



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

Hon. Clinton Owsley, Director
Gas Utilities Division
Railroad Commission of Texas
Austin, T e x a s

Dear Sir:

Opinion No. O-1715

Re: The Railroad Commission of Texas has jurisdiction to require the filing of annual reports on the part of Texoma Natural Gas Company.

In response to your letter of November 18, 1939, and subsequent verbal information herein reflected, we are of the opinion that the Railroad Commission of Texas has jurisdiction pursuant to Article 6053, Revised Civil Statutes, 1925, to require annual reports of the Texoma Natural Gas Company.

We are informed that this company distributes gas from its gathering lines to drilling contractors, private dwellings and to a warehouse. In respect to these sales the company is a utility and undoubtedly the Railroad Commission has both rate making jurisdiction, and jurisdiction to require annual reports of it.

While it has been your practice to require reports of this company, you cite the ruling of the Supreme Court of Texas in the case of HUBBLE OIL & REFINING CO., et al vs. RAILROAD COMMISSION OF TEXAS, et al, 123 S.W. (2d) 9, as cause for doubt as to the jurisdiction of the Commission in this regard. In the event the Texoma Natural Gas Company should not be classed as a utility, we shall consider whether the legislature has nevertheless conferred jurisdiction over it, a mere producer of gas, to require annual reports. Quoting from the case:

"Articles 6053 and 6054 are the statutes which directly define the jurisdiction of the

Hon. Clinton Cowsley, Director, page 2

Commission with regard to rate making * * * when the two are read together, it is evident that both are dealing with rate making as regards to pipe lines."

"When Articles 6053 and 6054, supra, are read either together or separately they demonstrate beyond any doubt that the rate making jurisdiction of the Commission has not been extended to cover mere producers of gas who sell their product at the point of origin." 128 S.W. (2d) at p.p. 14 and 15. (Underlining ours).

The court clearly holds that rate making jurisdiction as to "mere producers" has not been conferred upon the Commission, except that such producer be a part of an integrated enterprise under a single control engaged also in distribution of gas to the public. Other statutes dealing with jurisdictional matters were not considered by the court. The opinion, therefore, does not purport to control the question before us regarding the jurisdiction of the Commission to require annual reports of a "mere producer". However, Article 6053 makes a requirement of "such pipe lines" to file reports as the Commission may deem pertinent. The question then is whether a mere gas producer, such as Texoma, is a pipe line within the contemplation of this statute. We believe it is. While it has been held not to be a utility, the mere producer clearly exercises functions defined to be that of a pipe line. Article 6051 provides:

"Art. 6051. MAY ENJOIN GAS PIPE LINE

The operation of gas pipe lines for buying, selling, transporting, producing or otherwise dealing in natural gas is a business which in its nature and according to the established method of conducting the business is a monopoly and shall not be conducted unless such gas pipe line so used in connection with such business be subject to the jurisdiction herein conferred upon the Commission. The Attorney General shall enforce this provision by injunction or other remedy."

Hon. Clinton Owsley, Director, page 3

Article 6056 provides:

"Art. 6056. OPERATOR'S REPORTS

The Commission may require of all persons or corporations operating, owning or controlling such gas pipe lines sworn reports of the total quantities of gas distributed by such pipe lines and of that held by them in storage, and also of their source of supply, the number of wells from which they draw their supply, the amount of pressure maintained, and the amount and character and description of the equipment employed, and such other matters pertaining to the business as the Commission may deem pertinent."

The Supreme Court recognizes the necessity under the statute for the Commission to inquire into the price of the gas sold to the utility. While the seller, if a mere producer, cannot be regulated, from the standpoint of rate making, nevertheless the purchasing utility may be directed not to charge more upon its books than a reasonable price. In that event the utility would, of course, absorb the excess price found to be paid to the producer, and would be prohibited from passing it on to the public. However, in making a determination of the reasonableness of the price, the Commission would necessarily have to inquire into the contracts, books and records of the producer. In this connection the court clearly infers that the consumer will not have to pay a "burner tip" rate embracing an unreasonable "well head" or production price for the gas:

"At this point we pause to call attention to the fact that our holding to the effect that the Commission is without jurisdiction to tell a mere gas producer what price he must charge for his product when sold on the premises of production to a public gas utility does not mean that the Commission, in all instances and under all circumstances, in fixing gas utility rates, must allow the gas utility affected full credit for the purchase

Hon. Clinton Owsley, Director, page 4

price of the gas purchased by it. In regard to that matter, we think that, in fixing gas utility rates, it is not only the power but the duty of the Commission to inquire into the reasonableness or unreasonableness of the gas utility gas contracts. *Western Distributing Company vs. Public Service Comm.* 285 U. S. 119, 78 L. Ed. 655; *Smith vs. Illinois Telephone Co.*, 282 U. S. 133, 75 L. Ed. 255."

Article 6053 referred to by the court as defining rate making jurisdiction of the Railroad Commission specifically delegates the duty upon the Commission, in line with the suggestion of the court contained in the quotation from its opinion above, to "establish a fair and equitable division of the proceeds of the sale of gas between the companies transporting or producing the gas and the companies distributing or selling it". In addition to our belief that the producer of gas has been included specifically as a "pipe line" within the contemplation of the statute, requiring reports, we believe also it exists as an implied power. The Commission, of course, would be powerless to exercise this duty, except that it have power to require reports on its business activities. The power to require reports is therefore implied as incident to the primary power expressly given to the Commission to equitably divide proceeds between the producer and the distributor. It is true that a primary power such as rate making cannot be implied:

"It seems to be argued that our gas utility statutes, by necessary implication, confer the power on the Commission to fix the price of gas where it is sold by the producer on the premises of production to a public gas utility. We think that the power to fix prices and make rates by a board or commission is not to be taken as conferred by implication. Such power must be conferred under statutory or constitutional language that is free from doubt, and that admits of no other reasonable construction." 128 S.W. (2nd) at page 11.

Hon. Clinton Owsley, Director, page 5

In other words the Railroad Commission in exercising its express power to fix rates for gas to be charged by a distributing utility must also effectually exercise the express duty conferred upon it to make an equitable division between the "mere producer" on the one hand and the distributor or seller on the other hand. Collateral to this latter express jurisdictional power is the necessarily implied power to require annual reports from the mere producers of gas. There are many distributing companies in Texas who purchase their gas from mere producers of gas. Most of the latter come within the jurisdiction of the Commission as part of an integrated system engaged in all phases of production transportation and distribution. However, some of them are not thus "associated", as the court described it in the Humble case above discussed, and except that the Commission have the power to require reports of them, its rate making jurisdiction would be rendered impotent as to the distributors to whom said producers sell the gas.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By *Hugh J. Buck*
Hugh J. Buck
Assistant

APPROVED APR 4, 1940

HJB:ob

[Signature]
FIRST ASSISTANT
ATTORNEY GENERAL

AP
CO