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The Wyoming Natural Gas Consumers' Act of 1985: An Experiment in Controlling Natural Gas Prices and a Response to Indefinite Price Escalation Clauses

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In the 1985 session of the Wyoming legislature, a unique piece of legislation was passed which allows cities in Wyoming to negotiate their own natural gas purchasing contracts and to require the gas utility serving the city to transport that gas. In this article, the authors discuss the history and purpose of the Act as well as its possible future. Laramie and Casper are already attempting to utilize this innovative legislation, but, as the authors point out, some problems may have to be addressed before the law can be truly effective.

In 1985, the Wyoming legislature enacted a unique piece of legislation dealing with natural gas utilities. Under the "Natural Gas Consumers' Act,"[1] any city or town in Wyoming can purchase natural gas directly from suppliers, and can then require the local gas utility company to distribute this gas to the consumers.[2] The Act also prohibits the use of indefinite price escalation clauses in natural gas contracts between Wyoming producers and buyers that resell to retail customers if the escalation clause would raise the contract price higher than the prevailing market price of natural gas.[3]

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1. The legislature did not name the legislation, but the authors will refer to it as the "Natural Gas Consumers' Act" for a convenient reference.
2. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1.
3. WYO. STAT. § 15-1-103(c)(iii) (Supp. 1985).

The first part of the Act separates two previously united functions of natural gas utility companies. Before, natural gas utilities both purchased the gas and distributed it to consumers.[4] Under the new legislation, a municipality can purchase the gas on behalf of consumers. A utility company could be required, by the terms of its franchise, to transport this gas from the suppliers and deliver it to consumers. The second part of the Act simply prohibits the use of a particular type of contract clause that many felt was forcing residential users to pay above market prices for natural gas.

The basic motivation for the Wyoming Act—frustration over high gas prices—is easy to understand. The reasons for the high prices are complex, however. Therefore, this article will first examine the underlying causes of the problem addressed by the legislation. In the early 1970's, in Wyoming as in other states, it became popular to insert indefinite price escalation clauses into the private contracts between gas producers and public utilities. The clauses allowed utility companies to secure long-term supplies of natural gas, while protecting producers from locking into below market prices over long periods of time. Due to unforeseen changes in regulatory policy, the price escalation clauses ultimately required the payment of gas prices apparently well over current market prices. After a major public utility operating in Wyoming failed in its attempt to have such a clause judicially overturned as unconscionable, the legislature came to the rescue with the 1985 Act.

This article will also analyze the Act itself. The legislation finally passed is quite different from the original bill, and the changes clearly demonstrate how the Act attempts to protect residential consumers from paying more than necessary for natural gas. The legislative debate and the comments and criticisms of several legislators buttress this conclusion.

The third part of this article will consider the future of the Wyoming Natural Gas Consumers' Act. Because this legislation is unique, there are no examples to guide the Wyoming experiment. The Wyoming legislation may bring down natural gas prices for the consumers, or it may prove to be a noble but misguided mistake.

BACKGROUND: THE NORTHERN CONTRACTS—A CASE STUDY IN HIGH NATURAL GAS PRICES

Frustration over high natural gas prices was the basic motivation for the Natural Gas Consumers' Act. A sponsor of the new legislation, Senator Charles Scott from Casper, explained his support for the bill this way: "We consider it an insult to be living in the middle of the gas patch and paying higher than the market price."[5]

Wyoming is a gas producing state. In 1982, for example, gas production in Wyoming was over 465 million MCF, and in 1983 gas production

4. *See* Kerr-McGee Corp. v. Northern Utilities, Inc., 500 F. Supp. 624 (D. Wyo. 1980).
5. *Natural Gas Bill Opposed*, Laramie Boomerang, February 9, 1985, at 1, Col. 4.

in Wyoming probably topped 500 million MCF.[6] Yet consumers of natural gas in Wyoming pay some of the highest prices in the nation for their natural gas. In Laramie, for example, an average monthly gas bill is about $52.00. This compares to an average monthly bill of $36.79 in Denver, Colorado.[7] A case study of one utility company's supply contracts will help explain the commercial and regulatory background for the high price of natural gas in Wyoming.

The Contracts

Northern Utilities, Inc. supplies natural gas to the cities of Casper, Lander, Riverton, and intermediate communities. Northern Gas Company, a separate corporation, is the natural gas utility for Laramie, Rawlins, and intermediate communities. A large portion of the natural gas distributed by these two companies (referred to collectively hereafter as "Northern") is purchased under long term contracts from producers in the Beaver Creek Field in Fremont County, Wyoming. In 1980, Northern litigated these long term contracts, and the suit revealed many things about the price of natural gas to Wyoming consumers.[8]

The original contracts between Northern and the three producers in the Beaver Creek field[9] were identical twenty year contracts entered into during 1957 and 1958. In 1970 and 1973, these contracts were renegotiated and amended, and were extended to the year 1990.[10] These early 1970's amendments to the natural gas purchase contracts were the immediate subject of the litigation.

The original contracts each contained a two party most favored nations clause,[11] which provided that the price paid to the producers would increase to match any higher price Northern paid to any other gas producer in the state of Wyoming. The text of that clause read:

> If, at any time during the term of this agreement, Northern pays a producer of gas in the State of Wyoming a price per one thousand (1,000) cubic feet that is higher than the price being paid or otherwise payable under this contract, due consideration being given to the quality of the gas, bases of measurement and condi-

6. 7 STATE OF WYOMING ANNUAL REPORT, OIL AND GAS COMMISSION 5 (1983).

7. *Laramie Gas Bills Higher Than Most Other Cities,* Laramie Boomerang, April 24, 1985, at 1, col. 4.

8. Kerr-McGee Corp. v. Northern Utilities Corp., 500 F. Supp. 624 (D. Wyo. 1980), *rev'd,* 673 F.2d 323 (10th Cir. 1982), *cert. denied,* 459 U.S. 989 (1982). (Hereafter referred to as *Northern*) The district court opinion was noted in Comment, 17 LAND & WATER L. REV. 257 (1982).

9. The three producers are Amoco Production Company, Kerr-McGee Corporation and Phillips Petroleum Company.

10. *Northern,* 500 F. Supp. at 627.

11. The term "most favored nations clause" is taken from international law, where it refers to a trade agreement under which the terms extended by one nation to another are agreed to remain as favorable as the terms extended to the most favored nation with which it deals. Gregg, *Negotiating and Drafting Gas Purchase Contracts on Behalf of the Seller,* S.W. LEGAL FOUND. THIRTEENTH ANN. INST. ON OIL & GAS L. AND TAXATION 133 (1962). Most favored nations clauses are one type of indefinite price escalation clause.

> tions of sale, Northern shall, commencing on the date of delivery of such gas at such higher price, and continuing so long as such price is in excess of the price otherwise payable under this contract, increase the price being paid or otherwise payable to [the Beaver Creek producers] hereunder to equal such higher price. It is the intention hereof that the price to be paid [the Beaver Creek producers] hereunder shall at all times be equal to the higher of the following: (a) the price payable under . . . this contract . . ., or (b) the highest price paid by Northern to a producer of gas in the State of Wyoming.[12]

This sort of clause is common in natural gas contracts,[13] perhaps as a direct result of government regulation.[14] The federal government requires pipelines to show adequate long-term commitments of gas in order to receive the necessary certificate of public convenience and necessity.[15] Similarly, the Wyoming Public Service Commission requires a utility to show it has adequate supplies of natural gas as part of its application for the certificate of public convenience and necessity.[16] Utilities and pipelines must therefore enter into long term contracts with their suppliers, but the suppliers are naturally reluctant to fix firm prices for natural gas over such long periods. Producers enter these long term contracts only if the agreements contain provisions to protect them if prices rise over the term of the contract.

In the early 1970's, the contracts between Northern and the Beaver Creek producers were renegotiated and amended. This time, in addition to the common two party most favored nations clause, the contracts each contained a third party most favored nations clause. This provision read:

> From and after January 1, 1976, when the price to be paid by Northern to [the Beaver Creek producers] pursuant to the other provisions hereof is less than the sum of the price received for gas being sold in interstate commerce, by any producer within the State of Wyoming, except in the counties of Uinta and Lincoln, plus three cents per one thousand cubic feet . . ., then Northern shall increase the price to be paid [the Beaver Creek producers] hereunder to a price equal to the price being received by such producer plus three cents per Mcf.[17]

This sort of indefinite price escalation clause is not common, but neither was it unique to the Northern contracts. It effectively guaranteed that Northern would pay more, by three cents per thousand cubic feet, than the highest price paid for any gas sold in interstate commerce almost anywhere in Wyoming. Furthermore, this third party most favored na-

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12. *Northern*, 673 F.2d at 324, n.2.
13. *See* 4 WILLIAMS, OIL AND GAS LAW § 726 (1984 Supp.)
14. Payne, *The Exemption of Producers from Regulation Act*, 1956 A.B.A. SEC. MIN. L. 40.
15. *In re Kansas Pipe Line Co.*, 2 F.P.C. 29, 35-36 (1939).
16. WYO. STAT. § 37-3-112 (1977).
17. *Northern*, 500 F. Supp. at 628.

tions clause, unlike its predecessor two party most favored nations clause, did not even make allowances for different qualities, pressures, or other attributes of the gas.[18]

By 1980, when Northern took the contract to court, the actual effect of this provision was clear. Under the third party most favored nations clause, the price Northern paid the Beaver Creek producers for natural gas had increased from 28 cents per thousand cubic feet in 1976 to $2.80 per thousand cubic feet in 1980—a ten fold increase in four years. In contrast, the average wellhead price for natural gas in the United States in 1980 was $1.60 per thousand cubic feet.[19] The court noted that this increase in price had "the effect of increasing the residential consumers' monthly gas bill from an assumed $30 per month to a figure of approximately $250 per month."[20]

The Litigation

Northern's attempt to rid itself of the burden of the price escalation clause through a court challenge ultimately proved unsuccessful. It won a resounding victory in the district court, but the decision was reversed by the Tenth Circuit.

In the Wyoming District Court, Judge Brimmer boldly declared the third party most favored nations clause to be against public policy and unconscionable. The court stated that parties should generally be able to make and enforce their own agreements, but also concluded that a "court should not hesitate to refrain from enforcing a contract provision when there is some overriding reason for public concern and the contract provision in some way causes real harm to the public."[21] Because Northern was a utility company providing a vital product to the public, Judge Brimmer found that the contract involved a substantial public interest, justifying close judicial scrutiny of the terms of the contract.

Judge Brimmer found that the third party most favored nations clause was contrary to the public policy of both the federal government and the state of Wyoming. He concluded that the provision was intended by the producers to "remove all price restraints from the contract and fix a then indefinite price that would result in windfalls to the producers and would result in unjustly burdensome and harsh results to the consumers. . . ."[22] The court not only refused to enforce the provision, it also ordered the Beaver Creek producers to refund the amounts Northern had paid in

18. *Id.* at 634.
19. 2 ENERGY INFORMATION AD., 1981 ANNUAL REPORT 115 (1982).
20. *Northern*, 500 F. Supp. at 634.
21. *Id.* at 635. The unconscionability analysis of the district court opinion is criticized in Comment, *supra* note 8, at 264-71.
22. *Id. See also* Judge Barrett's concurring opinion in Superior Oil Co. v. Western Slope Gas Co., 604 F.2d 1281, 1294-97 (10th Cir. 1979) (arguing that a two party most favored nations clause is contrary to public policy.) *But see* Amoco Production Co. v. Kansas Power & Light, 505 F. Supp. 628, 636-40 (D. Kan. 1981) (rejecting the argument of Kansas public utility that a price escalation clause tied to FPC price ceilings was unconscionable).

excess of the price calculated under the other provisions of the contract, so that Northern could make refunds to its rate payers.[23]

Unfortunately for Northern's rate payers, the Tenth Circuit reversed the lower court's decision. The appeals court concluded that "the rise in gas prices borne by the consumer as the result of this contract, which the trial court found so disturbing, is not contrary to either federal or Wyoming public policy, nor is it the result of unconscionability," and said that the contract should be enforced as written.[24]

The Tenth Circuit based its finding largely on the Wyoming case of *In re Estate of Frederick*.[25] The court stated that, under Wyoming law, "unconscionability is tested as of the time the agreement is made and not in accordance with hindsight."[26]

Applying this perspective, the appellate court agreed with Judge Brimmer that the price increases under the contract were severe, but said that price increase alone did not make a contract unconscionable. Both Northern and the Beaver Creek producers were experienced negotiators, well versed in the details of the natural gas market. Unconscionability, by contrast, stems from such factors as "gross inequality of bargaining power," lack of an "opportunity for meaningful negotiation," or deprivation of meaningful choice. Because the contract at issue did not seem completely unreasonable under the circumstances at the time it was agreed upon, the court reversed Judge Brimmer's finding of unconscionability.[27]

The Tenth Circuit's holding meant that Northern was forced to pay an unusually high price for its natural gas. Being a regulated public utility, Northern was entitled as a matter of law to pass the high cost of this gas on to consumers.[28] Consumers of natural gas in Wyoming ended up paying an extremely high price for their gas. In fact, because this contract set the price Northern paid for gas at three cents per thousand cubic feet higher than any Wyoming gas sold in interstate commerce, Wyoming consumers were forced to buy natural gas produced in their own state at a higher price than any out-of-state consumer would have to pay.

The Difficulties of a Small, Intrastate Purchaser

One may wonder why Northern would have entered into a contract that ultimately forced it to pay above market prices for the natural gas

23. *Northern*, 500 F. Supp. at 636.
24. *Northern*, 673 F.2d at 330.
25. 599 P.2d 550 (Wyo. 1979).
26. *Northern*, 673 F.2d at 328.
27. *Id.* at 330. Some alternative legal theories that Northern might have employed to relieve itself of the burden of the indefinite price escalation clause include: (1) a claim of commercial impracticability under Section 2-615 of the Uniform Commercial Code. *See* Tannenbaum, *Commercial Impracticability under the Uniform Commercial Code: Natural Gas Distributors' Vehicle for Excusing Long-Term Requirements Contracts?*, 20 HOUS. L. REV. 771 (1983); or (2) a claim that the contract should have been voided or reformed under the common law doctrine of mutual mistake. *See* Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980).
28. Federal Power Comm'n v. Hope Natural Gas, 320 U.S. 591, 603 (1944).

essential to its operations. First and most obviously, the 1970 amendments to Northern's contracts were negotiated in the midst of a gas shortage. Northern was dealing in a sellers' market, and had to accept almost any terms available.

In its decision enforcing the Northern contract, the Tenth Circuit noted several of the problems facing a small purchaser of intrastate natural gas. Ironically, the court found most of these factors in Northern's own letters and memoranda, and in statements Northern made to the Wyoming Public Service Commission when seeking PSC approval of the contract.[29] Judge Brimmer had concluded that Northern had been in a disadvantaged bargaining position when it agreed to the third party most favored nations clause. The Tenth Circuit, however, believed that the problems facing a small, intrastate purchaser did not show that Northern was vulnerable to overreaching. Rather, the court felt that even a company in an equal bargaining position with the producers could have willingly agreed to such a contract under the circumstances.

First, of course, Northern had to enter into long term supply contracts in order to have adequate supplies for its consumers. The Wyoming Supreme Court has noted that producers are unlikely to enter into long term contracts unless the buyer agrees to a most favored nations provision which maintains prices more favorable to the producer over the life of the contract.[30] It was, therefore, almost inevitable that Northern would have to accept some sort of most favored nations clause in its contract with the Beaver Creek producers.

Second, Northern stated that the high national demand for natural gas had resulted in various large interstate pipelines becoming "very competitive" for Wyoming's supply of natural gas.[31] Although the federal government had set a ceiling on the prices which could be paid for natural gas in interstate commerce, the interstate pipelines found other ways to compensate Wyoming producers for selling the scarce supply of natural gas to them. For example, the pipeline companies were participating in drilling and exploration costs, making payments in advance for future gas deliveries, and making interest free loans to the producers. The pipelines were also agreeing to accept gas at the wellhead by installing and operating all the gathering, dehydrating, and compression facilities. Finally, the large volume pipelines could agree to take substantial amounts of gas in the early years of the contract in order to provide the producers with a fast return on investment.[32]

Since large interstate pipelines could offer these compensations, a small buyer like Northern found it hard to secure the supplies it needed. As Northern stated to the Wyoming Public Service Commission, "[i]t is very difficult for an intra-state gas distribution company, with a relative-

29. *Northern*, 673 F.2d at 329.
30. Amoco Prod. Co. v. Stauffer Chemical Co., 612 P.2d 463 (Wyo. 1980).
31. *Northern*, 673 F.2d at 329, n.11 (quoting statements made by Northern Utilities Co. to the Wyoming PSC).
32. *Id.*

ly limited market and high peak demands and a low load factor, to compete against these interstate companies and negotiate any long term gas supply contracts."[33] To obtain the supplies it needed, Northern was forced to accept almost any terms the producers cared to extract.

Finally, in the early 1970's when Northern was renegotiating the contracts with the Beaver Creek producers, the needs of these sellers and the buyer did not exactly meet. The producers found themselves with a large reservoir of gas, but they hoped to produce and sell it quickly. Northern, on the other hand, needed a steady supply over a several year period.[34]

In any effort to compromise, Northern was at a great disadvantage because it had already laid the pipelines into the Beaver Creek area and could not afford to abandon that large investment. To achieve the sort of compromise it needed and get the producers to agree to a more steady production schedule, Northern was forced to accept the third party most favored nations clause in the contract. In its statement to the Wyoming PSC, Northern stated that the negotiations on this contract were long and hard, and implied that this contract was about the best deal it could get.[35]

The Regulatory Environment

A combination of unforseen changes in the regulatory environment contributed to Northern's plight. At the time the third party most favored nations clause was accepted by Northern, federal price ceilings applied only to gas sold in interstate commerce, not to gas sold in intrastate commerce.[36] One effect of this regulatory dichotomy was that Northern, an intrastate buyer, could expect to pay somewhat more for its natural gas supplies than an interstate purchaser. Thus, when Northern agreed to pay a price at least as high as the price of any interstate gas sold by Wyoming producers, it did so at a time when interstate gas was selling for less than the intrastate gas it was purchasing. In a sharp departure from the past approach to price regulation, first the Federal Power Commission (FPC) and then the 1978 Natural Gas Policy Act (NGPA) attempted to encourage new gas drilling by dramatically lifting the price ceilings for newly drilled gas. The higher prices for some categories of interstate gas then triggered the price escalation clause in Northern's contract to unforeseen levels. A brief overview of federal price regulation of natural gas should help explain the dilemma facing utilities like Northern.

The Federal Power Commission did not begin regulating the wellhead prices of natural gas under the Natural Gas Act of 1938[37] until after the Supreme Court's 1954 decision in *Phillips Petroleum.*[38] Even then, the

33. *Id.*
34. *Id.*
35. *Id.*
36. The Natural Gas Policy Act of 1978 extended the price-setting power of the Federal Energy Regulatory Commission (the successor to the Federal Power Commission) to cover both interstate and intrastate sales. 15 U.S.C. § 3315 (1980).
37. Natural Gas Act, 52 Stat. 821 (1938) (current version at 15 U.S.C. §§ 717-717w (1981)).
38. 342 U.S. 672 (1954).

federal government regulated only the prices of gas sold in interstate commerce, and the prices of gas sold in intrastate commerce remained unregulated.

By 1970, the FPC ceilings for gas prices in interstate commerce were below the level that would have been set by market demand, creating a shortage and causing prices in the intrastate market to surge.[39] One United States House of Representatives report, for example, said,

> During the period 1969-1975, interstate natural gas prices for new contracts rose by 158 percent, from approximately 19.8 [cents] per Mcf to over 51 [cents] per Mcf. However, during the same period, intrastate natural gas prices rose at an even greater rate, from approximately 18.0 [cents] per Mcf in 1969 to in excess of $1.35 per Mcf in 1975, a 650 percent increase.[40]

Northern, which was engaged solely in intrastate commerce, naturally had to pay the higher intrastate gas prices, and in 1970 at least, it could have expected intrastate prices to stay above interstate prices.

Federal regulation of natural gas prices has undergone several changes over the years. The FPC first established natural gas prices by considering the production costs of each individual producer. In 1944, the United States Supreme Court approved of this method in *Federal Power Commission v. Hope Natural Gas Co.*[41] Setting prices on an individual firm basis proved far too cumbersome, however, and in 1960 the FPC took a different approach. In the *Permian Basin Area Rate Cases,*[42] the Supreme Court affirmed the FPC's plan to set natural gas prices by regions, and also approved the FPC plan to set different prices for natural gas based on the age of the well. The purpose of the two-tier approach was to encourage new drilling by allowing a higher price for gas pumped from new wells, while preventing producers pumping from old wells with lower costs from collecting the windfall profits or economic rents they would have received had they been able to charge up to the marginal cost of the new wells.[43]

Given this background, Northern should have expected the FPC to set vintaged prices for the Rocky Mountain area. But the Supreme Court in the *Permian Basin* case had only approved a two tier vintaged system, for "old" and "new" gas. Northern could not have expected the multilayered vintage prices which the FPC and the NGPA eventually set for the area.

Furthermore, during the time Northern was renegotiating its contracts with the Beaver Creek producers, the FPC had wavered in its regulatory approach. In 1972, the FPC abandoned the concepts of area pricing and

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39. *See* Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers,* 86 HARV. L. REV. 941, 976-79 (1973).
40. H.R. REP. No. 732, 94th Cong., 2d Sess. 6 (1976).
41. 320 U.S. 591 (1944).
42. 390 U.S. 747 (1968).
43. S. BREYER, REGULATION AND ITS REFORM, 240-60 (1982).

vintaging,[44] adopting instead a uniform national price ceiling for natural gas.[45] Again, the courts approved the new scheme.[46] Thus, when Northern was renegotiating its natural gas contracts in the early 1970's, it may have anticipated that the FPC would, at least for the next several years, maintain a uniform national ceiling on gas sold in interstate commerce.

The FPC, however, quickly changed course. In 1976, the agency again adopted a vintaging approach. This time, the agency set vintaged nationwide prices.[47] By the time of the litigation between Northern and the Beaver Creek producers, the FPC had set national price ceilings for at least four vintages of gas, and the Natural Gas Policy Act set some thirty different categories of gas for pricing purposes.[48]

When Northern took its contract to court, the maximum legal price for the Beaver Creek gas, had it been sold in interstate commerce, would have been .295 cents per thousand cubic feet,[49] because the Beaver Creek gas was from wells commenced before January 1, 1973.[50] In contrast, gas from wells commenced on January 1, 1975, or later could be sold in interstate commerce for around $1.60 per thousand cubic feet.[51]

The third party most favored nations clause set Northern's price three cents higher than the price paid for *any* Wyoming gas sold in interstate commerce. Thus, the price Northern had to pay was three cents higher than the FPC's newest gas price, or about $1.63 per thousand cubic feet. Furthermore, the FPC price ceiling for new gas escalated every quarter by one cent per thousand cubic feet.[52]

A second feature of federal price regulation in Wyoming was a special rate for small producers. Beginning in 1975, the FPC allowed small producers to charge 130% of the applicable price ceiling established for large producers.[53] The FPC intended by this regulation to recognize the additional costs experienced by small producers and to encourage the drilling of exploratory wells and the development of new supplies of natural gas.[54] The producers in the Beaver Creek Field, Amoco Production Company, Kerr-McGee Corporation, and Phillips Petroleum Company, were hardly small producers. But because Northern's contract price was to be three cents higher than the highest price paid for *any* interstate natural gas

44. FPC Opinion No. 639, 48 F.P.C. 1299 (1972). *See also* Shell Oil Co. v. Federal Power Comm'n, 491 F.2d 82, 84 (5th Cir. 1974).
45. FPC Opinion No. 699, 51 F.P.C. 2212 (1974).
46. Shell Oil Co. v. Federal Power Comm'n, 520 F.2d 1061 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).
47. FPC Opinion No. 770, 56 F.P.C. 509 (1976); FPC Opinion No. 770-A, 56 F.P.C. 2698 (1976) *See also* American Public Gas Ass'n v. Federal Power Comm'n, 567 F.2d 1016 (5th Cir. 1975), *cert. denied*, 435 U.S. 907 (1972).
48. *See* Pierce, *Natural Gas Regulation, Deregulation and Contracts*, 68 VA. L. REV. 63, 87 (1982).
49. FPC Opinion No. 770-A, 56 F.P.C 2698 (1976).
50. *Northern*, 500 F. Supp. at 630.
51. FPC Opinion No. 770-A, 56 F.P.C. 2698 (1976).
52. *Id.*
53. FPC Opinion No. 742, 54 F.P.C. 853 (1975).
54. *Id.*

in Wyoming, Northern was once again forced to pay the higher price. Northern had to pay, not merely the $1.60 applicable to new natural gas, but the small producers' rate of 130% of $1.60, with another three cents premium, for a total of about $2.11 per thousand cubic feet.

The passage of the Natural Gas Policy Act in 1978 added to Northern's problems.[55] Under this legislation, the regulated prices of new natural gas would rise steadily until, in 1985, the price for new gas would be deregulated. Thus, by 1980 when the contract was litigated, Northern looked forward to even more uncertainty than before. At least with regulated prices there was some predictability, but with unregulated prices Northern could only speculate about what price some Wyoming company might extract for a bit of natural gas. One thing was certain, however. Whatever the highest price paid for natural gas in Wyoming, Northern could expect to better that price by three cents per thousand cubic feet.

Contrary to any reasonable expectation on the part of Northern, the price escalation clause forced it to pay the producers more for their gas than they would have received had they sold it in interstate commerce and more than the market price would have been in a totally deregulated marketplace. FPC pricing regulations would have forced the Beaver Creek producers to sell their gas in interstate commerce for only .295 cents per thousand cubic feet. Northern was paying, at the time of the litigation, around $2.80 per thousand cubic feet. In contrast, the average United States price for natural gas at the wellhead in 1980 was only $1.60 per thousand cubic feet.[56]

Under normal competitive conditions, of course, no one would be willing to pay more than the going rate for a commodity. There is only one market price for an item in equilibrium in a perfectly competitive market. But the price ceilings had caused a shortage so that not all the demand was being met, and gas had to be rationed. Thus, many buyers were willing to pay more than the average (regulated) price because that price was lower than the price that would have been set by the unrestrained forces of supply and demand.

Yet with the phase-in of deregulation mandated by the NGPA, the higher deregulated prices which trigger the third party most favored nations clause would seem simply to reflect the actual market price for gas. Under most circumstances there is nothing objectionable about forcing a buyer, even a regulated public utility, to pay the market price, which after all reflects the true cost to society of using up that resource. The problem lies in the fact that the NGPA retains price ceilings for low priced "old" gas. Thus, some pipelines will still be willing, even after deregulation, to purchase some portion of their gas needs at above market prices because they can "cushion" those costs by averaging them with the cost

55. Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1981).
56. 2 ENERGY INFORMATION AD., *supra* note 19, at 115.

of their low price "old" gas supplies.[57] If even one buyer in Wyoming pays a price well above what would normally be the market price, however, then the price charged to Northern for *all* of its gas under the contract will rise to the above market price.

Summary of the Case Study of the Northern Contract

In hindsight, it seems that Northern should never have agreed to a contract with the Beaver Creek producers which contained a third party most favored nations clause. For various reasons, mostly unanticipated at the time of the agreement, the contract turned out to be a time bomb. Upon examination of the commercial and regulatory situation at the time Northern agreed to the contract, however, Northern appears neither villainous nor inept.

Still, the results of the contract were very unfavorable to the consumers of Northern's gas. By 1980, when the average United States consumer of natural gas was paying $2.80 per thousand cubic feet,[58] Northern itself was paying $2.80 per thousand cubic feet,[59] and its customers were presumably paying consideraly more. These high prices were especially galling to Wyoming residents who knew they were living in a natural gas producing state.

Unaware of, or perhaps unconcerned with, the commercial and regulatory background to Northern's actions, these consumers simply wanted something done about the high price of natural gas. In 1985, the Wyoming legislators heeded their constituents, and attempted to control consumer prices of natural gas through legislation.

THE WYOMING NATURAL GAS CONSUMERS' ACT OF 1985

The failure of Northern's judicial challenge, and the unfettered interaction of the third party most favored nations clause with the payment of above market prices for gas due to the phased in aspect of deregulation, resulted in Northern and possibly other utilities paying unexpectedly high prices for natural gas. These excessive costs were then passed on to consumers. The Wyoming legislature responded to the situation by enacting the Wyoming Natural Gas Consumers' Act of 1985. Essentially, the Act takes a market-oriented, pro-consumer approach by permitting cities or townships to bypass the long term contracts of their public utility and purchase gas directly from suppliers on the open market. Thus, even though the public utility may be locked into paying above market prices, the public will not be so constrained if the legislation works as planned.

57. *See* Pierce, *supra* note 48, at 96-99. Proposed Federal Energy Regulatory Commission regulations for interstate pipelines would mitigate the distortion caused by the low-cost gas "cushion" by requiring pipelines to bill separately for old and new gas and dedicate the old gas supplies to historic customers. *See* Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 24130, 42372 (1985) (to be codifed at 18 C.F.R. §§ 154, 157, 161) (proposed June 7, 1985) (hereinafter cited as FERC proposed rules).

58. 2 ENERGY INFORMATION AD., *supra* note 19, at 117.

59. *Northern*, 500 F. Supp. at 634.

One of the best ways to understand the Wyoming Natural Gas Consumers' Act is to compare the legislation as finally passed with the bill as originally introduced. Analyzing these changes, it becomes clear that what started as a statute favoring large corporate buyers of natural gas was transformed into a more positive piece of legislation for residential consumers.

Sponsored by Senators Charles Scott and Tom Strook, both of Casper, the Natural Gas Consumers' Act, Senate File 85, passed through the Wyoming Senate with few changes. In the House of Representatives, however, the bill was assigned to the Corporations Committee, and Chairman Patti MacMillan of Laramie led the bill through significant modifications.

The original bill was designed to make natural gas utilities into common carriers, available to any consumer of natural gas. The House amendments changed the whole approach. The House version, which ultimately became law, allows Wyoming cities and towns, but not individual consumers, to procure natural gas on behalf of their residents and gives them authority to enter into franchise agreements with utilities to distribute those supplies at reasonable rates to be set by the Public Service Commission.

The Bill as Introduced

Senate File 85 was introduced to amend Wyoming Statute Section 15-1-103, which defines the general powers of cities and towns.[60] This may seem like an odd place for a natural gas act, but there are two good reasons for the placement. The first, legal reason is that under this statute, municipalities in Wyoming are granted the authority to grant franchises to public utility companies.[61] Because the bill aimed to change the rules for franchising natural gas public utilities, it was logical to put the bill in this section. The second, political reason is that the idea to alter the way gas utility companies operate came from the city councils of Casper and Laramie.[62] Since the cities originated the idea, the legislature's first impulse was to amend the statutes granting cities the power to deal with public utilities.

The bill introduced by Senators Scott and Strook provided that "upon renewal or initial grant of a franchise, [the governing body of a city or town may provide that] the franchisee shall furnish a gas distribution system through which any supplier, including the franchisee, may sell and distribute natural gas . . . to any person served by the distribution system."[63] The bill further provided that the distribution system would have to "accept for delivery to any person served by the system, natural gas from any supplier. . . ."[64]

60. The bill was proposed to amend WYO. STAT. § 15-1-103(a)(xxxiii) (1977). S. 85, 48th Wyo. Legis. (1985).
61. WYO. STAT. § 15-1-103(a)(xxxiii) (1977).
62. Interview with Representative Patti MacMillan (May 6, 1985).
63. S. 85, *supra* note 60, § 1(a)(xxxiii)(C).
64. *Id.* § 1(b)(ii).

The idea was to give consumers a choice. The utility would continue to provide natural gas to those consumers who wanted to remain customers of the utility. Other consumers could negotiate their own natural gas contracts, then pay the utility company to distribute those private supplies. The utility would act as a common carrier, available to all who wished to use its facilities.

Consumers were always free to purchase their own natural gas from the producers. But a supply of natural gas is almost useless without a pipeline to transport it and some method of distributing it to the consumer. The franchised utility companies owned the distribution facilities, and they were not willing to let just anyone use them. Only the largest industrial users had the bargaining power to enter voluntary carriage contracts with pipeline or distribution companies,[65] and even the large purchasers could not force a utility or other distributor to transport its gas if that entity did not care to do so.

Under the original Senate File 85, this would have changed. The franchised public utility companies would not have been able to carry their own gas exclusively. Instead, as common carriers, the utility companies would have to accept, carry, and distribute the gas of anyone requesting them to do so. As with all common carriers, the distributors would be obligated to accept all applicants for service on equal terms and would have to charge uniform rates to all users.[66]

The theory behind the bill was that if natural gas users, in addition to the utility companies, could effectively enter the natural gas market and bid for their own supplies, consumers could negotiate lower prices for their natural gas. Senator Stroock, one of the sponsors of the legislation, commented that his bill created a "free market system, and explained that there will be no interference from the state."[67] This system would lower prices for those consumers with the initiative and the resources to negotiate their own contracts.

The Bill as Changed by the House Corporations Committee

When the bill reached the House of Representatives, there was strong criticism of the scheme. In a hearing conducted by the House Corporations Committee, several people testified to shortcomings in the bill.[68] Under the leadership of committee Chairman Patti MacMillan, the bill was rewritten to, "insure [that it is] workable and protects consumers in the long run."[69]

65. At least one large industrial gas user, Wycon Chemical Company of Cheyenne, was already purchasing its own gas supplies and had made a voluntary contract with Northern to transport the gas. *New Mexico's Natural Gas Rules Similar to Wyoming's Proposals*, Casper Star Tribune, February 8, 1985, at A12, col. 2.

66. *Compare* N.Y. TRANSP. CORP. LAW, § 90 (McKinney 1943).

67. *Senate Approves Gas Franchise Bill*, Laramie Boomerang, January 30, 1985 at 1, col. 4.

68. *Natural Gas Bill Opposed*, Laramie Boomerang, February 9, 1985 at 1, col. 2.

69. *MacMillan: Gas Bill Needs Work*, Laramie Boomerang, February 13, 1985, at 1, col. 4.

The major change in the bill allowed cites rather than consumers to purchase natural gas and have it distributed. The Committee amended the bill so that

> [a]ny city or town or its authorized representative shall act as an agent for any person served by the system in negotiating terms and conditions for the supply of natural gas to that person, and the franchisee distribution system shall accept for delivery to any person served by the system, natural gas from any supplier.[70]

Representative MacMillan explained that the reason for this change was concern for consumers. "We wanted to protect the average consumer. We felt that you and I and Mrs. Johnson down the street simply lacked the time, resources, and sophistication to deal effectively in the natural gas market," she commented later. "How would you like to telephone Amoco and ask to negotiate a natural gas purchase contract? I'm sure I couldn't even do as well as Northern has."[71] As Representative Peg Shreve noted, "experts have warned that allowing individual consumers to negotiate contracts would be an administrative nightmare."[72]

To further protect residential consumers, the House committee made several smaller changes. The Committee clarified that the transportation rates to be charged by the distribution company would be regulated by the State Public Service Commission, and should "reflect the reasonable nongas costs . . . plus a reasonable return on investment."[73]

Representative MacMillan also commented that the committee members felt the average consumer would not be able to deal with the safety and welfare aspects of natural gas, and in particular with the need to secure an adequate and dependable supply. The Committee did not want any consumer to be without gas through one of Wyoming's cold winters.[74]

To ensure safety and convenience, the Committee provided that the Public Service Commission, not the gas distributor, should designate where the system would accept the natural gas into the system.[75] The Committee also provided that a proposed supplier of natural gas to a city has the burden of proving to the Public Service Commission that the seller could supply adequate and deliverable reserves, and increased the required reserve from five years' supply to ten.[76] Finally, to protect consumers from any adverse effects of lower quality gas or distribution systems, the Committee added a provision that any supplier entering the system "is liable

70. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1.
71. MacMillan interview, *supra* note 62.
72. *House Gives Initial OK to Gas Bill*, Laramie Boomerang, February 19, 1985, at 8, col. 1.
73. Enrolled Act 70, Ch. 172 1985 Wyo. Sess. Laws § 1(b)(ii). *Compare* S. 85, *supra* note 60, § 1(b)(i).
74. MacMillan interview, *supra* note 62.
75. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1(b)(iii). *Compare* Senate File S. 85, *supra* note 60, § 1(b)(iii).
76. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1(b)(vi). *Compare* Senate File S. 85, *supra* note 60, § 1(b)(v).

for injuries, damages or other losses . . . due to failure of the supplier to exercise that standard of care which a reasonable, prudent person would exercise under the same or similar circumstances. . . ."[77]

In another move to help lower consumer prices, the committee inserted a provision giving the Public Service Commission authority to decide which gas a pipeline should ship. If a pipeline or distributor has insufficient capacity to accept all the gas it is requested to carry, the Commission may require it "to accept gas that has a lower price to the consumer in preference to higher price gas."[78] Under this provision, it is conceivable that a utility company would be unable to ship its own gas, and instead would have to accept the natural gas purchased by a city.[79]

After it provided that cities could purchase gas on behalf of consumers, the Committee was concerned that consumers might have no voice in deciding whether to choose the utilities' gas or the supply procured by the city.[80] The Committee therefore added a provision that the city must hold a special election on the question and get the approval of a majority of those voting before it forces the utility to carry gas.[81]

In addition to the above amendments designed to protect the safety and welfare of consumers, the Committee added a sunset provision. Unless the legislature re-enacts it, the direct purchasing portion of the Act will expire in 1988.[82] According to Representative MacMillan, if the experiment does not work, it will simply die quietly.[83] But if the experiment works fairly well, with only minor problems, the legislature will be forced to reconsider the bill and make the necessary changes.[84]

The Legislative Debate

After making these changes, the Corporations Committee reported the bill out to the House of Representatives. The bill eventually passed the House, and was approved by the Senate as well. The legislation was not received without criticism, however, and some of the negative comments on the bill are instructive.

One of the sponsors of the original bill, Senator Strook, became a vocal opponent of the new version. Repeating the theme of unregulated free enterprise, Senator Strook said, "I wonder if the city is capable of

77. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1(b)(xi).
78. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1(b)(vii).
79. *Amended Version of Gas Bill Makes It out of House Committee*, Casper Star Tribune, February 14, 1985, at A1, col. 1 [hereinafter cited as *Amended Version*]. As discussed later in this article, the fact that most public utilities are subject to the constraints of "take or pay" clauses in their long term purchase contracts means they may have to pay for some gas that they will not have the capacity to distribute under this legislatively authorized scheme. *See infra* text accompanying notes 95-96.
80. MacMillan interview, *supra* note 62.
81. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1(a)(xxxiii)(C).
82. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 3. No sunset applies to the provision of the Act prohibiting indefinite price escalation clauses in public utility contracts that cause intrastate gas prices to rise above the market price. *Id.*
83. MacMillan interview, *supra* note 62.
84. MacMillan interview, *supra* note 62.

negotiating as good a deal as the private citizen—private enterprise—would do."[85] Others shared Senator Strook's concern that the cities and towns of Wyoming really might not have the expertise and experience to negotiate favorable natural gas contracts.[86] These critics emphasized that Northern had not acted foolishly in accepting the contract it did, and that cities may have a difficult time doing any better. Some legislators said that cities will be tempted to take advantage of the current abundant supply of natural gas and make favorable short term contracts. These people feared that in the future, when gas supplies again run short, the cities will be unable to contract for new supplies. Utility companies' contracts, by that time, will have expired or been broken or renegotiated, and the cities' consumers will be left without natural gas supplies.[87]

The supporters of the bill replied that cities are indeed sophisticated players in the natural gas market. The cities of Casper and Laramie, for example, have attained some expertise in the area, and both have hired private consultants to assist them in natural gas problems. Furthermore, as Representative MacMillan pointed out, the new version of the bill requires that suppliers show at least ten years of reserve supply. The Public Service Commission requires utility companies to show the same ten year reserve, she noted, so the cities will be in no worse condition than the utilities if a shortage develops.[88]

A more common criticism was that the bill simply would not accomplish its goal of lowering gas prices for consumers. Representative Ken Burns, otherwise known for his pro-consumer stands, warned, "The city of Casper, [or] Laramie, is not going to save one cent by these bills. If anything, prices will be higher."[89]

The reasons for Burns' objection are derived from the peculiarities of rate regulation for natural monopolies such as natural gas distributors. Gas pipeline and distribution companies make large initial investments in laying the pipelines. Once the lines are in place, however, marginal costs are low, because the cost of serving one more consumer is very small. In a competitive industry, the equilibrium price is normally set at marginal cost. In the regulated monopoly of natural gas distribution, however, utility rates are regulated to provide a recovery of these fixed costs, not just to cover the marginal cost of serving each customer.[90]

Representative Burns was concerned that the large firms would convince the cities to purchase gas for them, and not for residential consumers. The firms would then negotiate to pay only the marginal costs of trans-

85. *Amended Version, supra* note 79 at A12, col. 1.
86. *House Gives Initial Ok To Gas Bill, supra* note 72, at 8, col. 2. (This statement was attributed to Representative Sorenson).
87. Interview with Representative Cynthia Lummis, (May 7, 1985.) Lummis stated that although she did not necessarily share these particular views, they were commonly expressed among legislators.
88. MacMillan interview, *supra* note 62.
89. *Amended Version, supra* note 79, at A12, col. 2.
90. *See generally* T. MORGAN, J. HARRISON & P. VERKULL, ECONOMIC REGULATION OF BUSINESS, CASES AND MATERIALS, 15-17 (2d ed. 1985).

porting their gas, while the remaining customers would bear an increased burden of compensating the utility for its fixed costs. In the end, consumers would pay a larger share of the utilities' costs.[91]

To this argument, Representative MacMillan responded that, under the amended bill, the Public Service Commission would set the rates the utilities received for transporting gas. The rates would reflect not only the direct costs of transporting the gas, but also a fair share of the return on investment. All those using the pipeline, whether industrial or residential consumers, would still pay a share of the utilities' return on investment, and no great cost shift to the consumer would occur.[92]

The supervisor of the state Oil and Gas Commission, Don Basko, voiced another concern. Nearby wells drawing from the same reservoir often have differently priced gas. If the Public Service Commission uses its authority under the Act to require utilities to carry the lower priced gas first, one well could have its production drained off by another well.[93] The legislation states, however, that the Commission must act consistently with the Wyoming "ratable take" statute, which prohibits discrimination by purchasers among producers drawing from the same gas pool.[94]

Representative Cynthia Lummis opposed the legislation for two reasons. First, it seemed unlikely that any city would be able to use the bill. Consultations with the director of the Public Service Commission convinced her that most of Wyoming's natural gas is already committed to other long term contracts. "There may be very little gas available for the cities to purchase," she said. Another reason the cities may be unable to use the bill effectively was that the language of the legislation was vague and hard to understand. These ambiguities were also the second major reason she opposed the bill. "The language of the bill is so confusing that it is sure to generate litigation," she stated. Not only will the litigation be a strain on the judicial system, but also the cities may find themselves buried in legal fees. In the end, she feared, any city that tries this experiment may end up costing its citizens far more in legal expenses than they could ever save on utility bills.[95]

Many questions are left unanswered by the legislation. For example, existing natural gas purchase contracts commonly contain take or pay clauses, under which the purchaser agrees to pay for a given amount of gas whether or not it actually takes that gas. If a city purchases its own supply and makes the utility company distribute that gas, the utility may be unable to use all the gas it previously contracted to buy. But if the utility has a take or pay clause in its contract, it must pay for that gas whether it takes it or not. The bill does not address what would happen

91. *Amended Version, supra* note 79, at A12, col. 2.

92. MacMillan interview, *supra* note 62. *See also, House Gives Initial Ok To Gas Bill, supra* note 72, at A12, col. 2.

93. *Amended Version, supra* note 79, at A12, col. 2.

94. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 1(b)(vii); WYO. STAT. § 30-5-125 (1983).

95. Lummis interview, *supra* note 87.

in this situation. If these extra costs are passed on to consumers in another city served by the utility, those consumers will be faced with even higher natural gas prices. If the utility has no other cities to absorb the costs, it may be forced to bear significant losses or perhaps even go out of business. In such a corporate life or death situation, the utility may not wish to agree to a franchise that would force it to distribute gas purchased by the city, and nothing in the legislation requires any public utility to sign a franchise agreement.

Representative MacMillan conceded that the bill did not address every problem. As to the take or pay problem, she said that most supporters of the bill simply assumed that such contracts also contained force majeure clauses[96] and if government action rendered the utilities unable to take a required amount, the take or pay clause would not be enforced.[97] This outcome is not guaranteed, however. Even if the utilities' contracts do contain force majeure clauses, there is sure to be litigation over whether or not the cities' purchasing of natural gas is the sort of major force which will excuse performance of the take or pay clauses.[98]

Summary of Wyoming's Natural Gas Consumers' Act

While the Natural Gas Consumers' Act has some unresolved problems, on balance it is a worthwhile attempt to lower consumers' natural gas bills. The House Corporations Committee was certainly correct that the vast majority of individual consumers would not want to negotiate individual supply contracts nor would they have the necessary experience, expertise, and resources. Allowing cities and towns to negotiate supply contracts on behalf of consumers is a good compromise. The legislation as passed neither forces consumers to negotiate their own contracts nor leaves them obligated indirectly under unfavorable contracts accepted by the gas utility companies.

The House Committee is to be commended for its attention to protecting the average consumer. They showed faith that cities have the ability to negotiate natural gas contracts but they also made sure the legislation would adequately protect the public safety and welfare. With the provisions for consumer protection that eventually appeared in the legislation, it seems unlikely that the consumers of Wyoming will be faced with any real disaster.

It remains to be seen, however, if the Natural Gas Consumers' Act will provide any relief to the natural gas users. In theory, the scheme could lower natural gas prices.

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96. "Force majeure" means superior force. In contract law, force majeure clauses are intended to excuse the promisor from performance in the event that performance becomes impossible due to causes beyond the control of the parties. BLACK'S LAW DICTIONARY 581 (5th ed. 1979).

97. MacMillan interview, *supra* note 62.

98. FERC has recently promulgated new regulations to permit interstate pipelines more leeway to buy out take or pay clauses in their long term purchase contracts. 50 Fed. Reg. 42408 (1985) (to be codified as 18 C.F.R. § 2.76-77). Also, most long term purchase contracts entered into since the late 1970's already contain such "market out" clauses.

FUTURE PROSPECTS FOR THE NATURAL GAS CONSUMERS' ACT

The Wyoming legislature has launched an experiment in controlling natural gas prices. Because the approach is new, any attempt to predict the affects of the legislation is speculative. Still, it is interesting to consider whether any city will put the Natural Gas Consumers' Act to use, and whether the outcome will be lower prices for Wyoming natural gas users.

Comparison With Other States

No other state can provide much guidance for Wyoming's experiment, because no other state has tried this particular method. New Mexico, New York, and West Virginia have tried similar but not identical plans, and their approaches provide some insight into the Wyoming legislation. Other states have simply prohibited indefinite price escalation clauses in public utility contracts on a retroactive basis.

In 1984, New Mexico passed legislation that is similar in effect to the Wyoming Natural Gas Consumers' Act. The New Mexico statute requires natural gas pipelines and utilities to transport natural gas purchased by any buyer, in essence declaring pipelines to be common carriers.[99] Unlike Wyoming's act, the New Mexico law is not limited to cities and towns. In another statute, however, the New Mexico Energy and Minerals Department is directed to "advise with and negotiate the purchase of natural gas for political subdivisions of the state . . . or purchase natural gas and resell it to them at a price which will produce a reasonable return" to the state.[100] In combination, these statutes would apparently allow the same sort of city purchasing program as the Wyoming law.

Unfortunately, the New Mexico experience does not offer much empirical data for Wyoming. For several reasons, no city in New Mexico has used the law to procure its own gas supply and have it delivered. First, while the New Mexico law took effect in July, 1984, the Public Service Commission did not promulgate the rules to put the program into effect until December of that year.[101] Second, the New Mexico law had a sunset provision, under which it expired in June, 1985, and the legislature made no mention of what would happen if a city were forcing a pipeline to deliver gas when the law expired. Cities may have been reluctant to enter gas supply contracts only to find themselves with no way to transport and distribute the gas when the law was no longer effective. New Mexico apparently did not re-enact the law in 1985.[102]

Wyoming may have learned one useful lesson from the New Mexico statutes, however. The Wyoming legislature also wrote a sunset provision into its act, and the law will expire in 1988. But the Wyoming

99. N.M. STAT. ANN. § 62-7-18 (1984).
100. *Id.* § 71-2-6.
101. Telephone interview with Jean Peters, New Mexico Legislative Council Service (Sept. 18, 1985).
102. *Id.*

lawmakers provided that "repeal of these provisions does not affect any franchise agreement made pursuant to these provisions prior to the effective date of their repeal."[103] Given this extra bit of security, Wyoming cities may be more willing to try the experiment than New Mexico cities have been.

A New York statute provides that natural gas pipeline corporations are common carriers. Under New York law, "[a]ll persons desiring to transport products shall have the right on equal terms to transportation in the order of application, on complying with the reasonable regulations and charges of such corporation."[104] West Virginia has also declared that gas utility pipelines are common carriers.[105] Unlike Wyoming's legislation, neither of these two statutes deals specifically with cities and towns. West Virginia's law took effect only in 1983, while New York seems to have considered gas pipelines as common carriers since the turn of the century. But if cities in either state have used the laws to combat high gas prices, the fact has not been widely publicized.

The Wyoming Act, in addition to setting up the direct purchase scheme, also outlaws the type of indefinite price escalation clause that was the subject of the Northern litigation.[106] Other states, including Kansas[107] and Oklahoma,[108] have declared that similar price escalation clauses in contracts entered into before 1977 may not be used to raise the price of intrastate gas to a level higher than what would be permitted under the NGPA for interstate gas of the same vintage. The Kansas law was upheld in the United States Supreme Court against a challenge that it violated the parties' constitutionally guaranteed freedom to contract.[109] When price escalation clauses are banned retroactively, the utilities may be able to renegotiate their long term contracts, taking into account the changed circumstances of the current deregulated market.[110] With this approach, lower prices to the utility could result, which should in turn be passed on to residential customers.[111]

The Wyoming statute, unlike the Kansas and Oklahoma laws, does not specify that the ban is applicable to contracts in effect before the

103. Enrolled Act 70, ch. 172, 1985 Wyo. Sess. Laws § 3.

104. N.Y. TRANSP. CORP. LAW, § 90 (McKinney 1943).

105. W. VA. CODE § 24-3-3a (1984 Supp.).

106. WYO. STAT. § 15-1-103(c) (Supp. 1985).

107. Kansas Natural Gas Price Protection Act, KAN. STAT. ANN. §§ 55-1401 to -1415 (1983).

108. Oklahoma Natural Gas Price Protection Act, OKLA. STAT. tit. 52, §§ 260.1-.13 (1981).

109. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 416-17 (1983). In dictum, the majority stated that since Kansas had a "significant and legitimate" interest in protecting consumers from the escalation of natural gas prices caused by deregulation, the parties had not been deprived of their constitutional right to contract.

110. Legislative proposals currently under consideration in the United States Congress would also restrict the effects of indefinite price escalation clauses in interstate gas contracts. *See* Ringleb, *The Natural Gas Regulatory Dilemma: A Market Solution, Another Complex Compromise, or the Status Quo?*, 6 J. ENERGY L. & POL'Y 107, 142-44 (1985).

111. The savings to Oklahoma consumers as a result of their legislation has been estimated at $1.1 billion. *See* Comment, *Legislative Impairment of Natural Gas Contracts: Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 19 TULSA L.J. 384, 402 (1984).

legislation was enacted. The Act states that "[a]ny provision in a gas purchase contract which contains or creates an indefinite escalator clause, . . . is contrary to the public policy of the state and is void and unenforceable" if certain conditions are met (that is, the contract must be for the purchase of intrastate gas by a public utility for resale to residential customers and the clause must raise the price above the market price and not be required by federal law).[112] This language could be interpreted to apply to contracts already in existence, but that point is debatable.

If the law voids the price escalation clauses retroactively, then it achieves virtually the same result that Northern sought in the courts, and it could open the door for lower prices to consumers before the current contract expires in 1990. If it does not operate retroactively, then the problem of excessive prices triggered by most favored nations clauses will continue to plague Wyoming public utilities for some time to come, and the direct purchase option provided in the rest of the legislation may be the only viable solution for consumers.

Will Any Wyoming City Use the Act?

The Natural Gas Consumers' Act was enacted largely at the urging of representatives of two Wyoming cities, Casper and Laramie. Some features of the Act seem to have been written with these two cities in mind. For example, the bill is designed so that cities can require utility companies to distribute natural gas only "[u]pon renewal or initial grant or renewal after condemnation of a franchise. . . ."[113] Both Casper and Laramie will be considering renewal of Northern's franchises to serve those cities in the next few years, before the Act is scheduled to expire in 1988. Representative MacMillan stated that one of the reasons for scheduling the Act to expire in 1988 was so that Casper and Laramie would have the opportunity to try the plan.[114] In fact, to Representative MacMillan's knowledge, only one other Wyoming city, Green River, will be considering renewal of a franchise in that time.[115]

Any city could, of course, take advantage of this plan by condemning its utility's franchise. Armed with the new Act, which by its language seems to contemplate possible condemnations of franchises to implement the new system,[116] a city could certainly argue that it is a public purpose to require a utility to distribute the city's new gas supply. But a condemnation proceeding is expensive, because the city would have to compensate the utility for the taking. Furthermore, the process of evaluating the property for condemnation would be long and difficult. Considering the expense and difficulty of a condemnation procedure, therefore, cities will be unlikely to take the trouble.

112. WYO. STAT. § 15-1-103(c) (Supp. 1985).
113. *Id.* § 15-1-103(a)(xxxiii)(C).
114. MacMillan interview, *supra* note 62.
115. *Id.*
116. *See* WYO. STAT. § 15-1-103(a)(xxxiii)(C) (Supp. 1985).

Casper and Laramie have been the leaders in the effort to do something about natural gas prices. It seems likely that either Casper or Laramie will be the first to try the new system.

Oddly enough, at first Northern itself seemed to be antagonizing these cities, almost encouraging them to implement the experiment. On April 27, 1985, the newspapers of both Casper and Laramie reported that Northern had petitioned the Public Service Commission for another rate increase. The *Laramie Boomerang* reported that the price hike "would increase Laramie's residential natural gas rates from $4.80 per Mcf to $5.30 per Mcf. . . ."[117] The front page headline of the *Casper Star Tribune* proclaimed, "Gas Prices to Soar if Hike OK'd."[118]

One day later, on April 28, the Wyoming Association of Municipalities hosted a meeting in Casper to help cities "learn how they can lower the cost of natural gas by implementing legislation passed this year."[119] The newspaper report of the meeting indicated that the cities felt confident about their ability to do so.

The signs indicate, then, that a Wyoming city may well attempt to use the Natural Gas Consumers' Act in the near future. Casper and Laramie voters have already authorized their city councils to pursue this option in special elections held August 20, 1985.[120] Both are already soliciting bids from natural gas suppliers.[121]

Possible Outcomes Under the Act

There are three possibile outcomes for the first city to implement its own natural gas purchasing program. First, the city could negotiate favorable supply contracts, and convince the voters to approve the plan. Under a new franchise agreement, the utility company would transport and distribute the city's gas to residents. In this success story, the city would actually bring down natural gas prices.

Another, less positive, outcome is also possible. Even if a city does negotiate a favorable gas supply contract, there are enough ambiguities in the new legislation that an uncooperative utility could entangle the city in endless litigation over the details of the plan. The city residents could end up paying more in legal fees than they save in gas prices. Even this scenario is not too discouraging. Once the first city clears a path through the legal jungle, the cities to follow would have an easier time implementing the program. While the first city might pay a high price for the success of the others, in the end the Wyoming experiment would prove to be a success.

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117. *Northern Asks 50 Cents per Mcf.* Laramie Boomerang, April 27, 1985, at 1, col. 1.

118. *Gas Prices To Soar If Hike Ok'd.* Casper Star Tribune, April 27, 1985, at A1, col. 1.

119. *Municipalities Learn Steps to Lower-Cost Gas,* Casper Star Tribune, April 28, 1985, at A1, col. 5.

120. *Laramie Voters Back Gas Supply Option,* Laramie Boomerang, Aug. 21, 1985, at 1, col. 4; *Gas Supply Proposals Approved,* Laramie Bomerang, Aug. 22, 1985, at 1, col. 6.

121. *Gas Bids Opened,* Laramie Boomerang, July 4, 1985, at 1, col. 5; *City Considers Switch to CIG Gas,* Laramie Boomerang, May 24, 1985, at 1, col. 2.

A third possibility is that the cities will be unable to negotiate contracts any better than Northern's. This is perhaps the most serious situation, for it would show that the Natural Gas Consumer's Act is merely a noble experiment that failed. In the end, no one would benefit under this scenario.

Using the Act to Gain Concessions

Even if no Wyoming city ever fully implements the new program, the Natural Gas Consumers' Act may still prove useful in controlling gas prices. As noted earlier, both Casper and Laramie will soon consider renewing Northern's franchises to serve those cities, and the voters have approved the quest for another supplier. Even without actually purchasing gas from another company, however, Casper and Laramie may be able to use their new authority to force Northern to make some concessions.

Northern in effect was trapped into paying excessive prices by a series of events and conditions beyond its control. If Northern is now faced with the possibility of losing a large part of its market for gas because cities will be purchasing their supplies elsewhere, Northern may be able to impress upon its own suppliers the seriousness of the situation. The Wyoming Act prohibits the use of indefinite price escalation clauses, so that if read to apply to contracts already in existence, Northern may well be in a good position to renegotiate more favorable terms with its suppliers. These savings could be passed along to consumers, especially if there is a real threat that Northern might be undercut by other suppliers if it does not find a way to lower its price. It is therefore possible that the Natural Gas Consumers' Act could help lower gas prices even if no city actually uses its provisions to bypass the local utility.

Indeed, in a recent negotiated settlement between Northern, the Wyoming Public Service Commission and eleven Wyoming communities which had intervened in Northern's rate case, the utility agreed to a rate cut of 25 cents per MCF to affected consumers. Northern was reportedly able to reduce rates to consumers because it had in turn negotiated a price cut on the natural gas purchased from one of its major suppliers, Amoco.[122] It may well be that the threat of cities purchasing their own gas supplies provided the bargaining chip nessary to gain this concession.

Representative MacMillan agreed that this is one of her hopes for the legislation. "I believe we gave the consumers and the cities more clout," she said. In an appropriate summary of the Natural Gas Consumers' Act, she stated, "it may prove to have its problems, but I think they are solvable. One way or another, this bill seems likely to help the consumers."[123]

122. *Settlement Will Trim Gas Rate*, Laramie Boomerang, Sept. 19, 1985, at 1, col. 5.
123. MacMillan interview, *supra* note 62.