliable aid. And since it is a tax case, any enthusiasm it might generate must be somewhat dampened when attempting to relate it to a test of power directly to regulate.

VII

CONCLUSION

By the time this is published, the Supreme Court will probably have handed down its decision in *Phillips*. In it, the Court will find a ready vehicle for resolution of a problem which is at once of exceptional importance, nationally and locally, and which has long plagued the Commission and the industry. Upon it, may depend the effectiveness of measures avowed to conserve a valuable and exhaustible natural resource, local measures with significance reverberating nationally. The principles there laid down could ultimately decide whether federal maximum-price regulation will range back to the well-head, and as some contend, insure natural-gas service at prices reasonable to consumer and all others, or as others would say, drive producers and gatherers to outlets not federally regulated, prematurely drying up reserves available for interstate markets. By the same tokens, those principles could eventually determine whether minimum-price regulation by producing states will, as some argue, be permitted to accelerate the impetus toward a consumer gas rate governed largely by competition with other fuels, or as others would put it, be allowed to conserve and achieve maximum recovery of inevitably diminishing reserves, making gas available for a longer period for both local and interstate uses at prices fair to the producer and all others. Somewhere within the ambit of these views may be found a coordinated basis under the present Act for harmonizing both state and federal interests. The variety of equities plead for the wisdom necessary to that end. Otherwise, it seems unlikely that the final chapter in the controversy will be written by the Supreme Court.

¹⁵³ 49 STAT. 838, 847 (1935), 16 U. S. C. §§791a, 824(b) (1952).

¹⁵⁴ *Hartford Electric Light Co. v. Federal Power Commission*, 131 F.2d 953, 961-963 (2d Cir. 1942), cert. denied, 319 U. S. 741 (1943). But see *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 526-531 (1945).

At least, it is surely not too much to hope that, however the Supreme Court decides *Phillips*, it will there settle definitively the question of jurisdiction over sales made during and at the conclusion of gathering, and this by the application in the opinion of principles spoken so plainly as to leave no room for fuzzy areas of clouded doubt when sought to be applied to physical operations differing slightly from those involved in *Phillips*.