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In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 891.

CITY OF CLEVELAND,
Petitioner,

v.

HOPE NATURAL GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fourth Circuit.

The Director of Law on behalf of the City of Cleveland, Ohio respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the case of *Hope Natural Gas Company v. Federal Power Commission, City of Cleveland, City of Akron, and Pennsylvania Public Utility Commission* on February 16, 1943, setting aside the Federal Power Commission's "Order Reducing Rates" of the respondent, Hope Natural Gas Company, and setting aside the Federal Power Commission's "Findings as to Lawfulness of Past Rates," charged by respondent.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is not yet officially reported, but may be found at R.[1] IV, pp. 169-207. The opinion of the Federal Power Commission is found at R. I, pp. 1-89.

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[1] In the record citations, roman numerals refer to the volume, arabic numerals to the page.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on February 16, 1943 (R. IV, p. 207). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 19(b) of the Natural Gas Act.

STATUTE INVOLVED.

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821; 15 U. S. C. § 717 *et seq.*) are set forth in Appendix A, *infra*, pp. 22-24.

QUESTIONS PRESENTED.

The Federal Power Commission, after complaints by Cleveland, Akron, and the Pennsylvania Public Utility Commission and after extensive hearings, found that Hope's interstate rates were unreasonable and unlawful and issued an order reducing Hope's future rates $3,609,-857 annually. The Commission also determined the lawful rate for sales to Hope's affiliate, East Ohio, for a period subsequent to the passage of the Natural Gas Act and prior to the Commission's order fixing future rates. The Commission adopted a prudent investment rate base. The Circuit Court invoked the "present fair value" theory to set aside the Commission's findings and order. The questions presented are:

1. Whether, for rate-making purposes under the Natural Gas Act, the Commission is authorized to use a rate base determined exclusively upon the basis of "prudent investment" measured by actual legitimate cost less depreciation, or whether it must use a rate base which reflects estimates of the extent and effect of post-investment fluctuations in labor and material prices.

2. Whether the Commission must include in actual legitimate cost amounts previously and correctly

charged to operating expenses, in accordance with industry practice of the time, and determined by the Commission to have been recouped through revenues from the rate payers.

3. Whether the lower court erred in holding that in determining the actual existing or accrued depletion and depreciation, the Commission failed to take into account "the present condition of the property."

4. Whether the Commission may determine actual existing or accrued depletion and depreciation, and the annual allowance in operating expenses for these factors, upon the basis of actual legitimate cost, or whether the Commission must base such determinations upon estimates of "present fair value" of the property.

5. Whether the economic-service-life principle, as applied by the Commission in this case, is a reasonable method of determining the actual existing depletion and depreciation and the annual allowance therefor.

6. Whether the lower court erred in holding that $165,965 for an experimental deep-test well, which was completed dry and charged to operating expenses in 1941, should have been included in 1940 operating expenses.

7. Whether the rates fixed by the Commission are just and reasonable in the statutory sense and nonconfiscatory in the constitutional sense.

8. Whether the Commission has jurisdiction to determine the *lawful* rates for interstate sales of natural gas at wholesale after the effective date of the Natural Gas Act of 1938 and prior to the issuance of a Commission rate-fixing order.

9. Whether the lower court erred in holding that the Commission's "findings as to past rates * * * should be set aside."

STATEMENT.

The Respondent.

Hope Natural Gas Company, a wholly-owned subsidiary of the Standard Oil Company (New Jersey), is conceded to be a "natural-gas company" within the meaning of the Natural Gas Act (R. III, p. 19). Hope purchases and produces natural gas in West Virginia, transports it in pipe lines to the West Virginia-Ohio and West Virginia-Pennsylvania state lines, and there sells it in interstate commerce to its affiliates, East Ohio Gas Company and River Gas Company, for resale to ultimate consumers in Ohio, to its affiliate, Peoples Natural Gas Company, for resale to ultimate consumers in Pennsylvania, and to the non-affiliated Manufacturers Light and Heat Company and Fayette County Gas Company for resale in Pennsylvania. About 85% of Hope's total sales are in interstate commerce and 95% of such sales are to its aforementioned affiliates. About 15% of Hope's total volume of gas is sold in intrastate commerce to local consumers in West Virginia (R. I, p. 18). Hope has been purchasing, producing, transporting and selling natural gas for more than forty years. Hope's interstate sales in 1940 amounted to about 53,000,000 M.c.f. and its interstate gross revenues in that year amounted to $19,296,000 (R. I, p. 51).

The Statute.

The Natural Gas Act (the "Act"), effective June 21, 1938, requires that all rates or charges in connection with the transportation or sale of natural gas subject to the Act must be just and reasonable and declares any rate or charge that is not just and reasonable to be unlawful (Sec. 4(a)). It provides that the Federal Power Commission (the "Commission"), upon complaint of any State, municipality, State Commission, or gas distributing company, or upon its own motion, whenever it finds that any rate is unjust or unreasonable, shall determine the rate to be

thereafter observed and in force, and shall fix the same by order; and, further, that the Commission "may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates" (Sec. 5(a)).

Any State, municipality, or State commission, complaining of anything done or omitted to be done by any natural gas company in contravention of the provisions of the Act may file a complaint with the Commission (Sec. 13). Under Section 14(a) the Commission may investigate "to determine whether any person has violated or is about to violate any provision of this act," and Section 16 empowers it to perform any and all acts as it may find necessary or appropriate to carry out the provisions of the Act. The Commission is required by Section 17(c) to make available to the several State Commissions "such information and reports as may be of assistance in State regulation of natural gas companies."

The Proceedings Before the Commission.

In July, 1938, the Cities of Cleveland and Akron filed complaints with the Federal Power Commission, charging that the rate collected by Hope from East Ohio was excessive and unreasonable (R. II, pp. 1, 7). Cleveland's complaint, filed two weeks after the Natural Gas Act became effective, was the first complaint received by the Commission under the Act. In October, 1938, the Commission, on its own motion, instituted an investigation to determine the reasonableness of all of Hope's interstate rates (R. II, p. 28). In March, 1939, the Pennsylvania Public Utility Commission filed a complaint with the Federal Power Commission, charging that the rates collected by Hope from Peoples Natural Gas Company, Manufacturers Light and Heat Company, and Fayette County Gas Company were unreasonable. (R. II, p. 18). The City of Cleveland's complaint, as amended and modified, prayed spe-

cially for a determination by the Commission that Hope's collected rate from East Ohio was unreasonable and therefore unlawful, and for a determination of just and reasonable Hope-East Ohio rates from June 30, 1939 to the date of the Federal Power Commission's decision, requesting such determinations "in aid of State regulation" and particularly to afford The Public Utilities Commission of Ohio a proper basis for disposition of a fund collected by East Ohio under bond from Cleveland consumers during the period since June 30, 1939 (R. II, p. 14). The City of Cleveland represented to the Federal Power Commission that, in a pending proceeding before The Public Utilities Commission of Ohio, Hope's distributing affiliate, East Ohio, sought to use the rate paid to Hope under the initial schedule filed by Hope with the Federal Power Commission, to support a claim that an ordinance rate of the municipality, suspended by the filing of a bond, should be permanently set aside, and that higher rates should be imposed upon the ultimate consumers of gas in the municipality. In October, 1939, the Federal Power Commission consolidated the three complaint cases and its own investigation of Hope's interstate wholesale rates for hearing (R. II, p. 34). On December 20, 1940, the Commission denied without prejudice a motion of the Cities of Cleveland and Akron for an immediate order reducing the Hope-East Ohio rate upon the Hope Company's own testimony, upon the ground that "there is insufficient evidence of record, at this time, to support the prayer for relief requested by movants," and subject to the reservation that "this order is not to be construed as a determination of any of the issues in the pending principal proceedings" (R. II, p. 43). Hearings were held in 1940 and 1941, and after briefs were filed, the case was argued orally before the Commission sitting *en banc* on October 27, 1941 (R. II, p. 48). The Commission decided the case on May 26, 1942 (R. I, pp. 1, 8) when it entered an "Order Reducing Rates" charged by Hope and in addition, separate

"Findings as to Lawfulness of Past Rates" collected by Hope from East Ohio.

The Commission's Determinations.

The Commission's "Order Reducing Rates" required Hope to reduce its interstate rates for the future to reflect a reduction of not less than $3,609,857 in operating revenues on an annual basis (R. I, p. 6). More particularly, the order required minimum reductions of 7 cents per M.c.f. from the 36.5 cent and 35.5 cent rates previously charged East Ohio and Peoples, respectively, and 3 cents per M.c.f. from the 31.5 cent rate previously charged Fayette County and Manufacturers Light and Heat (R. I, pp. 73-74). The Commission's "Findings as to Lawfulness of Past Rates," made in deciding the complaint of the City of Cleveland, determined that the rates collected by Hope from East Ohio were unjust, unreasonable, excessive, and therefore unlawful, by $830,892 in 1939, $3,219,551 during 1940 and $2,815,789 on an annual basis since 1940; it further determined just, reasonable and lawful rates for gas sold to East Ohio for resale for ultimate public consumption to be $11,528,608 for 1939, $11,507,185 for 1940 and $11,910,947 on an annual basis for 1941 and the first half of 1942 (R. I, pp. 12-13).

The Commission founded its "Order Reducing Rates" upon a rate base of $33,712,526, upon which it granted respondent a 6½% rate of return (R. I, p. 4), or $2,191,314, annually. The rate base was determined to be the actual legitimate cost of, or gross investment in, Hope's interstate property less existing depletion and depreciation, plus allowances for unoperated acreage, working capital and future net capital additions (R. I, p. 50).

The Commission's rate base was arrived at substantially as follows: The Commission found that Hope had kept complete documentary evidence, through books, records and vouchers, of its expenditures throughout its existence, so that no estimates were required to ascertain the

actual legitimate cost (R. I, pp. 23, 174). Pursuant to a check of the inventory of Hope's property in service and examination, analysis and audit of respondent's records, the Commission determined the cost to be $52,174,873 for the property devoted to the interstate sales, as of December 31, 1940 (R. I, p. 36). From this amount, the Commission then deducted accrued depletion and depreciation, which it found to be $22,328,016 (R. I, pp. 45-50). It arrived at this figure by applying the economic-service-life method to actual legitimate cost (R. I, p. 41). In making these determinations the Commission was guided by a study conducted by a qualified staff engineer, who made a field inspection of the Company's physical properties to aid in the determination of service lives (R. I, p. 42). The actual existing depletion and depreciation found by the Commission came to about $24,000,000 less than the depletion and depreciation which the Company had accrued on its books (R. I, p. 81). One of the Commissioners dissented on the ground that the Commission should have deducted accrued depreciation and depletion of not less than $38,000,000, the reserve remaining on the Company's books after it had transferred $7,500,000 from the reserve to surplus (R. I, p. 81). The Commission then added $1,392,021 for future net capital additions, $566,105 for useful unoperated acreage and $2,125,000 for working capital, yielding the total rate base of $33,712,526 (R. I, p. 50).

Using 1940 as a test year to forecast future revenues, and forecasting expenses at the 1940 figure plus $421,160, the Commission allowed respondent operating expenses and taxes amounting to $13,495,584 (R. I, pp. 62, 70, 72). Of this total $1,460,037 represented the annual allowance for depreciation and depletion (R. I, p. 53). This allowance was determined by the Commission in the same way as the actual existing depreciation and depletion, by the application of the economic-service-life method to the actual legitimate cost of respondent's properties (R. I, pp. 51-52).

The Commission's "Findings as to Lawfulness of Past Rates" were arrived at on the same principles and in substantially the same manner as the "Order Reducing Rates," except that they were based on actual operating experience for the years in question, instead of a test year (R. I, p. 11).

In issuing its order and findings the Commission rejected respondent's argument that post-investment changes in price levels had to be reflected in the rate base and in computing both accrued depreciation and depletion and the annual allowance in operating expenses for depreciation and depletion (R. I, pp. 20-23, 36, 41, 52). It condemned as hypothetical and without probative value the "reproduction cost new" and "trended original cost" estimates (amounting to approximately $97,000,000 and $105,000,000 respectively) submitted in evidence by respondent in support of its claimed rate base of some $66,000,000 (R. I, pp. 20-23). The Commission also rejected respondent's contention that, in any event, the rate base should have reflected an additional sum of about $17,000,000, representing largely expenditures for well-drilling prior to 1923, which respondent had charged to operating expense (R. I, pp. 24-34). Likewise unsuccessful were respondent's espousal of the "percent condition" theory of measuring accrued depreciation (R. I, p. 38), its claim that an expenditure of $165,965 for a deep-test well, which was completed dry and charged to operating expenses in 1941, should have been included in 1940 operating expenses, and its argument that the annual allowance for depletion and depreciation should take account of the capital additions recognized after 1940.

Pursuant to Section 19 of the Act, Hope filed an application for rehearing (R. II, p. 51), and upon denial, petitioned the United States Circuit Court of Appeals for the Fourth Circuit for a review of the Commission's "Order Reducing Rates" and the Commission's "Findings as to Lawfulness of Past Rates," naming the Federal Power Commission, the City of Cleveland, the City of Akron, and the Pennsylvania Public Utility Commission as parties

respondent (R. IV, p. 1). Hope did not seek a stay of the Commission's order from the Court of Appeals and such order has not been stayed; instead Hope agreed with its customer companies to charge the ordered rates pending litigation, upon the customers' agreement to make Hope whole if the Commission's order should be finally invalidated.

The Opinion Below.

On review, the court below, with one judge dissenting, set aside the Commission's "Order Reducing Rates" on the basic grounds that: (1) the Commission's use of a prudent investment rate base failed to reflect "present fair value," in view of the post-investment, "decided change in price levels" shown by the record and judicially noticeable (R. IV, pp. 172, 184); (2) the Commission erroneously excluded from the rate base the well-drilling costs charged to operating expenses prior to 1923 (R. IV, pp. 172, 184-189); (3) the Commission improperly determined accrued depreciation on the basis of "mere formulas," without considering the present physical condition of respondent's property (R. IV, pp. 172, 190); (4) the Commission should have based its annual allowance in operating expenses for depreciation and depletion upon the "present fair value" of the physical property, instead of upon actual legitimate cost (R. IV, pp. 194-196); (5) the Commission should have included in 1940 operating expenses $165,965 for an experimental deep-test well, which was completed dry and charged to operating expenses in 1941 (R. IV, p. 198); (6) the Commission should have made an annual allowance for depreciation and depletion on capital added to the rate base after 1940 (R. IV, p. 198).

The Court also set aside the Commission's "Findings as to Lawfulness of Past Rates," holding (1) that the Commission had no jurisdiction to make findings as to lawfulness of past rates "to be given effect in rate proceedings

before state commissions,'' and that rates filed with the Commission under Section 4 (c) of the Act became the only ''lawful'' ones which the utility could charge or accept until changed by the Commission; (2) that the Commission could investigate ''the conditions and rates of the past'' as an incident of its power to fix future rates, but that so viewed the findings in question were invalid for the same reasons as its ''Order Reducing Rates,'' and were also objectionable in that they were based on actual experience for the years in question, rather than reasonable estimates of expenses based on experience during a prior period (R. IV, p. 203). The Court further held that if the Commission has jurisdiction to determine lawful rates for a period subsequent to the passage of the Natural Gas Act and prior to the making of an order fixing future rates, its determination is, in effect, an order of the Commission affecting substantial rights and contractual relationships of a party to a proceeding before it and is reviewable as such (R. IV, p. 203). On March 8, 1943, the Circuit Court granted a motion for the stay of its mandate pending further order, upon the condition that a petition for writ of certiorari be filed with the Supreme Court of the United States within thirty days.

REASONS FOR GRANTING THE WRIT.

1. The public interest will be promoted by the prompt settlement in this Court of the questions involved.

The issue which is stirred by the main questions presented in this case is whether the Federal Power Commission under the Natural Gas Act may adopt the prudent investment method of rate-making.

The right of the Federal Power Commission to adopt the prudent investment method of rate-making under the Natural Gas Act is a matter of great importance to the Federal Power Commission in the administration of the Act; to States, municipalities, and State commissions, which are authorized by the Act to petition the Federal

Power Commission; to natural gas companies subject to the Act; and to the ultimate consumers of natural gas throughout the Nation, for whose benefit the Act was passed.

Several years ago the importance of a formal recognition by this Court of the freedom of an administrative body to adopt the prudent investment method of rate-making was urged in the concurring opinion of Mr. Justice Frankfurter, with whom Mr. Justice Black joined, in *Driscoll v. Edison Light and Power Company,* 307 U. S. 104, 122-123 (1939), as follows:

> "The decree below was clearly wrong. But in reversing it, the Court's opinion appears to give new vitality needlessly to the mischievous formula for fixing utility rates in *Smyth v. Ames,* 169 U. S. 466. The force of reason, confirmed by events, has gradually been rendering that formula moribund by revealing it to be useless as a guide for adjudication. Experience has made it overwhelmingly clear that *Smyth v. Ames* and the uses to which it has been put represented an attempt to erect temporary facts into legal absolutes. The determination of utility rates—what may fairly be exacted from the public and what is adequate to enlist enterprise—does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment. These are matters for the application of whatever knowledge economics and finance may bring to the practicalities of business enterprise. The only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process.
>
> "Mr. Justice Bradley nearly fifty years ago made it clear that the real issue is whether courts or commissions and legislatures are the ultimate arbiters of utility rates (dissenting, in *Chicago, M. & St. P. Ry. Co. v. Minnesota,* 134 U. S. 418, 461). Whatever may be thought of the wisdom of a broader judicial role

in the controversies between public utilities and the public, there can be no doubt that the tendency, for a time at least, to draw fixed rules of law out of *Smyth v. Ames* has met the rebuff of facts. At least one important state has for decades gone on its way unmindful of *Smyth v. Ames,* and other states have by various proposals sought to escape the fog into which speculations based on *Smyth v. Ames* have enveloped the practical task of administering systems of utility regulation.

"*Smyth v. Ames* should certainly not be invoked when it is not necessary to do so. The statute under which the present case arose represents an effort to escape *Smyth v. Ames* at least as to temporary rates. It is the result of a conscientious and informed endeavor to meet difficulties engendered by legal doctrines which have been widely rejected by the great weight of economic opinion (See 2 *Bonbright, The Valuation of Property,* 1081-1086, 1094-1102; 3A *Sharfman, The Interstate Commerce Commission,* 121-137) by authoritative legislative investigations (N. Y. State Commission on Revision of the Public Service Commission Law, *Report of Commissioners, passim* (1930)), by utility commissions throughout the country, (Proceedings of the Forty-Seventh Annual Convention of the National Association of Railroad and Utilities Commissioners, 232 *et seq.*; Proceedings of the Forty-Eighth Annual Convention of the National Association of Railroad and Utilities Commissioners, 115 *et seq.*, 289 *et seq.*; Proceedings of the Forty-Ninth Annual Convention of the National Association of Railroad and Utilities Commissioners, 159 *et seq.*) and by impressive judicial dissents. (See, e.g., Brandeis, *J.*, concurring, in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n,* 262 U. S. 276, 289 and bibliography therein contained.)"

More recently, Justices Black, Douglas, and Murphy, concurring in *Federal Power Commission v. Natural Gas Pipeline Company of America,* 315 U. S. 575, 606 (1942), flatly stated that the Federal Power Commission under the Natural Gas Act may adopt prudent investment as a rate base, in the following explicit language:

> "As we read the opinion of the Court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of 'fair value.' The Commission may now adopt, if it chooses, prudent investment as a rate base—the base long advocated by Mr. Justice Brandeis. And for the reasons stated by Mr. Justice Brandeis in the *Southwestern Bell Telephone* case, there could be no constitutional objection if the Commission adhered to that formula and rejected all others."

Judge Dobie of the United States Circuit Court of Appeals for the Fourth Circuit, dissenting below, interprets the opinions in *Federal Power Commission v. Natural Gas Pipeline Company,* 315 U. S. 575 (1942), *supra,* as authorizing the Commission to adopt a prudent investment rate base, as follows (R. IV, pp. 203-205):

> "The Commission, in arriving at the proper rate-base, frankly and openly adopted the Prudent Investment Theory and paid no attention to the present value of the properties of Hope. Mr. Justice Brandeis, in his classic concurring opinion (Mr. Justice Holmes joined in the opinion) in *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri,* 262 U. S. 276, has set forth, with his customary incisive clarity, the Prudent Investment Theory, together with the reasons for his belief in that theory. To my mind, the arguments he therein advances have never been convincingly refuted.
>
> "Nearly twenty years have slipped by since that opinion was handed down. During this period, the pronouncements of the United States Supreme Court in this field have been many, varied and quite confusing. This fact has been pointed out by writers whose names are thrice legion. The recent case (involving the Natural Gas Act, with which we are also concerned) of *Federal Power Commission v. Natural Gas Pipeline Co.,* 315 U. S. 575, however, does call for some comment.
>
> "The majority opinion in that case (written by Chief Justice Stone) contains no express discussion of

the Prudent Investment Theory and certainly does not in precise terms sanction the use of that theory alone. Interesting, though, in this connection is the oft-quoted statement of Chief Justice Stone (315 U. S. at page 586):

> " 'The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.'

But the concurring opinion of Justices Black, Douglas and Murphy, on the specific point under discussion, is as clear as crystal and as crisp as bacon; for this opinion flatly and squarely upholds the validity of the application of the Prudent Investment Theory, to the exclusion of any other theory (315 U. S. at page 606) in three sentences so free from ambiguity that they cannot be misunderstood:

> " 'As we read the opinion of the Court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost or giving any weight to that element of fair "value." The Commission may now adopt, if it chooses, prudent investment as a rate base—the base long advocated by Mr. Justice Brandeis. And for the reasons stated by Mr. Justice Brandeis in the *Southwestern Bell Telephone* case, there *could be no constitutional objection if the Commission adhered to that formula and rejected all others.'* (Italics ours.)

It is difficult for me to believe that the majority of the Supreme Court, believing otherwise, would leave such a statement unchallenged.

"A careful study of the Natural Gas Act (particularly the precise wording of Section 6) convinces me that Congress intended to give to the Federal Power Commission a wider latitude and a more extended discretion than had been given to any other federal board or commission under any previous statute in the field of rate making.

"Further, I think that the methods adopted by the Commission under the Prudent Investment Theory, in arriving at a rate-base in the instant case, were neither fanciful nor arbitrary. It seems to me, too, that there was substantial evidence to support the opposite findings of the Commission.

"Accordingly, I see here no adequate reasons for reversing on this score the decision and findings of the Commission."

In short, the prudent investment issue is important to the Federal Power Commission, States, municipalities, State commissions, natural gas companies, and ultimate consumers of natural gas. A dissenting opinion in the Court below interprets the decision of this Court in the *Natural Gas Pipeline Company Case* as authorizing the Commission to adopt a prudent investment rate base. Four of the Justices of this Court have rendered opinions urging that the public interest will be promoted by the prompt settlement of the prudent investment issue. There has been a change in the personnel of this Court since the *Natural Gas Pipeline* decision was rendered.

The first reason for granting the writ, therefore, is that the public interest will be promoted by the prompt settlement in this Court of the issue as to whether the Federal Power Commission under the Natural Gas Act may adopt the prudent investment method of rate-making.

2. The holding of the Court below that the Federal Power Commission has no jurisdiction to determine upon complaint of a municipality and upon its own investigation that a natural gas company has violated the Natural Gas Act Section 4(a) by charging an unjust, unreasonable and

therefore unlawful initial rate, and to determine the lawful rate for a period after the passage of the Natural Gas Act and prior to a Commission order fixing future rates, decides a federal question in a way probably in conflict with applicable decisions of this Court.

This question is of substantial importance to petitioner, the City of Cleveland, because the Federal Power Commission's "Findings as to Lawfulness of Past Rates," if valid, furnish an appropriate basis for refunds to Cleveland consumers of temporary rates collected under bond by respondent's affiliate, The East Ohio Gas Company, in pending proceedings before The Public Utilities Commission of Ohio (*East Ohio Gas Company v. City of Cleveland,* P. U. C. O. Nos. 11,001, 11,218, 11,442), of $3,600,000 or an average of about $13 per customer from June 30, 1939 to June 30, 1942.

Conversely, the holding of the Court below that initial filed rates of a natural gas company are the only lawful rates until changed by a future rate-fixing order of the Federal Power Commission, unless reviewed by this Court, would become *res judicata* between Cleveland and The East Ohio Gas Company as a privy of Hope, cf. *Sunshine Coal Company v. Adkins,* 310 U. S. 381, 389-391, 401-404 (1940) and in that event, the $3,600,000 would inure to the benefit of the Standard Oil Company (New Jersey), which is the sole owner of both Hope and East Ohio.

In holding that initial filed schedule rates of a natural gas company are the only lawful rates until changed by a future rate-fixing order of the Federal Power Commission, the Court below has decided a federal question, to wit, the interpretation of a federal statute. More particularly, the lower Court has misinterpreted Section 4(a) of the Natural Gas Act, which provides that all rates and charges made by any natural gas company for or in connection with the sale of natural gas shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. It has misinterpreted

Section 13 of the Natural Gas Act, which provides that any municipality complaining of anything done or omitted to be done by any natural gas company in contravention of the provisions of the Act may file a complaint with the Commission. It has misinterpreted Section 14(a) of the Natural Gas Act, which provides that the Commission may investigate to determine whether any person has violated any provision of this Act. It has misinterpreted Section 16 which empowers the Commission to perform any and all acts as it may find necessary or appropriate to carry out the provisions of the Act. And it has misinterpreted Section 17(c), which requires the Federal Power Commission to make available to the several State commissions such information and reports as may be of assistance in State regulation of natural gas companies.

The holding of the Court below that the Federal Power Commission has no jurisdiction to determine lawful rates for interstate sales of natural gas at wholesale after the effective date of the Natural Gas Act of 1938 and prior to the issuance of the Commission rate-fixing order, upon the ground that initial filed rates of a natural gas company are the only lawful rates until changed by a future rate-fixing order of the Federal Power Commission, is in conflict with applicable decisions of this Court.

First, the holding of the Court below is in conflict with the decision of this Court in *United States v. Morgan,* 307 U. S. 183, 191-193 (1939) (Mr. Justice Stone) where the Court said:

> "Assuming, as appellees contend, that after the Secretary's order of June, 1933, was set aside he could, in the reopened proceeding, neither promulgate a rate order as of that date nor make an order for the payment of money, he was still not without authority in the premises under the statute and the mandate of this Court. He was free to make an order fixing rates for the future, and for that purpose or any other within the purview of the Act he is now free to determine a reasonable rate for the period antedating any order he may now make. See *Atlantic Coast Line R. Co. v.*

Florida, 295 U. S. 301, 312. No prior decision of the Secretary stands in the way of his making the determination now. Cf. *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370. The sole limitation upon his power, prescribed by sec. 309 (c), is that upon an inquiry instituted by him he may not order the payment of money. In other respects his power to investigate and decide is unaffected.[3] He may make inquiry 'as to any matter or thing concerning which a complaint is authorized to be made' to him, 'or concerning which any question may arise under any of the provisions' of the Act, 'or relating to the enforcement of any' provision. He is given 'the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.' Sec. 309(c).

"That the Secretary, acting under sec. 309(a), could now entertain a complaint by the patrons of appellees who have contributed to the fund in court charging that the rates exacted were in violation of sec. 305, seems to be conceded as is, we think, plain. Section 309(a) specifically provides: 'If * * * there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.' It seems equally plain that under sec. 309 (c) the Secretary, in the exercise of his discretion, may conduct such an investigation on his own motion. Ordinarily, it is true, there would be no occasion for such an investigation if, as a result of it, the Secretary could make no reparation order. But, as we shall presently point out, when the alleged excessive rates are *in custodia legis,* the court has authority and is under an equitable duty to dispose of them according to law and justice. Thus the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his determination can afford a proper basis for the action of the district court in making disposition of the fund."

[3] Sec. 309(c): [Copy of this section set forth in margin of Court's opinion will be found in Appendix B, *infra,* p. 25].

Second, the holding of the Court below is in conflict with the decision of this Court in *Atlantic Coast Line Railroad Company v. Florida,* 295 U. S. 301, 312 (1935) (Mr. Justice Cardozo), where the Court said:

> "* * * Unjust discrimination against interstate commerce, 'forbidden' by the statute, and there 'declared to be unlawful,' (Interstate Commerce Act, sec. 13(4); *Board of Railroad Commissioners v. Great Northern Ry. Co., supra,* at pp. 425, 430; *Florida v. United States,* 292 U. S. 1, 5) does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. The word when it goes forth invested with the forms of law may fix the consequences to be attributed to the conduct of the carrier in reliance upon an earlier word, defectively pronounced, but aimed at the self-same evil, there from the beginning. The Commission was without power to give reparation for the injustice of the past, but it was not without power to inquire whether injustice had been done and to make report accordingly. * * *"

Third, the holding of the Court below is in conflict with applicable decisions of this Court because it overlooks the distinction between a legal and a lawful rate, enunciated by Mr. Justice Roberts in *Arizona Grocery v. Atchison Railway,* 284 U. S. 370 (1932), where the Court said at page 384:

> "* * * In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike. (*Id.,* sec. 6. *Kansas City Southern Ry. Co. v. Carl,* 227 U. S. 639, 653; *Pennsylvania R. Co. v. International Coal Co.,* 230 U. S. 184, 197; *Louisville & N. R. Co. v. Maxwell,* 237 U. S. 94, 97; *Dayton C. & I. Co. v. Cincinnati, N. O. & T. P. Ry. Co.,* 239 U. S. 446, 450. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. (Id. secs. 8, 9, 10.) Although the Act thus created a legal rate, it did not abrogate, but ex-

pressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. (Id. sec. 1.) In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. * * *"

The second reason for granting the writ is that the holding of the Court below that the Federal Power Commission has no jurisdiction to determine the lawful rate for interstate gas for a period after the passage of the Natural Gas Act and prior to a Commission order fixing future rates, decides a federal question in a way probably in conflict with applicable decisions of this Court.

CONCLUSION.

Since the public interest will be promoted by the prompt settlement in this Court of the issue as to whether the Federal Power Commission under the Natural Gas Act may employ the prudent investment method of rate-making, and

Since the holding of the Court below, that the Federal Power Commission has no jurisdiction to determine the lawful rate for interstate gas for a period after the passage of the Natural Gas Act and prior to a Commission order fixing future rates, decides a federal question in a way probably in conflict with applicable decisions of this Court,

Therefore, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Thomas A. Burke, Jr.,
Director of Law,

Spencer W. Reeder,
Special Assistant Director of Law,

Robert E. May,
Solicitors for City of Cleveland, Petitioner.

APPENDIX A.

Applicable sections of The Natural Gas Act of 1938, C. 556, 52 Stat. 833; 15 U. S. C. Supp. V, Secs. 717-717w, provide:

> Sec. 4.(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> Sec. 5.(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any state, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.
>
> Sec. 13. Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made

shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.

Sec. 14.(a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or mat-

ters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Sec. 17.(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

Sec. 6.(a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

APPENDIX B.

Section 309 (c) of Packers and Stockyards Act:

§ 309 (c) "The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money."