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Right To Share in Gas Market Under Texas Common Purchaser Act

I.

Two distinct problems are involved in considering the Texas Common Purchaser Act: first, the requirements for purchase that the Railroad Commission may impose under the various sections of the act; and, second, the propriety of applying the act at all, due to possible conflict with federal authority under the Natural Gas Act. In *Railroad Comm'n v. Rio Grande Valley Gas Co.* the Texas Supreme Court drew definite conclusions on the first problem but did not consider the second since the issue was not presented.

The West Port Isabell Field embraces seven vertically separated reservoirs and contains three wells. One well is a quadruple completion in four reservoirs and is owned by Rio Grande, a gas pipeline company. Its production is taken into the company's purely intrastate system which serves the lower Rio Grande Valley. The production of a Texas Gulf Producing Company single completion well is purchased by Rio Grande for use in the same system. A third well, owned by Russell Maguire, is completed in reservoirs entirely separate from the completion zones of the other two wells.

Maguire negotiated with Rio Grande for a gas sale. The parties were unable to reach an agreement, and Maguire applied to the Railroad Commission to force Rio Grande to purchase ratably under the Texas Common Purchaser Act.¹ The Railroad Commission ordered Rio Grande to make a 3,610 foot extension of gathering system from its own well to the Maguire well² at Rio Grande's expense, to negotiate for a gas purchase contract under compulsion of its order, and to take gas without unjust and unreasonable discrimination as between the separate reservoirs making up the field area. The Travis County District Court, declaring the order invalid, enjoined its enforcement; and the Railroad Commission appealed directly to the Texas Supreme Court. *Held, reversed*: All production is "in the same field" within the scope of the Common Purchaser Act, despite the circumstance that Maguire and Rio Grande produce from dif-

¹ TEX. REV. CIV. STAT. ANN. art. 6049a, §§ 8, 8a, 8aa, 8aaa, 8b, 8bb, 9, 11, 11b, 11c, 11d, 11dd, 11e, 11f (1962 and Supp. 1966).

² Though it was not an issue in the case, it is noted that the Railroad Commission's order probably required burdening the overlying surface of the Rio Grande lease with a gathering line designed to serve the separate Maguire lease. It is well settled that one surface owner cannot be burdened for the benefit of minerals underlying another surface, and if a pipeline were laid without the surface owner's permission clearly he could recover damages. *Lone Star Gas Co. v. Meyer*, 296 S.W. 1110 (Tex. Civ. App. 1927). See also 13 OIL & GAS INST. 385 (1962).

ferent reservoirs;³ hence, Rio Grande as a common purchaser must extend its system at its own expense and purchase ratably from Maguire. There is no necessity for the Commission order to determine rates and other details of purchase as it is to be assumed these will be worked out by the parties through the compulsory negotiations. *Railroad Comm'n v. Rio Grande Valley Gas Co.*, 405 S.W.2d 304 (Tex. 1966).

The oil segment of the Texas Common Purchaser Act was enacted in 1930,⁴ the preamble of the act stating its purpose as "forbidding discrimination in the purchase of crude petroleum." In 1931 the legislature extended the act by amendment to include common purchasers of natural gas,⁵ and the Railroad Commission was given the power to order common purchasers of both oil and gas "to make such reasonable extensions of their lines,⁶ such reasonable connections and such ratable purchases as will prevent discrimination."⁷ Under this act there are two types of common purchasers of oil. The first is a person who is either affiliated with, or is himself, a common carrier of oil by pipeline.⁸ A common carrier is considered to be any person who operates a pipeline for transporting crude petroleum to the public for hire or is engaged in the business of transporting crude petroleum by pipeline.⁹ The second type of common purchaser is a person who operates a crude oil gathering system, whether or not he is associated with a common carrier.¹⁰ Due to such comprehensive definitions nearly anyone involved in the purchase or transportation of natural gas is a common purchaser. Clearly there was no question that Rio Grande was a common purchaser as defined by the act.

³ The Commission's order required purchase "without unjust and unreasonable discrimination," which is the language of the act referring to purchase between fields; yet the court interpreted this order under that portion of the act requiring purchase "without discrimination" in the same field.

⁴ TEX. REV. CIV. STAT. ANN. art. 6049a, § 8 (1962).

Every . . . common purchaser of such crude petroleum . . . shall purchase oil offered it for purchase without discrimination in favor of one producer or person as against another in the same field, and without unjust or unreasonable discrimination as between fields in this state.

⁵ TEX. REV. CIV. STAT. ANN. art. 6049a, § 8a (1962).

[E]very . . . [common purchaser of natural gas] . . . shall purchase, or take, such gas under such rules or regulations as may be prescribed by the Commission, in the same manner, under the same inhibitions against discriminations and subject to the same provisions as are herein set out with respect to common purchasers of oil.

⁶ See *State v. Crown Central Petroleum Corp.*, 369 S.W.2d 458 (Tex. Civ. App. 1963) *error ref. n.r.e.*, dealing with the extension of oil pipelines. There are no reported decisions squarely requiring extensions except the instant case.

⁷ TEX. REV. CIV. STAT. ANN. art. 6049a, § 11d (1962 and Supp. 1966). This section was amended in 1965 to add the following sentence: "The Commission may issue a show cause order to any common purchaser requesting it to appear and show cause why it should not purchase the allowable production of any producer discriminated against."

⁸ TEX. REV. CIV. STAT. ANN. art. 6049a, § 8 (1962).

Every person, association of persons or corporation who purchases crude oil or petroleum in this state, which is affiliated through stock-ownership, common control, contract, or otherwise, with a common carrier by pipe line, as defined by law, or is itself such common carrier, shall be a common purchaser

⁹ TEX. REV. CIV. STAT. ANN. art. 6018 (1962).

¹⁰ TEX. REV. CIV. STAT. ANN. art. 6049a, § 8a (1965).

II. ISSUES DECIDED BY THE COURT

The Texas Common Purchaser Act allows the Railroad Commission to order purchases to prevent discrimination in the *same field* and unjust and unreasonable discrimination as *between fields*.¹¹ "Field" generally is defined as an area underlaid by one or more reservoirs,¹² though for proration purposes in Texas the term "field" means one common reservoir.¹³ Under the language of section 8 of the Common Purchaser Act,¹⁴ Rio Grande possibly could have been forced to purchase "without unjust or unreasonable discrimination as between fields," avoiding any issue as to interpretation of "same field."¹⁵ The construction of the portion of the act preventing discrimination as between fields has been the subject of litigation in only one Texas case which resulted in a determination that the act did not apply to the facts disclosed.¹⁶

The court in *Rio Grande* chose to read the term "field" in its broader form for purposes of the Common Purchaser Act, and in this case of first impression, interpreted "same field" as a geographical area underlaid by one or more common reservoirs.¹⁷ Relying in part on a 1939 Attorney

¹¹ See note 4 *supra*.

¹² WILLIAM & MEYERS, *MANUAL OF OIL AND GAS TERMS* 148 (1956). See also *Railroad Comm'n v. Aluminum Co. of America*, 380 S.W.2d 599 (Tex. 1964) (ten overlying reservoirs termed a field; however, each reservoir was considered separately for proration purposes). *Pan Am. Petroleum Corp. v. Railroad Comm'n*, 335 S.W.2d 425 (Tex. Civ. App. 1960) *error ref. n.r.e.* (two reservoirs called a field).

¹³ TEX. REV. CIV. STAT. ANN. art. 6049d, § 10 (1962). *Pickens v. Railroad Comm'n*, 387 S.W.2d 35 (Tex. 1965); *Railroad Comm'n v. Shell Oil Co.*, 380 S.W.2d 556 (Tex. 1964).

¹⁴ See note 4 *supra*.

¹⁵ In fact, this may have been what the Commission order intended, see note 3 *supra*. There is some question as to whether a common purchaser can be forced to purchase without unjust and unreasonable discrimination as between fields when the purchaser makes no purchases from the field involved. Several writers have stated that such an order would be invalid under the statute since there could be no discrimination present. Rogers, *Common Purchaser, Market Demand, Pipeline Proration*, 9 OIL & GAS INST. 48 (1958); Stayton, *Proration of Gas*, 14 OIL & GAS INST. 1 (1963). Stayton based his conclusion on an analogy to railroads. A railroad company cannot be compelled to build a line to reach new territory that the carrier never agreed to serve. *Interstate Commerce Comm'n v. Oregon-Washington R. & Nav. Co.*, 288 U.S. 14 (1933).

¹⁶ *Col-Tex Ref. Co. v. Railroad Comm'n*, 150 Tex. 340, 240 S.W.2d 747 (1951). The court held that Col-Tex was not a common purchaser under a technical construction of the act and could not be forced to purchase without unjust and unreasonable discrimination as between fields. This decision was based on the fact that Col-Tex was not a common carrier, but only purchased by contract from a common carrier. This constructional problem was cured by amendment to § 8aa of the Texas Common Purchaser Act. TEX. REV. CIV. STAT. ANN. art. 6049a, § 8aa (1962 and Supp. 1966). It would now appear that a direct purchaser would be under the requirement to purchase without unjust and unreasonable discrimination as between fields, as well as without discrimination in the same field.

¹⁷ The necessity of this interpretation has been avoided in other states simply by statutory definition. E.g.: N.M. STAT. 65-3-29 (1965). "Pool means an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both. Field means the general area which is underlaid or appears to be underlaid by at least one pool. Field unlike pool may relate to two or more pools." 52 OKLA. STAT. § 23 (1913) and MICH. STAT. ANN. § 22.1344 (1929) are identical and state: ". . . shall purchase all the natural gas in the vicinity of, or which may be reasonably reached by its pipe lines or gathering branches . . ."

General's opinion,¹⁸ the court took note that when the Common Purchaser Act was passed, multiple well completion was unknown and attention was focused on surface geography. As a result, the court made clear its adoption of the usual industry definition of what constitutes a field.¹⁹

The supreme court stated that there was no necessity to specify rates or details of purchase, as it would be assumed that contract terms would be worked out by the parties. The court may be rather optimistic in assuming that terms for the contract will be agreed upon when the parties have been unable to agree in the past. Should each party press his own advantage and disagreement continue, it would be up to the Railroad Commission to settle the dispute. As Justice Greenhill noted in his dissent, the Railroad Commission has no authority to set prices;²⁰ it can only determine the reasonableness of a price chosen by the common purchaser.²¹ Assuming the Commission cannot set prices, through a series of price offers which are unacceptable to the seller and rejected by the Commission, the effectiveness of the act might be hampered seriously due to an indefinite succession of administrative proceedings.

III. POSSIBLE CONFLICT WITH FEDERAL AUTHORITY

Entirely ignored in the briefs presented to the court and, therefore, not considered in the court's opinion is the overriding problem that in a great majority of substantial Texas gas fields there will be at least one or more interstate pipeline purchasers. In 1963 the Supreme Court of the United States unqualifiedly held that the Natural Gas Act,²² passed in 1938, had preempted the states' power to regulate the ratable take of interstate purchasers of gas.²³ There can be little doubt that the act also prohibits a state from forcing an interstate purchaser to extend its gathering facilities to connect wells,²⁴ for this would directly affect interstate rates which are under the sole control of the Federal Power Commission. Additionally,

¹⁸ 1 OPS. TEX. ATT'Y GEN. 294, No. 0-1103 (1939). "It is our opinion that a producer in a general area served by a common purchaser can force prorata purchase of oil by tendering same to a common purchaser." It should be noted that this opinion dealt with oil pipelines, never mentioned multiple reservoirs, and relied on the term "general area."

¹⁹ See note 12 *supra*.

²⁰ In regard to fixing prices for a gas purchase contract with a public utility, it has been held that, "The power of the Railroad Commission to fix the price of gas is not to be taken as conferred by implication, but such power must be conferred under statutory or constitutional language that is free from doubt and admits of no other reasonable construction." *Humble Oil & Ref. Co. v. Railroad Comm'n*, 133 Tex. 330, 128 S.W.2d 9 (1939).

²¹ The majority opinion did not state that such authority existed, but rather that the case could be decided without regard to this potential problem.

²² Natural Gas Act, 15 U.S.C. §§ 717-17w (1938).

²³ *Northern Natural Gas Co. v. Corporation Comm'n*, 372 U.S. 84 (1963).

²⁴ It has already been held that it is unconstitutional for a state to regulate, burden or interfere with interstate commerce by requiring a company transporting oil or natural gas through pipelines in interstate commerce to extend its pipe lines across a state line into another state, *Fidelity Title & Trust Co. v. Kansas Natural Gas Co.*, 219 Fed. 614 (D. Kan. 1913).

it has been held with regard to interstate purchasers that the states can impose no price terms.²⁵ The gravamen in this superseding federal power is that, laid against the realities of Texas gas production, there are few purely intrastate situations available to state regulation. Yet the Texas common purchaser scheme as passed plainly was premised on jurisdiction of all purchasers²⁶ and can be equitable and practical only so long as that underlying premise is available to the Railroad Commission. When the Texas Common Purchaser Act was amended in 1931, the Railroad Commission had control over the activities of all persons dealing with natural gas. Since 1963, as to ordering ratable taking by an interstate pipeline, the Texas Common Purchaser Act necessarily is invalid to that extent.²⁷ Perhaps as much as ninety per cent of the jurisdictional base upon which it was enacted has been removed from state control.²⁸ Certainly the legislature never intended its statute to apply in the manner it now must apply.

IV. CONCLUSION

Laid against the realities of the natural gas business, *Rio Grande* should not be accepted at face value. Had only multiple intrastate purchasers been involved, there would have been serious added complications.²⁹ Worse, if one or more purchasing pipelines in the field were interstate lines which could not be regulated, or if there were interstate purchasers in another field, close enough to be within the "as between fields" language of the act, the Common Purchaser Act would seem to be rendered ineffectual to accomplish its intended purpose. The burden of purchasing without discrimination should not be borne by, nor can it be intelligently cast upon, the intrastate purchasers only.

It has been said that courts are not at liberty to disregard, dispense with, or refuse to enforce a statute on the ground that conditions or circumstances have so changed that the object, reason, or policy for it has ceased.³⁰ But here, though the conditions and underlying reasons for pass-

²⁵ *Cities Serv. Gas Co. v. Corporation Comm'n*, 355 U.S. 391 (1958); *Natural Gas Pipeline Co. v. Panama Corp.*, 349 U.S. 44 (1955).

²⁶ The preamble of the original act described its function as "vesting in the Railroad Commission of Texas jurisdiction to authorize and require common carriers by pipeline to extend and enlarge their respective facilities."

²⁷ See text accompanying note 23 *supra*.

²⁸ At the time the Texas Common Purchaser Act was passed in 1930 and even when the Natural Gas Act was passed in 1938, it was thought that the regulation of oil and gas was exclusively in state control. It was not until the commerce clause revolution of the 1940's, characterized by *Wickard v. Filburn*, 317 U.S. 111 (1942), that the intervention of federal authority into the area of state control was apparent. For a discussion of this extension of the commerce clause, see Flittie & Armour, *The Natural Gas Act Experience—A Study in Regulatory Aggression and Congressional Failure To Control the Legislative Process*, 19 Sw. L.J. 448, 454 (1965).

²⁹ Some of the problems involved in control would be: the determination of ratable take in the reservoir with other purchasers present; the setting of prices for the imposed gas purchase contracts, see note 20 *supra*, and accompanying text, and the difference of quantity and quality of gas in the various reservoirs making up the field.

³⁰ *Palermo v. Stockton Theatres, Inc.*, 195 P.2d 1 (Cal. 1948).