

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO.

TITLE

PUBLIC SERVICE COMMISSION OF THE	:	
STATE OF NEW YORK, Petitioner	:	
v.	:	No. 81-1889
MID-LOUISIANA GAS COMPANY, ET AL.;	:	
- - - - -	-X	
ARIZONA ELECTRIC POWER	:	
COOPERATIVE, INC., Petitioner	:	
v.	:	No. 81-1958
MID-LOUISIANA GAS COMPANY, ET AL.;	:	
- - - - -	-X	
MICHIGAN, Petitioner	:	
v.	:	No. 81-2042
MID-LOUISIANA GAS COMPANY, ET AL.;	:	
and	:	
- - - - -	-X	
FEDERAL ENERGY REGULATORY	:	
COMMISSION, Petitioner,	:	
v.	:	No. 82-19
MID-LOUISIANA GAS COMPANY, ET AL.	:	

PLACE Washington, D. C.

DATE March 22, 1983

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WASHINGTON, D.C. 20001

1	IN THE SUPREME COURT OF THE UNITED STATES		
2	- - - - -	-x	
3	PUBLIC SERVICE COMMISSION OF	:	
4	THE STATE OF NEW YORK,	:	
5	Petitioner	:	
6	v.	:	No. 81-1889
7	MID-LOUISIANA GAS COMPANY, ET AL.;	:	
8	- - - - -	-x	
9	ARIZONA ELECTRIC POWER	:	
10	COOPERATIVE, INC.,	:	
11	Petitioner	:	
12	v.	:	No. 81-1958
13	MID-LOUISIANA GAS COMPANY, ET AL.;	:	
14	- - - - -	-x	
15	MICHIGAN,	:	
16	Petitioner	:	
17	v.	:	No. 81-2042
18	MID-LOUISIANA GAS COMPANY, ET AL.;	:	
19	and	:	
20	- - - - -	-x	
21	FEDERAL ENERGY REGULATORY COMMISSION,	:	
22	Petitioner	:	
23	v.	:	No. 82-19
24	MID-LOUISIANA GAS COMPANY, ET AL.	:	
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Washington, D.C.

Tuesday, March 22, 1983

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:00 p.m.

APPEARANCES:

JEROME M. FEIT, ESQ., Solicitor, Federal Energy  
Regulatory Commission, Washington, D.C.;  
on behalf of the Petitioner.

JAMES D. McKINNEY, JR. ESQ., Washington, D.C.;  
on behalf of the Respondents.

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

JEROME M. FEIT, Esq.

4

on behalf of the Petitioner

JAMES D. MCKINNEY, JR., Esq.,

22

on behalf of the Respondents

JEROME M. FEIT, Esq.

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on behalf of the Petitioner -- Rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in Public Service Commission of New York against Mid-Louisiana Gas.

Mr. Feit, you may proceed whenever you are ready.

ORAL ARGUMENT OF JEROME M. FEIT, ESQ.,  
ON BEHALF OF THE PETITIONERS

MR. FEIT: Mr. Chief Justice, may it please the Court.

This case poses a question of the statutory construction, whether Congress in the Natural Gas Policy Act of 1978 meant that natural gas produced by a pipeline is automatically entitled to the incentive pricing scheme under Title I of that Act. Even though, as here, the gas is old gas long dedicated to the interstate market.

In our view, the Court in holding that the first sale prices and that the pricing scheme of Title I applied to this pipeline produced gas misconceived the legislative intent and argued, granted a profit to which the pipeline were not entitled, \$200 million prospectively and something over \$2 billion total projected. These are complex matters under a complicated statutory scheme. And I think it would be

1 helpful as I use these words to indicate we're talking  
2 about wellhead or field sales, mixed systems supply,  
3 commingling, downstream. I think those terms are  
4 essential to the decision making in this case and they  
5 also have functional meaning in the history of pipeline  
6 regulation.

7           A pipeline gets its gas from many wells. It  
8 can be, I guess, compared to a tree with roots. Most of  
9 these wells are operated by independent producers. Some  
10 are pipeline produced wells.

11           Normally, in the usual instance, these go  
12 through gathering lines, through processing plants and  
13 commingle in the pipeline and become part of fixed  
14 pipeline supply, mixed pipeline supply. And they go  
15 downstream to the pipelines' -- generally to the  
16 pipelines' regular system customers.

17           A pipeline also, however, produces its own gas  
18 which it sells at the wellhead, principally to other  
19 pipelines, sometimes to other third parties. In this  
20 sense -- and that's part of, essential of our argument  
21 -- it functions like an independent producer. These  
22 differences have very important regulatory  
23 considerations in the historical background.

24           First, very early in the application of the  
25 Natural Gas Act which was enacted in 1938, pipeline

1 produced gas was deemed to be like other gas the  
2 pipeline transported in interstate commerce. It was  
3 deemed to be part of the entire wholesale transaction.  
4 Colorado Interstate, a decision of this Court, made that  
5 clear. And it was subject to the cost-of-service  
6 methodology which, as the Court knows, places the  
7 initial risk on the consumer. The gas of that nature is  
8 the gas involved here, where the risk, as I say, is the  
9 consumer risk.

10 On the other hand, as the Court will recall,  
11 it was not until 1954, when the Phillips case was  
12 decided, that the independent producer was deemed to be  
13 a natural gas company covered by the Act, by the Natural  
14 Gas Act.

15 As this Court recognized in Permian, the early  
16 years proved to be a time of very difficulty in any  
17 effort to regulate. They didn't -- they weren't natural  
18 gas companies in the traditional sense. They didn't  
19 transport in interstate commerce. And individual  
20 cost-of-service regulation failed, as Permian points out.

21 The Commission then turned to a different way  
22 of regulating independent producers. The regulation  
23 consisted of average industry costs based upon area and  
24 then national rates. This was essentially an incentive  
25 type pricing. For example, the risk was on the

1 investor. If an independent producer produced only dry  
2 holes, he got no recovery. If, on the other hand, he  
3 operated on less than average costs, dug a well which  
4 produced, then he was able to make a profit so that  
5 there was that investor risk approach.

6 Most pertinently as this development occurred,  
7 the affiliate of the pipeline, the affiliate of the  
8 pipeline, the producing affiliate of the pipeline was  
9 accorded the same treatment. More to the point here the  
10 pipeline who sold at the wellhead was given this  
11 economic risk establishment, was also treated as an  
12 independent producer would be, that you have that kind  
13 of development.

14 At the same time, as the years went on,  
15 starting in '69 when there was an indication of a gas  
16 shortage, the commission decided to give not cost based  
17 gas -- all of that pre-'69 cost based gas was on  
18 cost-of-service -- but mixed system supplied from a  
19 pipeline to be on parity, giving parity pricing to the  
20 independent producer, wellhead pricing, and to the  
21 pipeline, pricing of its wellhead sales.

22 But cost-of-service remained on  
23 cost-of-service. As a matter of fact in the '70's, in  
24 the early '70's, the pipelines essentially either  
25 through agreements or through their own choice by saying

1 we'd rather be on -- we'd rather be on cost-of-service  
2 with -- it serves our purposes better. These special  
3 circumstance pipelines were allowed to be on  
4 cost-of-service. Other pipelines as to this mixed  
5 system supply chose instead to get the area and national  
6 rates.

7           So you have at the time of the enactment of  
8 the Natural Gas Policy Act, that development coupled  
9 with the development that the result of the decision in  
10 the Phillips case had lead to an interstate regulated  
11 market and an intrastate unregulated market with regard  
12 to independent producer sales or sales like independent  
13 producers.

14           The consequence was that the market  
15 bifurcated. The independent producer certainly, in  
16 shopping the market place as to his new wells, would  
17 prefer to sell it in the intrastate market, which he did  
18 -- or which the producers generally did. The  
19 consequences were there was less gas in the interstate  
20 market, more gas in the intrastate market, and high  
21 priced gas. This was the bifurcation coupled with the  
22 fact that at that time the shortages commenced.

23           Now I would like, with that background, to  
24 turn to the statutory language. Statutory language is  
25 set forth at page 2 of our main brief, or in the

1 Appendix at E(1). As the Court will note, the first  
2 portion of that statute, Section 2(21), was a  
3 definitional section. It employed a term for sale. And  
4 under that initial A of that section it appears that  
5 every sale -- the universe of sales -- was a first  
6 sales, kind of a jurisdictional marking point. Every  
7 sale was a first sale. The critical provision, however,  
8 is in subsection B, which says certain sales not  
9 included.

10 And the certain sales not included -- and I'd  
11 like to -- I think this is essential to point to the  
12 Court -- that it shall not include the sale of any  
13 volume of natural gas by any interstate pipeline,  
14 intrastate pipeline, or local distribution company, or  
15 any affiliate thereof -- and now the critical language  
16 -- unless such sale is attributable to volumes of  
17 natural gas produced by the pipeline, the interstate  
18 pipeline, or the local distribution company, or the  
19 affiliate.

20 The Court of Appeals said, well, while there  
21 is no sale we must set up if there's a intra-corporate  
22 transaction. When the production division of a pipeline  
23 transfers the gas to the transportation division of the  
24 pipeline there is a hypothecated first sale. Therefore  
25 the higher pricing provisions of the Title I of the

1 Natural Gas Policy Act would apply.

2 We think that this interpretation flies in the  
3 face of the statute. Section 2(20), which is also  
4 printed at page 2 of our brief, makes it clear that the  
5 term "sale" means a transfer for value. There is no  
6 transfer for value in the context of the Court of  
7 Appeals analysis.

8 More significantly, or equally significantly,  
9 there's no contract. There's no relationship which  
10 traditionally has been the basis of regulation by this  
11 commission -- by the FERC -- under the Natural Gas Act.  
12 The Mobil Sierra doctrine, as this Court will recall,  
13 makes it clear that the contract to the parties are the  
14 basis for the relationship.

15 The same principle attaches quite clearly  
16 under the Natural Gas Policy Act. As this Court's  
17 decision the other day at agency -- in energy reserves  
18 makes clear, the critical consideration is, you don't  
19 get the contract, you don't get the statutory price, you  
20 get the contract price or whichever is lower.

21 So it seems to me that the initial  
22 interpretation by the Court of Appeals cannot withstand  
23 the statutory language. There's another interpretation  
24 which the Court of Appeals rejected, but which is made  
25 by several of the petitioners.

1                   QUESTION: Before you leave that  
2 interpretation, am I correct in recalling that if the  
3 pipeline had a subsidiary instead of a single corporate  
4 entity that transferred from its wholly-owned production  
5 subsidiary to its transmission subsidiary, that you  
6 would regard that as a sale?

7                   MR. FEIT: I would regard that as a sale. Let  
8 me say this, Mr. Justice --

9                   QUESTION: Unless they do exactly the same  
10 bookkeeping for a division.

11                  MR. FEIT: No, but there's a difference.

12                  QUESTION: What is the difference?

13                  MR. FEIT: The difference is that the  
14 affiliate has been on cost. He acts like an independent  
15 producer. He sells under a contract. He sells at the  
16 wellhead. Functionally, he's the equivalent of the  
17 independent producer, and economically in that the risk  
18 lays with the investor. Conceptually the affiliate  
19 performs like an independent producer.

20                  The problem that you point to in terms of  
21 perhaps intra-corporate, it's the same thing. The  
22 statute has an affiliate entities limitations which  
23 makes it clear that where an affiliate producer sells to  
24 his affiliated pipeline he must sell at the comparable  
25 price sold by an independent producer.

1                   Now, historically, it's not clear in the '50's  
2   how they treated the affiliate producer. There's some  
3   indication that they deemed him to be part of the  
4   pipelines at the transportation. But starting, I think  
5   clearly, in the late '60's and the early '70's affiliate  
6   production was like independent producer production,  
7   both economically and both functionally.

8                   QUESTION: Well, wouldn't it be possible to  
9   organize a division so that economically it was the  
10  exact equivalent of --

11                  MR. FEIT: I think it -- no, only in the sense  
12  of --

13                  QUESTION: I can understand the statutory  
14  difference, but as a matter of economics or ordinary  
15  business and investment and all the rest, why couldn't  
16  you have your division doing the same kind of operating  
17  that a subsidiary would.

18                  MR. FEIT: I guess you could have that, but  
19  two answers. One, the statutory scheme does not talk  
20  about that kind of intra-corporate transfer. The word  
21  production -- affiliate -- production affiliates notes  
22  contracts and on the face of it, of the statute, it  
23  seems to us that there is a clear statutory  
24  distinction. Now in terms of -- in terms of parity  
25  pricing which is parity with independent producer sales,

1 the commission has given parity pricing to mixed system  
2 supply sales by a pipeline, but that's not a matter of  
3 statutory interpretation. That's a matter of agency  
4 interpretation based on our view that Congress left to  
5 the commission the task of harmonizing the Natural Gas  
6 Act with the Natural Gas Policy.

7 QUESTION: Would you say the statutory  
8 language is so clear that if the commission had adopted  
9 the same construction as the Fifth Circuit had adopted  
10 that would have been impermissible?

11 MR. FEIT: No, on the contrary. I, we do not  
12 take the position that the statutory language -- it  
13 doesn't leap from the page. I think it quite clearly --  
14 the statutory language has to be read in the context of  
15 the legislative background coupled with the deference if  
16 there -- the rule as I understand it clearly is if there  
17 are two possible interpretations and the commission or  
18 the regulatory agency's interpretation is a rationally  
19 based interpretation.

20 QUESTION: So you would say that the  
21 commission rationally could have read it either way?

22 MR. FEIT: Yes, and I say that the Court of  
23 Appeals didn't give us deference.

24 QUESTION: I understand.

25 MR. FEIT: Because it said that we had no

1 input into the first sale definition.

2 But, yes. I -- let me turn a bit to what we  
3 view the legislative history to mean it to say.

4 The Court of Appeals -- the central assumption  
5 of the Court of Appeals -- they thought that there  
6 should be no distinction between pipelines and  
7 producers. If producers are entitled to monies and the  
8 sale price, similarly a pipeline. That is a basic  
9 fallacy in terms of the statutory scheme. If one reads  
10 the legislative history and looks at the other indicia  
11 in the statute, wellhead pricing, the need to harmonize  
12 Title 6 which retains Natural Gas Act jurisdiction, and  
13 it reads the background of the history, it's clear that  
14 Congress was making a discriminating judgment. Congress  
15 was trying to overrule Phillips. The history is  
16 interesting in that regard. The Senate bill purported  
17 to decontrol, deregulate old gas and keep new gas under  
18 regulation. It had an affiliate entities rule which  
19 seem to cover -- cover pipeline produced gas.

20 On the other hand, the House bill -- the House  
21 bill clearly was aimed at what they called the 1954  
22 decision. Well, the 1954 decision was Phillips. Nor  
23 throughout the history of the debates for over two years  
24 did any pipeline that I could find in the history say,  
25 oh, yes, we're entitled to this price. That view --

1 that view, in our judgement, was the one that Congress  
2 enacted in the Natural Gas Policy Act. A discriminating  
3 statutory construction approach which meant to deal with  
4 the problem, the problem of Phillips.

5 Pipelines were not involved in the bifurcated  
6 market. Pipelines had system supply. They served their  
7 customers, the mixed system supply. True enough, their  
8 production increased in times of shortage and helped the  
9 market that they were in. But that, the commission  
10 recognized by its parity pricing policy.

11 The bifurcation was a producing problem.  
12 Whether the producer was the independent producer or, in  
13 fact, the pipeline who sold at the wellhead. And I  
14 might point out in that regard that pipeline -- our  
15 figures indicate that pipeline production is about 5.,  
16 5.1 percent of the total production, so that we're  
17 dealing with an independent producer statute which says  
18 only those whether they be affiliates, whether they be  
19 pipelines who perform functionally and economically as  
20 the independent producer, are entitled to the  
21 independent producer pricing.

22 QUESTION: Is it your submission that an  
23 interstate pipeline company that also produces gas but  
24 does not do so through a subsidiary is not entitled to  
25 the benefits of the Act of '78.

1                   MR. FEIT: Is not entitled to the first sale,  
2   yes.

3                   QUESTION: So there's never a first sale --

4                   MR. FEIT: It's not first sale, first, because  
5   as -- the statute language doesn't compel it. It's not  
6   a first sale because -- as a matter of fact we think it  
7   points the other way.

8                   QUESTION: But, is the purpose of the Acts  
9   served by your position?

10                  MR. FEIT: That's precisely our point. We  
11   think the purpose of the Act was to meet the Phillips  
12   problem. We think the error, the fatal error in the  
13   Court of Appeals was its assumption that this was an  
14   entitlement. I mean because -- it seems to me a strange  
15   legislative doctrine that because you're meeting the  
16   problems of independent producing production by -- to  
17   avoid the bifurcated market that at the same time -- and  
18   this seems to be the argument -- at the same time while  
19   we pipelines, we're entitled to it, too.

20                  It seems to me there had to be a basic reason  
21   why pipeline production other than wellhead sale  
22   production -- wellhead sale was intended by Congress.  
23   In that -- in that regard the commission left -- we, the  
24   NGPA, as leaving to the commission the problem of  
25   harmonizing the Natural Gas Act with the Natural Gas

1 Policy Act. In that harmonization we have -- that is  
2 the commission have -- has set up a basis of attributing  
3 pricing similar to our independent producer production.  
4 And I -- my --

5 QUESTION: May I follow that up a little bit?

6 If 25 percent of all the natural gas in the  
7 United States were produced by interstate pipeline  
8 companies, would you take a different view?

9 MR. FEIT: I would have to see how that gas is  
10 sold and how the impact is --

11 QUESTION: If it were sold the same way as the  
12 gas before the bill --

13 MR. FEIT: I think the logic of my position  
14 would be that the basic purpose of the statute was to  
15 overrule Phillips and that we would read the statute as  
16 not covering that gas unless it could be shown that that  
17 gas production had a very substantial impact on the  
18 bifurcated market.

19 QUESTION: But would it not -- would it not  
20 have a substantial impact on the extent to which gas is  
21 produced in the United States?

22 MR. FEIT: Yes, it would.

23 Let me just make my point -- I repeat, the  
24 critical consideration is a contract -- a contractual  
25 relationship.

1           For example, in your situation there would be  
2 no contract, so the pipeline could get the highest  
3 maximum lawful price while the independent producer who  
4 was operating pursuant to a contract would get a lesser  
5 amount.

6           QUESTION: But if the country has a shortage  
7 of natural gas, it seems to me, your position is awfully  
8 technical.

9           MR. FEIT: Awfully -- I'm sorry.

10          QUESTION: Awfully technical.

11          MR. FEIT: It wasn't --

12          QUESTION: If they had a contract --

13          MR. FEIT: I don't think the contract  
14 revisions is technical. You're right Mr. Justice. The  
15 statute --

16          QUESTION: Or whether or not you have a  
17 subsidiary.

18          MR. FEIT: The statute is a technical statute,  
19 undeniably. It's very technical. And as I say, it  
20 doesn't leap from the page. But to the extent that the  
21 gas produced by pipelines would have an effect on the  
22 Phillips type problem, my answer to you would be yes.

23                 And I assume the more you found the gas  
24 industry producing in that fashion, the more likely one  
25 would say that Congress didn't act stupidly. It acted

1 to solve the problem. So I assume I would reach a point  
2 which says, yes, even though there's not a contract.

3           What I'm suggesting is that that's not the  
4 case. The case is that there were 5.1 percent  
5 produced. There was no contract. There is no economic  
6 -- economic functional equivalence. And more to the  
7 point here -- and I would like to emphasize, we're  
8 dealing with old gas, always on cost-of-service. And as  
9 a result of which, to us, this would be a windfall.

10           QUESTION: Mr. Feit, is your argument a little  
11 bit inconsistent with FERC's own findings in connection  
12 with its Order 98, that extending the NGPA pricing to  
13 this production would encourage production and help  
14 eliminate the dual market.

15           MR. FEIT: I think that it's not an  
16 inconsistency, I think. Maybe it could be  
17 rationalized. Our position is this, that Order 98 --  
18 which by the way is not here in terms of the substantive  
19 basis -- was based on the notion that the commission  
20 believed that the Natural Gas Policy Act left the  
21 Natural Gas Act control of pipelines intact.

22           In exercising its discretion under the Natural  
23 Gas Act, the commission recognized that there were gas  
24 shortages, that there was need for gas in the interstate  
25 market. And it was based upon that notion that it

1 adopted the parity policy -- parity plan. Our position  
2 is simply that the statutory development was based upon  
3 essentially to get rid of Phillips. The 1954 decision  
4 that appears in the House bill, it appears --

5 QUESTION: It does seem there is a little  
6 tension between the articulations of FERC's findings and  
7 your argument.

8 MR. FEIT: I would say there is a tension and  
9 perhaps FERC could have done it somewhat differently.  
10 But it read the statute as essentially a matter with a  
11 functional and the economic equivalence were entitled to  
12 first sale status.

13 QUESTION: Was any of the gas production by  
14 affiliates of interstate pipelines formerly subject to  
15 the cost-of-service treatment?

16 MR. FEIT: It's hard to say. I would say  
17 early on -- early on -- in the early interpretation,  
18 affiliates who sold to their pipelines, that went into  
19 system supply, and the chances are yes. But I want to  
20 emphasize that as we get into this late '60's and '70's  
21 we find that affiliate production is treated like  
22 independent producer production. That is -- as a matter  
23 of fact, they'd only sell to their pipelines. Our  
24 figures show that they'd sell one third of their sales  
25 to a third parties.

1           The concern that the Court has with regard to  
2 the form over substance -- that is, why should there be  
3 a difference between the two -- it seems to us rests  
4 upon contract and Congress took care of that by saying  
5 that where an affiliate produced and sold gas to its  
6 pipelines, not to its third party -- produced and sold  
7 to its pipeline, that in that situation there was an  
8 affiliate entities limitation. The price had to be  
9 comparable.

10           Another point I would make in this regard.  
11 There may be an argument that says that now they can  
12 spin it off. The commission has indicated that it will  
13 look very closely at that possibility. So it seems to  
14 me, in summary, and I'd like to preserve a bit of time,  
15 that this functional economic division remains. The  
16 statute permits that reading. The Court misconceived  
17 the history of the act and did not give this agency the  
18 deference in this very technical and difficult area.

19           QUESTION: May I ask one more question, which  
20 is, do you agree with the petitioner, Arizonia Electric  
21 Coop., that the Court of Appeals should have remanded to  
22 FERC rather than vacating Order 98 once it determined  
23 that Order 58 was void?

24           MR. FEIT: Of course my position is that 58  
25 was --

1 QUESTION: Yes, I know.

2 MR. FEIT: Was valid. I -- presumably yes, it  
3 should have sent it back.

4 Thank you, I'll reserve what I have.

5 CHIEF JUSTICE BURGER: Mr. McKinney.

6 ORAL ARGUMENT OF JAMES D. MCKINNEY, JR., ESQ.,

7 ON BEHALF OF THE RESPONDENTS

8 MR. MCKINNEY: Mr. Chief Justice, may it  
9 please the Court.

10 This case is far less complicated than Mr.  
11 Feit would suggest. Simply stated, the question in this  
12 case is simply whether Congress intended to include or  
13 to exclude natural gas produced by pipelines and  
14 distribution companies from the coverage of the Natural  
15 Gas Policy Act of 1978.

16 Now, Mr. Feit spent a great deal of time at  
17 the beginning of his argument talking about the Natural  
18 Gas Act of 1938, and that just isn't relevant to this  
19 proceeding. What we're concerned with here is  
20 interpreting what Congress intended to do in the Natural  
21 Gas Policy Act and this Court itself on January 4th of  
22 this year found, in the Energy Reserves case, that for  
23 gas sold in the interstate market the Natural Gas Policy  
24 Act replaced the federal price controls that had been  
25 established under the Natural Gas Act.

1           Now petitioners argue that the Congress  
2 generally intended to exclude the production by  
3 pipelines and distributors from the coverage of the  
4 Act. The Court of Appeals unanimously disagreed. It  
5 found that the deference that's normally viewed, agency  
6 determination, could not justify an interpretation that  
7 was contrary to the plain meaning and the purposes and  
8 the legislative history of the Act. And there is no  
9 basis whatever for disturbing that decision.

10           In support of their position, the petitioners  
11 argue that Congress generally could not have intended to  
12 include pipeline production because this would be  
13 inconsistent with commission cost-of-service regulation  
14 for certain periods when the commission regulated  
15 production under the Natural Gas Act. They also argue  
16 that the Court of Appeals erred, therefore, in not  
17 deferring to their interpretation and that the Court of  
18 Appeals decision would create a substantial reworking of  
19 state and federal regulatory schemes and that the  
20 pipelines would reap a windfall.

21           Now, in examining these arguments, the  
22 starting point is not the Natural Gas Act of 1938. The  
23 starting point is to recognize the reasons leading to  
24 the passage of the Natural Gas Policy Act and the  
25 structure of the pricing provisions that Congress

1 created to deal with the problem it was confronted with  
2 in 1978.

3 The Act was passed because of shortages that  
4 had developed in the interstate market in the 1970's  
5 that had resulted from commission regulation under the  
6 Natural Gas Act. It had two fundamental purposes.

7 The first purpose was to eliminate the  
8 disparity between the interstate and the intrastate  
9 markets. And the second purpose was to provide  
10 incentive prices to encourage production.

11 To accomplish this the Act establishes a  
12 comprehensive pricing structure applicable to all  
13 categories of natural gas production. Each of those  
14 pricing categories of gas production applies to any  
15 first sale of gas. Therefore, the definition of first  
16 sale in Section 2(21) is very important, and that  
17 definition defines first sale broadly to mean any sale  
18 of any volume of natural gas.

19 By this broad definition, Congress plainly  
20 intended that the pricing structure of the Act would  
21 apply to all gas production sold in interstate or  
22 intrastate commerce. However, without any further  
23 qualification, the ceiling prices would have applied to  
24 all downstream sales by pipelines where they were  
25 reselling gas that they had purchased by -- from others.

1                   Now to avoid this, Subsection B of Section  
2 2(21) --

3                   QUESTION: Mr. McKinney, where in the briefs  
4 do we find these sections that you're quoting?

5                   MR. MCKINNEY: They are -- throughout the  
6 briefs you will find the -- Section 2(21). It's --

7                   QUESTION: I think page two and three of the  
8 government's briefs is where it should be.

9                   MR. MCKINNEY: It's at page two of the brief  
10 of the mid-law respondents.

11                  Now in Subsection B of the definition -- this  
12 subsection generally provides that sales by pipelines  
13 are indeed not included within the first sale  
14 definition. And if Congress had wanted to exclude  
15 pipeline production from the price ceilings of the act,  
16 it could have stopped right there.

17                  But Congress knew that while pipelines  
18 function primarily as resellers they also produce their  
19 own natural gas for sale by their systems. And in this  
20 respect they perform the same service as any other  
21 producer and should be subject to the incentives and  
22 ceilings of the Title I pricing structure.

23                  Congress therefore added a critically  
24 important provision. Congress said that a pipeline or  
25 distribution company sale is excluded unless -- unless

1 such sale is attributable to volumes of natural gas  
2 produced by such interstate pipeline, intrastate  
3 pipeline, or local distribution company or any other  
4 affiliate thereof.

5 Now this language on its face plainly is  
6 intended to provide that natural gas produced by  
7 pipeline companies should be subject to the price  
8 ceilings of the act and that the pricing structure of  
9 the act apply to volumes attributable to gas produced by  
10 the pipeline.

11 It doesn't go on to say, but only to the  
12 extent the FERC in its discretion permits, or any other  
13 limiting language. Petitioner's interpretation simply  
14 would leave -- would read the unless clause of the act.

15 Now Petitioners argue however that their  
16 interpretation would still leave some meaning to the  
17 unless clause while they acknowledge that pipeline  
18 production would be excluded from the acts coverage.  
19 They argued that certain sales by the pipelines into  
20 their systems other than their -- into other systems  
21 than their own, would still be covered.

22 Now the interpretation is based on the  
23 following reasoning, that the intracorporate transfer of  
24 gas from a pipeline's producing properties is not a  
25 first sale within the meaning of the act, and secondly,

1 that the downstream sale of the gas produced by the  
2 pipeline is mixed with other gas purchased by the  
3 pipeline and that the sale of those volumes is not  
4 exclusively comprised of the pipeline's production,  
5 words the petitioners would add to the act.

6           However, neither of these arguments is  
7 supportable in any way. The basic rationale that  
8 petitioners give for their positions is that their  
9 interpretation would give meaning to past commission  
10 regulation of certain pipeline production on a  
11 cost-of-service basis. That is it, the entire rationale  
12 they rely upon.

13           Now first of all, this rationale is not  
14 supported even by the nature of past commission  
15 regulation itself. Cost-of-service regulation hadn't  
16 been applied to pipeline production or to pipeline  
17 affiliate production from leases acquired after 1969 or  
18 to any production developed since 1973. And the reason  
19 that the commission had abandoned cost-of-service  
20 regulation, had abandoned that methodology because it,  
21 itself, had found that the methodology had been a  
22 failure in encouraging the pipelines to produce their  
23 own gas. It made that finding in 1969 and abandoned the  
24 methodology.

25           Now, in addition, it should be recognized that

1 contrary to what Mr. Feit has said this morning, or this  
2 afternoon, pipeline affiliates and pipelines themselves  
3 for their own production were treated exactly the same  
4 for comparable categories of production under Natural  
5 Gas Act regulation. There was absolutely no difference.

6 Now even assuming arguendo then that the  
7 rationale they have put forward had any merit, it would  
8 apply with equal force to pipeline affiliate  
9 production. And they make no argument that pipeline  
10 affiliate production is not expressly covered by the  
11 Natural Gas Policy Act of 1978.

12 No, the rationale they put forward doesn't  
13 apply at all to intrastate pipeline production or  
14 distributor production. The commission didn't regulate  
15 that under the Natural Gas Act, and yet, Congress  
16 extended its regulation under the Natural Gas Policy Act  
17 to state production.

18 Moreover, Mr. Feit gave you no citation  
19 anywhere in the legislative history of this act which  
20 even remotely suggests that Congress sought to carve out  
21 in-production from the sweeping coverage of the act.  
22 And you can't read -- you can't read the conference  
23 report accompanying this legislation and come away with  
24 anything but the distinct impression Congress meant to  
25 establish a comprehensive uniform pricing structure to

1 apply to all gas production sold in the United States  
2 whether interstate or intrastate.

3 Finally, the rationale would produce absurd  
4 results. Apart from the fact that the rationale would  
5 treat pipeline affiliate production differently than  
6 pipeline affiliate -- than pipeline production when they  
7 were treated the same under Natural Gas Act regulation,  
8 it also should be recognized that new gas, which is one  
9 of the categories under the Title I pricing structure,  
10 that new gas is no less new gas simply because it's  
11 produced by a pipeline. Yes, produced from certain high  
12 cost geological formations, has to be produced from that  
13 formation irrespective of whether a pipeline or an  
14 independent producer produces the gas.

15 There are many wells throughout the country  
16 that are jointly owned by a pipeline with other  
17 producers. It is the height of absurdity to believe  
18 that the gas produced from that well by a pipeline  
19 should be valued any different than the gas from the  
20 same well owned by an independent producer or by a  
21 pipeline affiliate.

22 Now apart from the lack of support in the  
23 plain meaning of Section 2(21), there are other  
24 provisions of the act that also support the Court of  
25 Appeals decision. Section 203(b) defines the cost of

1 gas to be passed through to certain industrial  
2 customers. The general rule of that section speaks of  
3 first sale acquisition costs as the price paid by the  
4 pipeline. However, Subsection 2 had to state a separate  
5 rule applicable to pipeline production.

6 The separate rule expressly recognizes that  
7 the FERC must fashion rules governing the first sale  
8 acquisition cost for pipeline production.

9 Now the reference to first sale acquisition  
10 costs for pipeline production clearly evidences that  
11 Congress envisioned pipeline production would be the  
12 subject of a first sale at the intracorporate transfer  
13 point, where there is no price paid. Otherwise, there  
14 is absolutely no meaning to that provision of the Act.

15 Notably also, the conference report  
16 accompanying the Act states that Section 501 provides  
17 authority to the commission to establish rules  
18 applicable to intracorporate transactions under the  
19 first sale definition.

20 Now it doesn't say that the commission can  
21 exclude sales from the coverage of the act. It says  
22 that the commission may establish rules applicable to  
23 intracorporate transactions under the first sale  
24 definition. That clearly means the intracorporate  
25 transfers were considered by Congress to be under the

1 first sale definition.

2 In fact, there is nothing in the Act which  
3 even remotely suggests that Congress intended to give  
4 the commission power to exclude production from the  
5 Act's coverage. The commission was only given the power  
6 to prevent the circumvention of the prices established  
7 in that Act.

8 Now, petitioners argue that intracorporate  
9 transfers do not involve certain conventional indicia of a  
10 sale such as a change of title or payment of cash.  
11 Petitioners' arguments in this respect are refuted by  
12 the plain meaning of the Act and by the commission's own  
13 regulatory methods.

14 The term "sale" is not defined narrowly in  
15 Section 2(20), but broadly to include any sale, exchange  
16 or other transfer for value. Now the Court of Appeals  
17 properly rejected the narrow interpretation because it  
18 would have frustrated the comprehensive application of  
19 the act, and because it would have resulted in a  
20 rational discrimination between like categories of gas  
21 production.

22 Contrary to petitioners' argument the  
23 intracorporate transfer does have significant legal and  
24 economic effects and they are transfers for value.  
25 Transfer triggers the payment by the pipeline of

1 royalties on the value of the production. The transfer  
2 triggers the payment of state severance taxes on the  
3 value of the production. And the transfer to the  
4 pipelines transmission system requires it.

5 QUESTION: Mr. McKinney, your argument seems  
6 to have concentrated, just as I believed Mr. Feit's did,  
7 on this section of the Act that defines first sale, and  
8 I realize the Court of Appeals concentrated on that  
9 too. How does the first sale definition tie in to the  
10 other operative sections of the Act?

11 MR. MCKINNEY: Well, there's only one  
12 definition section for the entire Act, so any definition  
13 that's set forth at the beginning of the Act is  
14 encompassed and is used for all of the titles of the Act  
15 so that the other --

16 QUESTION: What's the practical consequence of  
17 the commission's definition of first sale? I mean, what  
18 does that enable it to do or prohibit it from doing that  
19 it couldn't have otherwise done? What other sections of  
20 the Act are involved?

21 MR. MCKINNEY: Well the commission has -- I  
22 think the commission is relying upon Section 2(21) which  
23 is in the definition section at the outset of the Act  
24 and they are saying that that section does not authorize  
25 them to regulate under the Natural Gas Policy Act

1 intracorporate transactions by pipeline companies where  
2 they transferred their own production into their  
3 systems. And I think they're relying directly upon  
4 Section 2(21). They may be referring to other sections  
5 of the Act, too. We think other sections of the Act do  
6 support the fact that Congress intended that  
7 intracorporate transactions would be treated as first  
8 sales. I've just cited the Section 203 and I plan to  
9 mention the Section --

10 QUESTION: Well, what has the commission done  
11 insofar as regulating or not regulating by virtue of its  
12 definition of first sale, particularly the one that's in  
13 contest here?

14 MR. MCKINNEY: They simply have failed to  
15 recognize that the definition of first sale does indeed  
16 include a sale by a pipeline of its own production.

17 QUESTION: Well, how is that hurting your  
18 clients?

19 MR. MCKINNEY: Well, because I represent the  
20 pipelines that have their own production and who are not  
21 therefore being given the incentive prices that Congress  
22 intended by the Natural Gas Policy Act of 1978. But the  
23 commission wants to retain the very kind of regulation  
24 under the Natural Gas Act that lead to natural gas  
25 shortages in this country.

1           QUESTION: Well, I guess your clients would  
2 receive substantial amounts of additional money if they  
3 were given first sale pricing on these intracorporate  
4 transfers.

5           MR. MCKINNEY: That's true, Justice O'Connor.  
6 And there are some --

7           QUESTION: And now that gets to the windfall  
8 argument and I would be interested to know how much of a  
9 windfall that would be. Are we talking about a one time  
10 major pricing effect or would it even out after that, or  
11 what are we really talking about?

12          MR. MCKINNEY: I'd like to address the  
13 windfall argument right now.

14          The commission argues that because certain  
15 pipeline production was treated on a cost-of-service  
16 basis under the Natural Gas Act regulation, that the  
17 pipeline enjoyed certain benefits and less risk than  
18 independent producers. From this premise they further  
19 argue that applying the Natural Gas Policy Act prices to  
20 pipeline producers would grant them a windfall. This  
21 argument has no basis at all.

22          First of all, a pipeline can receive no  
23 greater price under the Natural Gas Policy Act for its  
24 production than is received for comparable categories of  
25 gas produced by independent producers and pipeline

1     affililates.

2                 Secondly, the Act's pricing structure itself --

3                 QUESTION: May I interrupt right there. Their  
4     argument, as I understand it, is that your risks of  
5     exploration and the rest have already been recouped  
6     through the cost-of-service pricing which was different  
7     than the others had so that they are different. Are  
8     they wrong on that?

9                 MR. MCKINNEY: Absolutely wrong. First of  
10    all, a great deal of production developed with the  
11    pipelines. The risks were taken for that production  
12    before there was a Natural Gas Act or any commission  
13    regulation under the Act. The risks of whether they  
14    found gas were taken long before the Natural Gas Act of  
15    --

16                QUESTION: Confine yourself to the period in  
17    which there was cost-of-service pricing.

18                MR. MCKINNEY: Even during that period the  
19    question of whether or not a pipeline was returned the  
20    revenues required for it to be encouraged to go on with  
21    production was dependent upon a myriad of factors.

22                QUESTION: Well, but wait a minute. Go  
23    through that again.

24                Assume it was inadequate, was it nevertheless  
25    different from other production -- a different system of

1 pricing?

2 MR. MCKINNEY: Well, there was first of all --  
3 there was no difference at all between pipelines and  
4 pipeline affiliates.

5 QUESTION: Well, I understand that, but take a  
6 totally independent producer --

7 MR. MCKINNEY: But between the independent  
8 producers -- when Congress first embarked upon  
9 regulation of independent producers in 1954 up until  
10 1960 they tried to regulate independent producers on a  
11 cost-of-service basis. In 1960, in the second Phillips  
12 case, why, they abandoned that and went to area rate  
13 making.

14 Now under area rate making -- incidentally,  
15 they abandoned it, they abandoned cost-of-service rate  
16 making for pipelines themselves in 1969, only nine years  
17 later. In area rate making the commission determined a  
18 cost-of-service for an entire area. And it allowed the  
19 same costs for that -- in that determination as it would  
20 allow for an individual company cost-of-service. There  
21 was no difference in the classification of the cost that  
22 went into that cost-of-service. They were the same  
23 costs that went into the cost-of-service.

24 Now the argument of the commission is, well,  
25 but you were guaranteed somehow that you would get your

1 exploratory costs back, your dry hole costs back, as a  
2 result of being on an individual company cost-of-service  
3 basis. And to some extent, if you assumed that  
4 cost-of-service regulation, in fact, did work -- and it  
5 didn't -- if you assume that it worked there would be  
6 some merit to their argument, but the point is that both  
7 the commission with respect to independent producer  
8 regulation abandoned the methodology, and then later  
9 abandoned it with respect to pipeline production as  
10 well. And as I say, since 1969, they haven't regulated  
11 pipeline or pipeline affiliate production on the basis  
12 of that methodology.

13 QUESTION: Well, Mr. McKinney, they -- it did  
14 apply, did it not, the cost-of-service pricing, but your  
15 point is just that it was done on an area basis so it  
16 didn't focus on individual companies?

17 MR. MCKINNEY: With respect to independent  
18 producers, between 1960 and 1969, there was a difference  
19 between independent producers and pipelines and pipeline  
20 affiliates. Pipeline and pipeline affiliates were  
21 treated on a cost-of-service basis. Independent  
22 producers were treated on an area basis. Later --

23 QUESTION: But we're talking about the  
24 pipelines, of course, here. And so you were treated on  
25 a cost-of-service basis, and therefore the argument is

1 that your clients would now get a windfall by  
2 application of this first sale pricing.

3 MR. MCKINNEY: But it simply is not a  
4 windfall. The pipelines can't get any more for their  
5 production than independent producers or pipeline  
6 affiliate producers.

7 QUESTION: Well, call it what you will. It  
8 would be more money.

9 MR. MCKINNEY: They would get more money than  
10 if the commission were allowed to continue regulation  
11 they don't have power under the Natural Gas Policy Act  
12 to administer, yes. We wouldn't be here if it weren't  
13 for that. But let me put that money in context.

14 There's an Appendix D filed to the  
15 Consolidated Natural Gas Company brief in this  
16 proceeding which clearly shows that the impact of  
17 applying Natural Gas Policy Act prices to pipeline  
18 production is less than one and one half percent of the  
19 total impact of the Natural Gas Policy Act for the  
20 period of 1979 to 1981.

21 Now pipelines during that period contributed  
22 about five percent of U.S. production and this would  
23 strongly suggest that independent producer prices rise  
24 more than pipeline production under the Natural Gas  
25 Policy Act. And I think it should be noted by this

1 Court that the commission hasn't brought to you any  
2 comparative analysis of the impact upon independent  
3 producers or pipeline affiliate producers of the Natural  
4 Gas Policy Act. They're only talking with one side of  
5 the aperture, one side of the coin --

6 QUESTION: Weren't pipeline affiliate  
7 producers getting cost-of-service pricing before?

8 MR. MCKINNEY: If there were -- if I  
9 understand your question, Justice O'Connor, if there  
10 were a windfall, that windfall would be just as  
11 applicable to pipeline affiliate producers as it would  
12 be to pipeline producers.

13 QUESTION: Well, that's the point of the  
14 question.

15 MR. MCKINNEY: Yes, and it would be. And they  
16 were treated exactly the same under Natural Gas Act  
17 regulation. If the affiliate sold his gas to the  
18 pipeline under Natural Gas Act regulation part of the  
19 price that he got back --because he was regulated on a  
20 cost-of-service basis for comparable periods, too -- the  
21 price he got back was to reimburse him for his  
22 exploratory expenses as well, just as in the case of  
23 pipeline production that was taken directly into the  
24 system.

25 I'd like to say, just briefly, that there is

1 no basis -- we cover completely in our briefs the fact  
2 that the application of Title I prices either by state  
3 commission or by a federal commission doesn't interfere  
4 with their regulatory processes one iota. They can  
5 regulate the same as they always have the transmission  
6 costs of interstate pipelines or the distribution costs  
7 of distributors. All they have to do is apply the Title  
8 I price at the point where the gas is actually produced.

9           And I might add, the commission itself does  
10 that when it regulates independent producer sales that  
11 are made far beyond the wellhead, either at the outlet  
12 of a processing plant or at a central point in the  
13 field. The point of the sale isn't the consideration,  
14 it's whether or not gas is sold that's the real point.

15           And that's what Congress was trying to get  
16 across. If you sell gas produced in the United States,  
17 we want it covered by this policy. And they carved out  
18 absolutely no exceptions.

19           QUESTION: May I ask one other question. As I  
20 understand you, the pipeline affiliates were on  
21 cost-of-service pricing before the new statute was  
22 passed. And independent producers were on an area wide  
23 pricing, and you say well there really isn't much  
24 difference because the same elements went into the  
25 calculation of the area wide pricing. Were the price

1 levels generally about the same or was there a material  
2 difference between the two?

3 MR. MCKINNEY: I'm very glad you asked that.  
4 The price levels would have varied, of course, from  
5 pipeline to pipeline but I certainly represent a  
6 pipeline where -- which would have given its left arm to  
7 have had area rate making because the cost-of-service  
8 pricing that the commission administered on that  
9 pipeline was well below the area prices they would have  
10 been entitled to.

11 QUESTION: How typical was that situation?

12 MR. MCKINNEY: I think it probably would have  
13 been more typical than not typical, although that would  
14 be quite a judgment to try to make.

15 CHIEF JUSTICE BURGER: Mr. Feit.

16 ORAL ARGUMENT OF JEROME M. FEIT, ESQ.,  
17 ON BEHALF OF THE PETITIONERS -- REBUTTAL

18 MR. FEIT: Mr. Chief Justice, may it please  
19 the Court. I just want to make a few points.

20 First, Justice Stevens, if the affiliate  
21 production by the late '60's and 70's, the affiliate  
22 production were making wellhead sales and were costed at  
23 investor risk under the parity and national rates, so  
24 that there was a difference, cost-of-service gas was  
25 based upon the normal prudential investments which the

1 consumer paid.

2 QUESTION: On their wellhead sales, but  
3 insofar as a pipeline affiliate production went into the  
4 pipeline transmission system, was that priced on a  
5 cost-of-service basis?

6 MR. FEIT: In the '70's it was not.

7 QUESTION: It was not, so the two of you  
8 disagree --

9 MR. FEIT: Unless it was -- unless I'm -- in  
10 general, it was not. Unless, as I understand it, 569  
11 was a '69 order. If it were -- I don't know -- less  
12 than ten percent or more than ten percent or less --  
13 but in the '70's it was -- even if it were sold to the  
14 pipeline.

15 But I want to make another point in that  
16 regard.

17 QUESTION: Well this is quite important to me  
18 because it's a rather dramatic difference between what  
19 the Court is being told by the two adversaries here.  
20 You're a hundred percent sure you're right on this?

21 MR. FEIT: Not -- never a hundred percent sure  
22 I'm right. I'm suggesting two things.

23 One, first, one third of the sales are made  
24 non -- not to --

25 QUESTION: Well I understand, though, the

1 wellheads --

2 MR. FEIT: The history is not, back here in  
3 the '50's. My understanding is that the '60's and  
4 '70's, it was, whether sold to the pipeline -- it was  
5 costed on area national rates.

6 Now I would like if the Court would wish me to  
7 submit a memorandum referring --

8 QUESTION: No it's -- your whole argument is  
9 that all they want to do is overrule Phillips. And if,  
10 to the extent that he's right on what he's represented  
11 to the Court, that's a big hole in your argument.

12 MR. FEIT: Well I don't --

13 QUESTION: Because if that was cost-of-service  
14 pricing for this body of production, however significant  
15 it may be, the commission has changed and maybe that's  
16 because the statutory language is clear.

17 MR. FEIT: As my understanding is, by the  
18 '70's whether it was sold to the pipeline or to a third  
19 party, it was on area national rates.

20 Justice Rehnquist, you refer to what what  
21 other provisions of the Act would refer to -- Title 6  
22 deals with interstate pipelines and the costing of  
23 interstate pipelines. It talks about a first sale as if  
24 obviously the pipeline purchased that from the producer.

25 At the bottom of the case though, it seems to

1 me, that we're talking about cost-of-service gas which  
2 is always been priced on traditional cost-of-service  
3 pricing. There is nothing in this statute that suggests  
4 that Congress wanted to overrule that determination.

5 And it seems to us that if it had it would  
6 have said something. What appears here constantly is  
7 reference primarily or basically to Phillips and  
8 independent producer pricing.

9 Unless the Court has any further questions.

10 QUESTION: Let me just ask this one question.  
11 If your opponent were right about the affiliate gas, and  
12 then by the definition of sale, Congress did say  
13 something as to that gas, because clearly there is a  
14 sale within the literal language of the statute when a  
15 sale from a subsidiary to the parent.

16 And it did say something if he is right on his  
17 --

18 MR. FEIT: If, in fact -- if, in fact, that  
19 was a first sale, right.

20 QUESTION: But it would be under the plain  
21 language of the statute.

22 MR. FEIT: Well if -- if --

23 QUESTION: Which would probably explain why  
24 the commission now draws that distinction.

25 MR. FEIT: Well it draws the distinction since

1 the early '70's.

2 Unless the Court has any further questions.

3 QUESTION: How significant, on the increase  
4 that we're talking about --

5 MR. FEIT: Yes, I wanted to mention that. We  
6 haven't retroactively determined the amounts, but  
7 speculatively we're talking about \$200 million a year.  
8 And somewhere over \$2 billion until this old gas -- let  
9 me just make a reference -- you reminded me -- it's  
10 about \$2 billion total.

11 The real issue here is economically a stripper  
12 well gas, which means a well is depleted.  
13 Cost-of-service has -- the consumer has borne the risk.  
14 This is the highest price of regulated gas under the  
15 Natural Gas Policy Act pricing scheme if first sale  
16 prices were attributed to it, the pipeline company would  
17 be able to charge off all of the expenses of  
18 redeveloping that well on the highest -- or one of  
19 highest NGPA pricing structures.

20 And it seems to us that in a section floor  
21 proceeding the normal way a pipeline gets its rates,  
22 prudent costs would apply. But here you're saying that  
23 a consumer has borne all the risks. Its an old well,  
24 and suddenly incentive pricing permits these kinds of  
25 prices to go to interstate pipelines.

1           QUESTION: May I ask this question? In the  
2 conversation about windfall and about increased costs of  
3 gas, did not Congress contemplate that there would be an  
4 increase in the cost of gas as a result of the 1978 Act?

5           MR. FEIT: Congress did but --

6           QUESTION: At least initially, the theory was  
7 that over time as more gas was produced, the economics  
8 of it would bring the price back down.

9           MR. FEIT: Yes, but I think in terms of a  
10 response to you, there was nothing in the Congressional  
11 debates that one of the incentive pricing schemes would  
12 apply to any other than independent producers and those  
13 that function like independent producers.

14          QUESTION: What about affiliates?

15          MR. FEIT: That's -- my point is, you're  
16 getting a response to the question, that affiliates up  
17 to the late '60's and early '70's functioned like  
18 independent producers.

19               The history is such that the Court must  
20 remember that up until the decision in Phillips the  
21 question of production ingathering was a problem. An  
22 affiliate might not very well have been even deemed to  
23 be covered by the Act. And it was in the late '60's  
24 where affiliate production became more and more like  
25 independent producer production. The commission's

1 approach in the '70's and in Order 98, at the enactment  
2 of the 1978 Act, was precisely that. That the  
3 affiliate, whether he sold to a third party or through  
4 his pipeline, is selling like an independent producer,  
5 and in our view, is entitled to that kind of pricing  
6 while the pipeline -- as long as he doesn't make a first  
7 sale -- if he makes a first sale, as Herweg defined it,  
8 is not -- a mixed system supply is not entitled to first  
9 sale pricing.

10 QUESTION: But apart from everything else our  
11 duty, as you suggested at the outset, is to construe the  
12 language of the Act and its legislative history to  
13 ascertain Congressional intent.

14 MR. FEIT: That's exactly what would be --

15 QUESTION: Without regard to who loses what  
16 where.

17 MR. FEIT: Without regard except that it  
18 suggests itself to me that Congress would hardly have  
19 adopted a theory without any affirmative statement to  
20 that effect which would have lead to what we think are  
21 the windfall pricing that would follow from treating  
22 pipeline production as a first sale.

23 Thank you.

24 CHIEF JUSTICE BURGER: Thank you, gentlemen.

25 The case is submitted.

1                   [Whereupon, at 2:01 p.m., the case in the  
2 above-entitled matter was submitted.]

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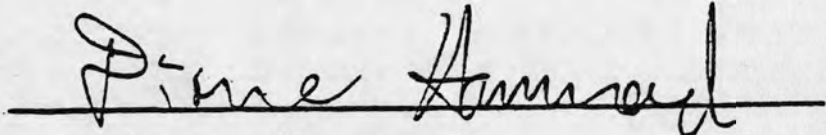
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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: Public Svc Comm of the State of NY, Petitioner v. Mid Louisiana Gas Company, et al., No. 81-1889 - Arizona Electric Power Cooperative, Inc., Petitioner v. Mid-Louisiana Gas Company, et al #81-19 and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY



(REPORTER)

\*Michigan, Petitioner v. Mid Louisiana Gas Company, et al.; No. 81.2042 and

Federal Energy Regulatory Commission, Petitioner, v. Mid Louisiana Gas Company, et al No . 82-19

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