

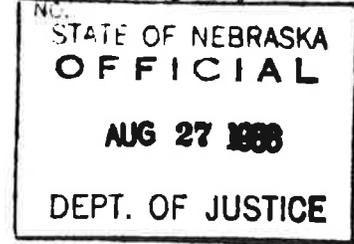
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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# 86067



DATE: August 21, 1986

SUBJECT: Natural Gas Rate Regulation

REQUESTED BY: Senator Ron Withem  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on several questions regarding the status and regulation of natural gas pipelines operating in the State of Nebraska. You indicate that the purpose of your request is to assist the Urban Affairs Committee in their consideration of legislation regarding the presently existing system providing for local regulation of natural gas rates, and the possibility of introducing legislation to modify the present scheme to provide for the regulation of natural gas rates on a statewide basis. Prior to responding to your specific questions, we believe it may be helpful to provide a brief summary of the framework surrounding the regulation of the natural gas industry.

The typical system flow of natural gas has been characterized as "from producer to pipeline to distributor to consumer. . . ." Pierce, Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry, 97 Harv. L. Rev. 345, 348 (1983). Regulation of the natural gas industry at the federal level is accomplished through the provisions of the Natural Gas Act (NGA), 15 U.S.C. §§717-717z, and the Natural Gas Policy Act (NGPA), 15 U.S.C. §§3301-3342. The federal agency responsible for the administration of these regulatory Acts is the Federal Energy Regulatory Commission (FERC). 42 U.S.C. §§7171 and 7172.

The FERC regulates interstate natural gas pipelines. Intrastate pipelines, in turn, are regulated only by the states in which they operate. Furthermore, the FERC's jurisdiction under the NGA does not extend to the local distribution of natural gas. 15 U.S.C. §717(b). Distributors of natural gas are regulated, generally as public utilities, by the states in which they operate. Pierce, supra, at 350.

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Initially, you ask whether natural gas pipelines are common carriers. Since, as was previously noted, interstate pipelines are regulated by the FERC, we limit our consideration to whether intrastate natural gas pipelines operating in Nebraska are considered common carriers.

Neb.Rev.Stat. §75-501 (Reissue 1981) provides, in part:

Any person, company, corporation, or association transporting, transmitting, conveying, or storing any liquid or gas by pipeline for hire in Nebraska intrastate commerce, is hereby declared to be a common carrier and subject to commission regulation. (Emphasis added).

Clearly, pursuant to the express terms of §75-501, intrastate natural gas pipelines engaged in transporting natural gas for hire within Nebraska are deemed to be common carriers subject to regulation by the Nebraska Public Service Commission.

Your second question concerns whether the grant of authority under Neb.Rev.Stat. §§18-414 and 18-415 (Reissue 1983) (Amended, Laws 1986, LB 494), providing cities and villages the authority to regulate natural gas rates charged by a public utility supplying gas under a franchise or rate ordinance, represents an unconstitutional divestment of the authority granted to the Public Service Commission to regulate common carriers under Article IV, Section 20 of the Nebraska Constitution.

In City of Bayard v. North Central Gas Co., 164 Neb. 819, 83 N.W.2d 861 (1957), the Nebraska Supreme Court held that the distribution and sale of natural gas directly to the consumer did not make the utility a common carrier, and, therefore, the Commission had no jurisdiction under Article IV, Section 20, to regulate the gas company's rates or service. The court noted that the gas company, by engaging in the distribution and sale of gas to ultimate consumers at retail, did not fulfill the critical element of rendering transportation services for hire necessary to be considered a common carrier. Id. at 830, 83 N.W.2d at 867.

Thus, in responding to your inquiry, a distinction must be made between the transportation of gas by pipelines in Nebraska intrastate commerce, and the distribution and sale of natural gas to consumers by gas companies operating as public utilities under

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franchises or rate ordinances. The former activity, by virtue of §75-501, renders such pipelines subject to regulation as common carriers by the Public Service Commission. The latter activity, however, does not render gas companies common carriers, and therefore does not subject these utilities to the jurisdiction of the Public Service Commission under Article IV, Section 20 of the Nebraska Constitution. Thus, the provisions of §§18-414 and 18-415 do not operate to unconstitutionally divest the Public Service Commission of their constitutional grant of authority to regulate common carriers in Nebraska.

You also ask whether the Legislature may enact legislation to provide for state regulation of natural gas rates, possibly granting such authority to the Public Service Commission, rather than continuing to provide for local regulation in the manner set forth in §§18-414 and 18-415. In this regard, we note that the Legislature has imposed on the Commission the duty of regulating activities other than those pertaining to common carriers. In Rodgers v. State Railway Commission, 134 Neb. 832, 844, 279 N.W. 800, 807 (1938), the court pointed out a number of activities, not involving common carriers, which the Commission had, by statute, been given the duty to regulate. The court noted that these statutory powers and duties had "not been challenged in the courts". Id. Article IV, Section 20 states that the powers and duties of the Commission shall include the regulation of common carriers. Thus, we believe that the Legislature may impose additional regulatory duties upon the Commission by statute regarding natural gas rates, such as those currently provided for on a local basis under §§18-414 and 18-415. Should the Legislature choose to consider such an option, this would not preclude all municipal involvement in the regulatory process. The extent to which the Legislature may deem it appropriate to establish a scheme consisting of both state and local involvement in the regulatory process in this area is simply a matter of policy.

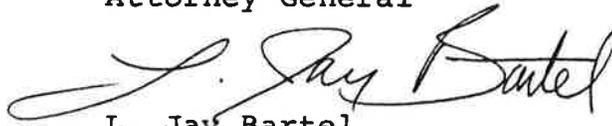
Finally, you have asked us whether Orders No. 436 and 436A, issued by the FERC, will have the effect of imposing common carrier status on natural gas pipelines. Generally, the transportation-related provisions of the Orders require that pipelines which choose to participate under these provisions must provide non-discriminatory access to all parties that desire firm or interruptible transportation of natural gas. 18 C.F.R. §§284.8 and 284.9 (1986).

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During the course of the rule making process on Order No. 436, the FERC specifically addressed the contention that the transportation requirements operated to impose common carrier status on pipelines. The FERC determined that the non-discriminatory access provisions relating to the transportation of natural gas did not impose common carrier status on pipelines. 50 Fed. Reg. 52227-52229 (1986). Thus, it is clear that the FERC does not view the provisions of Order Nos. 436 and 436A as requiring pipelines choosing to provide transportation thereunder to operate as common carriers, and we are not in the position to take issue with their determination. Furthermore, in the absence of any factual information which might enable us to assess what effects, if any, the provisions of these Orders may potentially have on any pipeline or distribution activities conducted within Nebraska, we simply are not able to further respond to your inquiry in this regard. In any event, it does not appear that these FERC Orders would affect our responses to the questions previously addressed in this opinion concerning the regulation of natural gas rates paid by consumers under Nebraska law.

Sincerely,

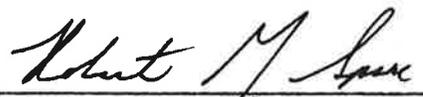
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cc: Patrick J. O'Donnell  
Clerk of the Legislature  
1/15

APPROVED:

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