

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1076

TITLE TRANSCONTINENTAL GAS PIPE LINE CORPORATION, Appellant  
V. STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL  
EXPLORATION, INC., ET AL.

PLACE Washington, D. C.

DATE October 8, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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TRANSCONTINENTAL GAS :  
PIPE LINE CORPORATION, :  
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Appellant :  
:  
v. : No. 84-1076  
:  
STATE OIL AND GAS BOARD OF :  
MISSISSIPPI AND COASTAL :  
EXPLORATION, INC., ET AL. :  
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Washington, D.C.  
Tuesday, October 8, 1985

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at  
11:48 a.m.

APPEARANCES:

JOHN MARSHALL GROWER, ESQ., Jackson, Mississippi;  
on behalf of the Appellant.  
  
JEROME M. FLIT, ESQ., Solicitor, Federal Energy  
Commission, Washington, D.C.; as amicus curiae  
in support of Appellant.  
  
GLENN GATES TAYLOR, ESQ., Jackson, Mississippi;  
on behalf of the Appellee Coastal Exploration.  
  
ED DAVIS NOBLE, JR., ESQ., Assistant Attorney General  
of Mississippi, Jackson, Mississippi; on behalf  
of the Appellee State Oil & Gas Board.

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1           However, in the spring, particularly May of 1982,  
2 it became apparent to the gas industry as a whole  
3 particularly that there was becoming a surplus of deliver-  
4 ability of gas. There was a loss of market for a number  
5 of reasons that I will not take my time here, the drop in  
6 the price of oil, surplus oil, for many reasons. But, there  
7 was an unprecedented, an unforeseeable loss in the markets  
8 for natural gas. That created a problem whereby the inter-  
9 state pipe line companies, and Transco in this case, could  
10 not then purchase all of the gas that was required to be  
11 purchased under its contracts.

12           QUESTION: In other words, they couldn't sell  
13 it.

14           MR. GROWER: That is exactly right, Your Honor.  
15 They could not sell it.

16           QUESTION: They could buy it. They could buy  
17 it if they had the money.

18           MR. GROWER: The pipe line is not the market.  
19 The pipe line is the conduit to the market and if the market  
20 can't take it, they can't buy it. It is that simple.

21           Now, when they were unable to buy all of their  
22 contracted gas, they had to cease buying gas from owners  
23 that they had no obligation to purchase the gas from. Now,  
24 these owners in East Morgantown and Greens Creek field areas  
25 of Mississippi, Coastal and others, had chosen not to commit

1 their gas to contract. In 1978, '79 and '80, when the long-  
2 term contracts in this field were made with Getty, Harkins,  
3 Florida Gas, and others by Transco, of course, there was  
4 a shortage and these particular producers chose not to  
5 commit their gas to contract.

6 All indications were that for the foreseeable  
7 future prices were going to continue increasing, oil prices  
8 were going up, the market was going to expand, everything  
9 look<sup>ed</sup> rosy. There was no need to commit their gas they  
10 thought. I assume they thought that. They didn't.

11 So, in essence, when the axe dropped and they  
12 were no longer able to sell their gas to Transco at the  
13 high prices being received by the contract producers under  
14 those 1979 and '80 contracts, they sought relief from the  
15 Mississippi Oil & Gas Board pursuant to Rule 48 of the Board  
16 which required the ratable taking of gas from the State  
17 of Mississippi. It was a state-wide rule. The Board enforced  
18 that rule. The Board required Transco to take the non-  
19 contract gas and to take it without discrimination.

20 The impact, the consequence of that order was  
21 to displace contract purchasers, because, as we said in  
22 the beginning, the market is limited, they cannot take any  
23 more than the market could take, so if they are required  
24 to take non-contract gas, they have got to cut back on taking  
25 some contract gas, the effect of the order.

1 QUESTION: What is the effect of that state order,  
2 because I am not sure I understand it. Did it require Transco  
3 to take more gas or simply to spread the payments around  
4 for the gas that it did take?

5 MR. GROWER: The effect of the order, Justice  
6 O'Connor, was to increase -- take or pay payment for one  
7 thing. I will explain that. In that the contracts required  
8 a certain minimum take.

9 QUESTION: Well, if you could answer my question  
10 it would help me understand your response. Did the state  
11 order require Transco to take more gas or simply to spread  
12 the payments out to a broader group of people for the gas  
13 it did take?

14 MR. GROWER: The effect of it was to ultimately  
15 require the taking of more gas. That was the practical  
16 effect. Because of the take or pay requirement -- this  
17 is complicated and difficult for me to explain. I know  
18 it is not difficult for you to understand, but these contracts  
19 require take or pay which in essence the cost of making  
20 take or pay payments are a flow through to the consumer.  
21 It increases the cost. But, that take or pay may be recouped  
22 in a five-year period. And, if that gas can be recouped,  
23 it is only recouped out of the excess above the minimum  
24 take.

25 So, we are either going to pay for the gas twice

1 if we can't recoup it or when we are catching up and pro-  
2 ducing above the minimum we are going to have to produce  
3 more gas from that contract while at the same time producing  
4 the non-contract gas that the state requires us to take.

5 QUESTION: Well, right now, I suppose, the court  
6 below remanded for a determination of what price ultimately  
7 would have to be paid for these other pool owners, so we  
8 don't even know what it would cost ultimately, I gather.

9 MR. GROWER: Your Honor, we know what it would  
10 cost from this standpoint. The take or pay payments under  
11 the high-cost contracts -- Those contracts at this time  
12 were \$7.90. So, when you have to pay for gas you can't  
13 take at \$7.90, that increased cost increases substantially.

14 QUESTION: Well, maybe I misunderstand the order,  
15 but I thought that to the extent that the state interfered  
16 with your arrangement, it was on behalf of the other owners  
17 of the common pool and that the amount to be paid then  
18 was not the amount to be paid Getty under the contract --

19 MR. GROWER: That is right, Your Honor.

20 QUESTION: -- but some reasonable rate based on  
21 present or then current market.

22 MR. GROWER: That is right, Your Honor. But,  
23 Transco did not want to take this gas at all. Its market  
24 could not take this gas without increasing its obligations  
25 under its contract. That is the main problem.

1 QUESTION: Mr. Grower, what is a take or pay?

2 MR. GROWER: Take or pay obligation is -- For  
3 instance, in these contracts that were made after the NGPA  
4 when there was a severe shortage in the pipe lines needed  
5 gas supply, under their contract made in that context, they  
6 were required to purchase from 85 to 90 percent of the  
7 deliverability of those wells and if they did not purchase  
8 85 or 90 percent, whichever the figure was in the contract,  
9 they would then have to pay -- in a particular year, they  
10 would then have to pay for the gas not taken in addition  
11 to the gas taken.

12 Now, that take or pay gas, it is paid for, then  
13 may be recouped within the next five years, but it can only  
14 be recouped out of the 10 or 15 percent excess above the  
15 85 or 90 percent that is available to recoupment, because  
16 you still have the minimum requirement to take 85 or 90  
17 percent.

18 QUESTION: So, it can be recouped only by taking  
19 more than 85 percent?

20 MR. GROWER: Only by taking more than 85 percent.  
21 Now, the problem now is that under today's market conditions,  
22 where the market cannot take that gas, they are incurring  
23 additional take or pay problems that are so severe that  
24 there is no way that they can catch up out of that 10 or  
25 15 percent.

1 QUESTION: Well, what are today's market conditions  
2 compared to what they were when this problem arose?

3 MR. GROWER: Well, it has gotten worse, it has  
4 gotten worse. The take or pay problems today are much greater  
5 than they were then. They were just starting then. Today --  
6 In this case, we are talking about \$50 million to \$70 million  
7 incurred at that time, a short period of time. Today it  
8 is in the billions.

9 QUESTION: Incurred. What do you mean? I don't  
10 even know what you are talking about when you say \$50 million  
11 incurred.

12 MR. GROWER: All right. The pipe lines are incurring  
13 these take or pay obligations to producers for gas it cannot  
14 take.

15 QUESTION: I see.

16 MR. GROWER: Because of the unprecedented and  
17 unforeseeable drop in the market.

18 QUESTION: Well, it is a drop in demand for the  
19 gas?

20 MR. GROWER: That is correct. A serious drop  
21 in demand, I might say.

22 The problem is exacerbated by the fact that the  
23 more the market drops under the regulatory scheme and the  
24 take or pay obligation is incurred and if those costs are  
25 added, you are increasing the cost, you are losing more

1 market and you just have the --

2 QUESTION: Well, I guess you are going to tell  
3 us probably after lunch what is wrong with the order. The  
4 order may hurt you, but are you going to tell us why it  
5 is beyond the state's power?

6 MR. GROWER: Yes, sir, I hope to and I think the  
7 main trouble with the order is --

8 CHIEF JUSTICE BURGER: We will take that up right  
9 after lunch.

10 MR. GROWER: Thank you.

11 (Whereupon, at 12:00 noon, the case in the above-  
12 entitled matter was recessed, to reconvene at 1:00 p.m.,  
13 this same day.)  
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1                                    A F T E R N O O N   S E S S I O N

2                    CHIEF JUSTICE BURGER:   Mr. Grower, you may resume  
3 your argument.

4                    ORAL ARGUMENT OF JOHN MARSHALL GROWER, ESQ.

5                    ON BEHALF OF THE APPELLANT

6                    MR. GROWER:   Mr. Chief Justice, and may it please  
7 the Court:

8                    The order in this case by the State Oil and Gas  
9 Board of Mississippi requiring the purchase of non-contract  
10 gas at any cost directly impacts on the cost of service  
11 of the pipe line.

12                   Also, the order which requires additional take  
13 or pay increases the cost of the gas to the consumer which  
14 is a direct impact on the cost of service also.

15                   These matters have been condemned by this Court,  
16 particularly in Northern Natural versus the State Corporation  
17 Commission of Kansas in 1963.   It is almost an identical  
18 case.

19                   The question today is --

20                   QUESTION:   Wasn't that a price regulation in  
21 Northern Natural?

22                   MR. GROWER:   No, sir.

23                   QUESTION:   What was the regulation?

24                   MR. GROWER:   It was a ratable take order exactly  
25 like this one, Northern Natural versus State Corporation

1 Commission of Kansas.

2 QUESTION: Well, the Supreme Court of Mississippi  
3 thought it was different though.

4 MR. GROWER: The difference, Your Honor, today  
5 is and the issue raised today is whether or not the Natural  
6 Gas Policy Act has changed the jurisdiction so that the  
7 state may now enter this field and regulate the interstate  
8 pipe line.

9 QUESTION: Northern Natural said that that regulation  
10 was bad because what?

11 MR. GROWER: Well, it interfered with the cost  
12 of service of the pipe line.

13 QUESTION: And, therefore, what?

14 MR. GROWER: It pre-empted the --

15 QUESTION: All right. That is the bottom line,  
16 isn't it?

17 MR. GROWER: Right. The pervasive and comprehensive  
18 regulation under the Natural Gas Act and the Natural Gas  
19 Policy Act today simply sweeps the field clean. There is  
20 no room left for state regulations. The Natural Gas Policy  
21 Act didn't change that.

22 QUESTION: Well, didn't the Natural Gas Policy  
23 Act deregulate for this type of gas that is involved here?

24 MR. GROWER: Justice O'Connor, it deregulated --

25 QUESTION: What action specifically could the

1 Federal Energy Regulatory Commission take that would conflict  
2 with the state's order here?

3 MR. GROWER: Well, in the first place, it conflicts  
4 with -- the state order here conflicts with the jurisdiction  
5 of the Federal Energy Regulatory Commission to regulate  
6 the cost structures of the pipe line company which --

7 QUESTION: Well, this particular gas was taken  
8 out of their regulatory jurisdiction, wasn't it?

9 MR. GROWER: The price of the gas at the well  
10 head was deregulated, but my point, Your Honor, is that  
11 any price that the company is required to purchase this  
12 gas affects its cost structures which has been held by this  
13 Court on several occasions, and recently in Maryland versus  
14 Louisiana and Exxon versus Eagerton, that that regulation  
15 of the cost structures of the interstate pipe line is the  
16 exclusive domain of the FERC.

17 QUESTION: But, if you are right about that, I  
18 would assume that the state's order, even just as applied  
19 to intrastate gas purchases, would have the same kind of  
20 effect and subject the state to the same argument.

21 MR. GROWER: Well, intrastate gas is not sold  
22 in interstate commerce. It does not impact on the inter-  
23 state price.

24 QUESTION: Well, we are talking about the pre-  
25 emption argument, I guess.

1 MR. GROWER: Well, the NGPA has given the states  
2 the right to establish lesser prices for intrastate gas  
3 than the maximum price allowed by the NGA. That is the  
4 only jurisdiction that has been given and very well state  
5 regulations of intrastate that would conflict with that  
6 might be pre-empted. Of course, that is not the issue here,  
7 if the Court please, and I have not looked at that point.

8 QUESTION: May I ask one question, Mr. Grower.  
9 You have talked a great deal about the take or pay contract.  
10 Had your client not entered in any take or pay contract,  
11 but had foreseen the economic situation that later developed,  
12 would you still contend that the Missouri rule was  
13 unconstitutional?

14 MR. GROWER: The --

15 MR. GROWER: Mississippi rule, I am sorry.  
16 Mississippi rule.

17 MR. GROWER: Your Honor, yes, because, as I say,  
18 the regulation which requires the company to purchase non-  
19 contract gas at any cost impacts directly on the cost of  
20 service of this pipe line. The price of the gas is a direct  
21 cost of service that flows through subject to the FERC  
22 regulations.

23 QUESTION: So that then the discussion of the  
24 take or pay contract is not really critical to your  
25 constitutional argument?

1 MR. GROWER: It is not critical, but it is the  
2 point that was the focus in the Northern Natural case, because  
3 in the Northern Natural case take or pay was indicated to  
4 be one of the problems of conflict that could occur where  
5 it increased the price to the consumer and affected the  
6 cost of service.

7 I would like to take some additional time for  
8 rebuttal, if the Court please.

9 CHIEF JUSTICE BURGER: Very well.

10 Mr. Feit?

11 ORAL ARGUMENT OF JEROME M. FEIT, ESQ.

12 ON BEHALF OF THE APPELLANT

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

15 This case very squarely raises the pre-emption  
16 question as the continuing vitality of Northern Natural.  
17 The facts, as Mr. Grower stated, are essentially the same  
18 statutory scheme, either comply with the state ratable take  
19 order and take more gas than it was able to need for its  
20 customers or take less gas under its take or pay provisions  
21 and incur costs with the ultimate result being, as Northern  
22 Natural said, that that could seriously impair the Federal  
23 Commission's authority to regulate the intricate relationship  
24 between the purchasers' cost structures and eventual cost  
25 to wholesale customers.

1           The question, and the state courts quite clearly  
2 recognized, that the decision would go in favor of Transco  
3 in that case if Northern Natural was still good law. The  
4 divergence, the difference was that Northern Natural, the  
5 courts found, was not good law by virtue of their reading  
6 of the Natural Gas Policy Act and the Natural Gas Act.

7           Our reading, on the contrary, is totally to the  
8 opposite. We believe that both under the Natural Gas Policy  
9 Act and the Natural Gas Act that the Northern Natural case  
10 has continuing validity.

11           Let me turn to the Natural Gas Policy Act. There  
12 are two kinds of things under that statute which I think  
13 indicate the continuing nature of non-state intervention  
14 and effective federal control.

15           As you know, this was -- The Act was to set up  
16 a nation-wide market in gas because of the problems that  
17 had arisen. And, what Congress did under the Natural Gas  
18 Policy Act in Title I was statutorily fix the prices,  
19 statutorily fix -- detail the prices for gas. FERC no longer  
20 had any authority under that to fix those prices.

21           But, in addition to that kind of scheme -- In  
22 addition to that, FERC did have specific authority under  
23 Title VI of the Natural Gas Policy Act to prohibit the pass  
24 through of such gas costs which is found to be the product  
25 of fraud, abuse, or similar grounds.

1           So, what you had was just the opposite of a  
2 commission of state intervention. You had a free market  
3 under Title I which FERC could not interfere with as you  
4 pointed out in the Mid-Louisiana opinion. And, on the other  
5 hand, you had FERC's control to assure that gas costs --  
6 that pricing practices of pipe lines are not fraud, abusive,  
7 or invalid on similar grounds from passing through. That  
8 is the Natural --

9           QUESTION: Would you fit this under the fraud  
10 or abuse section?

11          MR. FEIT: I don't know if -- My point is the  
12 power exists. I don't know whether in fact this amounts  
13 to fraud or abuse or similar grounds. It seems to me --

14          QUESTION: The power only exists if it does amount  
15 to that.

16          MR. FEIT: Well, the power to impose denial to  
17 pass through exists.

18          QUESTION: Right.

19          MR. FEIT: I might add that this very case is  
20 presently pending not under the Natural Gas Policy Act,  
21 but my next point, under the Natural Gas Act prudent standing  
22 in which the staff of FERC is arguing to the Commission  
23 that the fact that Transco complied with the state order,  
24 complied with the state order, in fact, made those purchasing  
25 practices subject to Natural Gas Act prudence regulation.

1 And, this, I think, pinpoints the concern in Maryland v.  
2 Louisiana. The concern is that we regulate interstate pipe  
3 lines under the Natural Gas Act and in Mid-Louisiana it  
4 was made crystal clear that while FERC has no continuing  
5 regulatory control on the prices under Title I, it has  
6 continuing control, as it always had, under the relationship  
7 of the pipe line to its downstream customers.

8 So that rather than Northern Natural in our view  
9 losing vitality by virtue of the Natural Gas Policy Act,  
10 the Natural Gas Policy Act has established a free market,  
11 no state interference with whatever authority exists, exists  
12 in FERC under Title VI. To the extent there is additional  
13 authority, it exists under the prudent standard of the  
14 Natural Gas Act.

15 So, it seems -- Without even reaching the question  
16 of the commerce clause issue, it seems to us that this is  
17 a clear case of federal pre-emption by statute and --

18 QUESTION: Well, Mr. Feit, what do you think that  
19 a state can properly do within its regulatory powers that  
20 remain to protect common pool owners?

21 MR. FEIT: I was going to turn to that exactly.  
22 I think, one, Northern Natural makes plain at that time  
23 that states can affect the producers; that is the statute  
24 shall be directed -- The device in Northern Natural was  
25 the problem of affecting the interstate pipe line.

1 I realize that that may not be a complete answer.  
2 There is another case coming before this Court.

3 QUESTION: I don't understand your answer. What  
4 is it that you think the states can properly do within their  
5 regulatory authority?

6 MR. FEIT: I think at the bottom line is the states  
7 can set up a scheme which is regulated by market demand  
8 situations. Let me just -- The reason I mentioned what  
9 Northern Natural said, because that was the rule of Northern  
10 Natural. Northern Natural said you cannot deal with the  
11 interstate pipe line, you can only regulate the producer.

12 I am suggesting now that there may be other more  
13 sophisticated efforts. Many states have adopted market  
14 demand where denominations are made by the pipe lines and  
15 it is based on -- Even Texas has monthly kinds of crude.  
16 That may pass constitutional muster because what the state  
17 is doing then, it seems to me, is taking care of its own  
18 mining interest, protection of waste, protection of the  
19 owners of the pool, which clearly, Your Honor, the states  
20 have. We have never taken the position, and I don't take  
21 it now, that the states do not have significant rights over  
22 their minerals within the state and natural gas is such  
23 a mineral.

24 The problem is that to the extent the state action  
25 intrudes upon the federal structure the state action must

1 fail. That this Court has said repeatedly in Arkla v. Hall,  
2 Maryland v. Louisiana.

3 And, the reason I am not answering --

4 QUESTION: Well, if there were no take or pay  
5 contract, do you think the state regulation would be valid  
6 here?

7 MR. FEIT: If there were no take or pay contracts --  
8 It is hard to answer the question. I think it would turn  
9 on whether the pipe line is being required to change its  
10 purchasing practices in a way that makes it take more gas  
11 than it wants, because it affects -- It is not only  
12 Mississippi that is involved here, pipe lines have sources  
13 of supply throughout the producing state. And, the concern  
14 of FERC is not that one state provision fails, the concern  
15 of FERC is how the entire scheme operates.

16 It seems to us that it may well be a case where  
17 a state directing -- more than produces may have a valid  
18 statute.

19 Our position here is simply that this order is  
20 not a valid statute.

21 QUESTION: You think if there were no take or  
22 pay contract it might be valid. Is that what I --

23 MR. FEIT: I think if there were no take or pay  
24 contracts and the pipe line was taking no more gas than  
25 it needed for its customers or it was required to take,

1 that would be a different -- might be a different case  
2 because there was more -- You see, the vice that we find  
3 in it is that somehow by the state requiring the pipe line  
4 to take more gas than it wants -- It is not the pipe line  
5 that is the essence of our concern. The essence of our  
6 concern is the downstream customer. It then kind of intrudes  
7 upon that relationship and that is where the difficulty  
8 arises.

9           So, while I think there can be valid state laws,  
10 as Northern Natural pointed out, and market demand may be  
11 another way to deal with the problem. These are a myriad  
12 of concerns. Northern Natural said that FERC cannot kind  
13 of deal with each little state statute and have the state  
14 accommodate to the federal concern -- I am sorry, the state  
15 must accommodate the federal concern and not the federal  
16 on the states' concern.

17           Unless there are any further questions, I think  
18 my time is up.

19           Thank you.

20           CHIEF JUSTICE BURGER: Very well.

21           Mr. Taylor?

22           ORAL ARGUMENT OF GLENN GATES TAYLOR, ESQ.

23           ON BEHALF OF THE APPELLEE

24           MR. TAYLOR: Mr. Chief Justice, and may it please  
25 the Court:

1           Before coming to my submission, I would like to  
2 address the question that Your Honor raised about take or  
3 pay payments. Take or pay payments are refundable pre-  
4 payments for gas. A fundamental assumption is that during  
5 the period of a 20-year contract that there will be significant  
6 periods of time during which a purchaser will not need  
7 all of the gas that the producer can deliver, but at the  
8 same time the producer needs some sort of cash flow.

9           So, if and where and the parties agree, they agree  
10 to include a take or pay provision which provides that if  
11 you get to the end of a contract year and the pipe line  
12 has not taken all of the minimum quantity that it agreed  
13 to, it will pre-pay for the balance and it will recover  
14 it either in kind or in cash under cash balance. If, at  
15 the time the take or pay obligation is called for, they  
16 cannot make up the gas, if they are being called to pre-pay  
17 for, then they have a contractual defense.

18           Now, as interesting as all that is, it has nothing  
19 to do with what the state has required in this case. Forget  
20 the exaggerations that have been made about what the State  
21 of Mississippi has required and look at pages 14 and 15  
22 of our brief and how our Mississippi Supreme Court has  
23 construed this requirement.

24           The requirement is not that a pipe line has to  
25 take the first MCF of gas. It is that the pipe line when

1 and if -- this is on 14 and 15 of our brief -- when and  
2 if a pipe line decides to take gas from a pool, then whatever  
3 quantity it wants to take, it must offer to take those  
4 quantities ratably as among the different wells in the pool  
5 so they are not taking 100 percent out of one well and 10  
6 percent out of another one, which is virtually the example  
7 we had in this case, and they must offer to pay a market  
8 price unless the parties agree otherwise. The parties are  
9 free to agree to two cents, two dollars, or twenty dollars.

10 But, in the absence of that agreement, if somebody  
11 wants their gas taken so that no drainage occurs, the state  
12 is not going to allow drainage to occur simply because somebody  
13 is being obstinate about the price that ought to be paid.  
14 They called for a market-responsive price.

15 And, as we point out in our brief, Transco has  
16 been complying with this by offering a market-out clause  
17 price since December of 1982.

18 Now, let me get to the issue which is pre-emption.  
19 We submit that Under Section 601(a) of the NGPA Congress  
20 clearly eliminated FERC's Section 1(b) jurisdiction over  
21 wholesales of deregulated natural gas in interstate commerce.

22 Consequently, the states are once again free to  
23 attach a reasonable ratable take requirement to any  
24 purchaser's takes of deregulated gas.

25 I want to explain why Mississippi's requirement

1 is not pre-empted. I want to explain the inconsistency  
2 of FERC's position in this case and why producers need this  
3 simple protection.

4 It is a question of implied pre-emption. No one  
5 claims that this state power, ratable take power, is pre-  
6 empted by Congress. FERC -- *in its brief* it is briefed on page 15 --  
7 concedes that point. It is a question of implied pre-  
8 emption; that is in passing the NGPA did Congress intend  
9 to prohibit the state from attaching reasonable conservation  
10 requirements to takes of deregulated gas or did Congress  
11 intend to create a gap into which the states could not step  
12 with their conservation powers. We submit that Congress  
13 didn't either.

14 First, look at the legislative history and look  
15 at the Act itself. Congress intended that the states would  
16 play a major role in what was the overriding objective of  
17 Congress to increase the supply of natural gas available  
18 to the interstate commerce and end the perpetual shortages  
19 of gas in that market.

20 Congress vested the states with broad powers under  
21 Section 503 to make these fundamental determinations that  
22 would determine what price you got if it was regulated gas  
23 or whether it was going to be deregulated gas.

24 As importantly, the legislative history reflects  
25 that the NGPA was not to intrude on the states' historical

1 conservation powers or their traditional conservation  
2 functions.

3 QUESTION: But, Mr. Taylor, as I understand this  
4 case, the conservation power is not implicated. The  
5 Mississippi Supreme Court expressly disclaimed that as I  
6 understood.

7 MR. TAYLOR: No, Your Honor.

8 QUESTION: They just relied on fairness, didn't  
9 they?

10 MR. TAYLOR: The unfairness was that because of  
11 these discriminatory takes drainage would result. The concept  
12 of drainage is a concept of fair share; that the owners  
13 in a pool must have an opportunity to get their fair share  
14 of gas.

15 QUESTION: And, they expressly disclaimed, did  
16 they not, reliance on conservation as the motivating force  
17 for the regulation?

18 MR. TAYLOR: No, Your Honor, they did not. They  
19 explained that the overriding purpose is fairness. They  
20 cited Shell Oil versus James, which is a drainage case.  
21 I mean, drainage is wrapped up in the fairness issue. In  
22 order to breathe life into an owner's opportunity to recover  
23 his fair share, he must have the mere opportunity to get  
24 into the market at the well head.

25 I was going to point out that in the legislative

1 history Congressman Dingell in submitting the NGPA to the  
2 House made this statement on October 14, 1978. He said  
3 that the legislation does not contemplate that FERC will  
4 intrude into the traditional conservation functions performed  
5 by the states. This is a matter reserved to the state agencies.  
6 During the exercise of their historical power will continue  
7 to regulate such matters and he goes on to say such as  
8 drilling locations, completion techniques, production rates,  
9 etc. He could have just as easily said such as ratable  
10 take orders which this Court in the Phillips case, in the  
11 Northern Natural case pointed out. Ratable take orders  
12 have always been part of the states' historical powers.

13 QUESTION: Mr. Taylor, Justice Stevens asked you  
14 a couple of moments ago whether the Supreme Court of  
15 Mississippi hadn't disclaimed reliance upon the conservation  
16 element. And, if you look at page 34a of the jurisdiction  
17 statement which the Appellant -- I am looking at the opinion  
18 of the Supreme Court of Mississippi. It says in the middle  
19 paragraph beginning "Coastal, Getty and the other producers  
20 argue that conservation of an important natural resource  
21 and the prevention of waste are implicated. Without doubt,  
22 if this were so, such would be a legitimate local interest..."

23 It is difficult, however, for us to see how there  
24 is a waste of natural resources when an interstate pipe  
25 line company refuses to take ratably or otherwise.

1 And, in the paragraph after that they go on and  
2 say that "the true and entirely legitimate local interest  
3 here implicated is fairness."

4 MR. TAYLOR: Yes, sir. And, if you go on --

5 QUESTION: Is there some place else where they  
6 say that it is conservation?

7 MR. TAYLOR: Yes, sir. If you go to the last  
8 four pages of the Supreme Court's opinion -- I am referring  
9 to the Southern citation -- if you go to those last four  
10 pages in which they are construing the purpose and objective  
11 and power of the Oil and Gas Board under Rule 48, it is  
12 designed to prevent drainage and to insure fairness of  
13 correlative rights because it is fundamentally unfair for  
14 ratable takes to occur and a purchaser to take indirectly  
15 what he will not take directly.

16 QUESTION: Is that a conservation concern?

17 MR. TAYLOR: Absolutely it is a conservation concern  
18 for this reason.

19 QUESTION: We are just not talking about the same  
20 thing, I guess.

21 MR. TAYLOR: Your Honor, we are. As we explain  
22 at pages six through ten of our brief, the legitimate state  
23 interest involved, drainage is a phenomenon of life. Judge  
24 Robertson in the Supreme Court's opinion pointed that out.  
25 In order to breathe meaning into the opportunity of someone

1 to recover their fair share of production, they cannot bag  
2 it, they cannot store it, they cannot wait to get their  
3 one percent until 99 percent has been produced. They must  
4 have an opportunity to take when others take and to sell  
5 when others sell.

6 So, I respectfully would have to disagree that  
7 the purpose of this rule is to insure fairness in the sense  
8 that it is unfair to deny and deprive owners possessed of  
9 correlative rights the opportunity to recover their fair  
10 share.

11 Secondly, no gap was intended by Congress in passing  
12 the NGPA.

13 QUESTION: Mr. Taylor, it seems to me that you  
14 are arguing fair share, not conservation at all.

15 MR. TAYLOR: They are part and parcel of the same  
16 thing. Fair share is conservation. If you look at  
17 Mississippi Code, Section 5311 which is the Preamble to  
18 the Conservation Act, it says that it is the purpose and  
19 intent of this Act to insure and afford the opportunity  
20 of each owner in a common source of supply the opportunity  
21 to recover his fair share.

22 QUESTION: You may deem that conservation, but  
23 it doesn't sound like the Mississippi Supreme Court thought  
24 that, what conservation was.

25 MR. TAYLOR: Your Honor, they did. Conservation

1 is -- Part and parcel of conservation is preventing drainage,  
2 preventing unratable takes, preventing reservoir damage.  
3 The purpose of this rule is to allow each owner the mere  
4 opportunity to recover his fair share so this is not --

5 QUESTION: Mr. Taylor, your definition is quite  
6 different from the Mississippi Supreme Court. They seem  
7 to think that conservation is avoidance of waste and they  
8 say that it is difficult for us to see how there is a waste  
9 of natural resources when an interstate pipe line company  
10 refuses to take ratably or otherwise. Waste would seem  
11 to follow from taking too much, not too little.

12 MR. TAYLOR: But, if you don't --

13 QUESTION: Do you disagree with that?

14 MR. TAYLOR: I don't disagree with that but you  
15 have got to read the tail end of the opinion in which --  
16 First, they consider the constitutional questions, then they  
17 move to the legitimate state interest in connection with  
18 the commerce clause and there is no way to separate -- Waste  
19 is defined under Mississippi law as the non-ratable or dis-  
20 proportionate taking of gas so as to cause drainage.

21 If you get down to the point in the opinion in  
22 which Judge Robertson says we regard fairness as one of  
23 the more noble attributes of this rule. He cites Shell  
24 Oil Company versus James which is a drainage case and he  
25 says drainage is a phenomenon of life in the gas pool.

1 It must be prevented.

2 In other words, the purpose of the Conservation  
3 Act, one of the fundamental purposes, is to prevent drainage  
4 which gets me back to my gap argument.

5 QUESTION: That is only drainage as among owners,  
6 not drainage which would result in waste.

7 MR. TAYLOR: No, Your Honor. Waste is defined  
8 as some owners recovering -- Under Mississippi law some  
9 owners recovering more than their fair share because of  
10 non-ratable disproportionate takes of gas. And, it is this.  
11 You have several wells in a pool. In this case, you had  
12 Transco taking 100 percent from the Florida Gas wells and  
13 taking 40 percent from the Getty wells and it was undisputed  
14 in the record that drainage was occurring. Transco was taking  
15 indirectly by way of drainage what they refused to take  
16 directly. That is exactly what these ratable take require-  
17 ments in all of the oil and gas producing states -- and  
18 there is not a nickel's worth of difference between that  
19 fundamental requirement, whether it is in Colorado, whether  
20 it is in New Mexico, whether it is in Texas or whether it  
21 is in Louisiana. The purpose is to give the owners in the  
22 pool the opportunity to recover their fair share, which  
23 gets me back to the no-gap intended argument and you have  
24 to cross the Attleboro decision in covering the pre-emption  
25 question and the commerce clause.

1           In 1938, Congress wrote into law this Court's  
2 decision in the Attleboro line of cases which was that  
3 because of the commerce clause the states can't regulate  
4 these wholesales.

5           Congress came along and passed the Natural Gas  
6 Act, saying because the states can't do it because of the  
7 commerce clause, we are going to allow the Federal Power  
8 Commission to do it.

9           Ironically, after the Natural Gas Act was passed  
10 in 1938, this Court went off and abandoned that line of  
11 cases. And, the decision from a couple of terms ago in  
12 the Arkansas Electric Cooperative case makes it very clear  
13 that the Attleboro test has for all practical purposes been  
14 abandoned, the Pike test has been applied.

15           Now, we take that back to the NGPA. In other  
16 words, even in Phillips, this Court acknowledged that after  
17 Attleboro and after the Natural Gas Act was passed, the  
18 constitutional restrictions on the ability of the states  
19 to regulate activities that impacted interstate commerce  
20 had been loosened. It was recognized in Phillips and a  
21 perfect example is the Peerless case in which this Court  
22 upheld the ratable take minimum price order. There the  
23 State Conservation Commission fixed the price. This Court  
24 upheld that type order against a commerce clause challenge.

25           Now, bring it all into focus. The only barrier

1 before was the commerce clause, so we had the Natural Gas  
2 Act, Section 1(b) jurisdiction. The Court goes off and  
3 adopts the new Pike test.

4 We then come down the NGPA in which Congress eliminat  
5 the very Section 1(b) jurisdiction that was applied in  
6 Phillips which leaves us only with the commerce --

7 QUESTION: I am a little slower, I think, perhaps  
8 than you are, but I think you are arguing just commerce  
9 now and not pre-emption at all.

10 MR. TAYLOR: That is what I am bringing it all  
11 down to. You --

12 QUESTION: Do you think the two arguments merge  
13 or are quite the same? Peerless has nothing to do with  
14 pre-emption as I understand it.

15 MR. TAYLOR: Peerless had nothing to do with it.  
16 Peerless is an example of a court having abandoned the Attleboro  
17 test and applied the Pike test. In Peerless the Court cited  
18 South Carolina versus Barnwell and that line of cases as  
19 representing the more modern approach. And, if you look  
20 at Pike, that is the same test that the Court has applied  
21 under the commerce clause and that is exactly my point;  
22 that since the NGPA eliminated Section 1(b) jurisdiction  
23 which was a codification of Attleboro, since they eliminated  
24 that, there is no statutory pre-emption question. It is  
25 a question of the commerce clause.

1           If you apply the commerce clause test to Pike,  
2       which, under another name it was applied in Peerless, this  
3       simple state requirement passes that test, because there  
4       are strong interests in the state and it is consistent with  
5       the policy of Congress in encouraging more producers to  
6       get involved in the process of drilling more wells, discovering  
7       new gas, and offering that gas and making it available for  
8       sale in interstate commerce. That is all this rule does.  
9       It goes no further.

10           Let me turn to FERC's conflict claim with this  
11       perspective in mind. At the time of the Northern Natural  
12       decision, we had a pervasive scheme of federal regulations.  
13       Producers could not sell into interstate commerce without  
14       FERC authority. Pipe lines could not bid for gas, there  
15       were no deregulated sales. It was truly regulated from  
16       the well head to the burner tip.

17           It was because of that -- The Court in Northern  
18       Natural cites Attleboro and they rely on Section 1(b).  
19       They rely on Phillips. They say because of that pervasive  
20       scheme there is a likelihood or an imminent possibility  
21       of collision. If youi go back to Northern Natural, the  
22       Court did not require an actual conflict be shown. The  
23       recent decisions of this Court have made it clear that the  
24       Court is no longer content to settle for these speculative,  
25       hypothetical possibilities of collision which brings me to

1 FERC's position.

2 All they have been able to offer in the way of  
3 an alleged conflict is that this state requirement might  
4 in some way conflict with their Section 601(c) powers which  
5 is the power not to prevent somebody from buying gas, but  
6 the power to deny a pass-through of a payment for fraud  
7 or abuse. There is nothing about this requirement that  
8 prevents the exercise of that power. If they can, with  
9 a straight face, stand up here and claim that the payment  
10 of a market price is the result of fraud or abuse, then  
11 they have still got the power to deny the pass-through.  
12 The same holds true for the take or pay payments. If they  
13 claim that a take or pay payment that somebody makes and  
14 then tries to pass-through as the result of fraud or abuse,  
15 they can deny that pass-through which brings me to this  
16 closing point.

17 Without the protection of this simple rule --  
18 producers are not dumb. For the same considerations that  
19 they sought the protection of the intrastate market before  
20 the NGPA was passed, where they could get a better deal,  
21 they will seek the protection of an intrastate market in  
22 which they are not treated like this, in which the Coastals  
23 of the world, the one percent owners, whether they are pro-  
24 fessionals, whether they are farmers who have leased, will  
25 not be treated like this, or the state will resort to more

1 disruptive measures.

2 In other words, the state could come in and completely  
3 shut in the field until every owner had a contract signed  
4 up. It would be disruptive, but it would clearly be within  
5 the conservation powers to prevent waste. It will discourage  
6 producers from competing against one another.

7 Independents -- All the world of oil and gas is  
8 divided into independents and majors and if the independents  
9 end up with the contracts and the majors -- the majors are  
10 left with the contracts and the independents are left to  
11 scramble for themselves, they don't compete.

12 More fundamentally though, this practical observa-  
13 tion: If because of the NGPA a producer and a pipe line  
14 can agree like they did in the case of the Florida Gas contract,  
15 that we will take all owners' gas regardless of whether  
16 they are signed up and we will take their gas regularly,  
17 and there is nothing FERC can do to prevent that. If they  
18 can contract for that protection, which they can, and nobody  
19 denies it -- They did it in the Harkins contracts in the  
20 states, they did it in the Florida Gas contract, then there  
21 is nothing to prevent the state in the exercise of its  
22 conservation powers from stepping in and providing that  
23 minimal protection where the parties fail to agree.

24 One question has come up about, well, is there  
25 a better way that the states can handle this, the so-called

1 market demand allocation system. That is a gimmick and  
2 a game which Mississippi decided in 1948 that we are not  
3 going to play. It serves only one or two purposes, allowing  
4 the pipe lines to run the state allowable system or getting  
5 the state involved in a socio-economic decision that you  
6 pipe lines tell us how much gas you want to buy and we will  
7 dole it out among the different pools in the state. That  
8 is not a conservation function. The purpose of that rule  
9 is not to protect owners in a given pool from drainage and  
10 it is not to give owners in a pool an opportunity to sell.  
11 It gets the state intruding even more so into contractual  
12 affairs.

13 Mississippi has a pure allowable system and to  
14 the claims that the market demand allocation system is the  
15 best way to go, I refer the Court to the Texas Law Journal  
16 article which cites that the blue ribbon panel appointed  
17 by the Texas Railroad Commission to investigate the question  
18 of unratable takes found that under their own system of  
19 market demand allocations that unratable takes were still  
20 occurring.

21 While some people might think that that is the  
22 best way to go, Mississippi has chosen a pure allowable  
23 system in which, based on maximum efficient rate of flow  
24 of wells, they set the ceiling and the pipe lines are free  
25 to come in and take 100 percent, one percent, 50 percent,

1 they can vary their takes at noon and at midnight. They  
2 have the complete freedom on what their takes are going  
3 to be. The state is not involved in some game of manipulating  
4 and gerrymandering allowables.

5 Thank you, Your Honor. If there are no questions,  
6 the Attorney General would like to talk.

7 CHIEF JUSTICE BURGER: Mr. Noble?

8 ORAL ARGUMENT OF ED DAVIS NOBLE, JR., ESQ.

9 ON BEHALF OF THE APPELLEE

10 MR. NOBLE: Mr. Chief Justice, and may it please  
11 the Court:

12 My purpose is to explain what the legitimate state  
13 interest of the State of Mississippi is with its Rule 48.

14 We believe that it encourages the development  
15 of its natural gas by protecting the correlative interest  
16 of each owner, operator, and producer in a particular pool,  
17 but more importantly, Rule 48 also satisfies the statutory  
18 requirement that the Oil and Gas Board at least attempt  
19 to conserve the natural gas in the State of Mississippi;  
20 that is to prevent drainage as it has been defined by co-  
21 counsel, waste and reservoir damage caused by unratable  
22 and disproportionate withdrawals of gas.

23 The requirements of Rule 48, in effect, are practical  
24 and consistent with the congressional goals of the NGPA.  
25 And, in response to Justice O'Connor's question, it encourages

1 the participation of all the owners, operators, or producers  
2 in a particular field and encourages them to develop the  
3 state's natural resources by permitting just compensation  
4 for their efforts in the development at a fair and current  
5 price.

6 Now, if the primary objective of the NGPA is to  
7 increase the supply of natural gas in intrastate, then we  
8 say that 48 is consistent with the federal program. That  
9 is because it corrects what could be a potential market  
10 failure in the sales of gas at the well head in Mississippi.  
11 That can occur when you see a situation which we have and  
12 that is very few purchasers in a field where there are multiple  
13 owners, operators, and producers, thereby creating a market  
14 situation of perhaps less production and lower prices offered  
15 than would be in a perfectly competitive market.

16 Further, the producer would be without a purchaser  
17 and, therefore, would suffer a risk under the rule of capture  
18 which exists in oil and gas and that is he would see his  
19 property extracted without compensation, and, therefore,  
20 it would conflict with the rule and the law of correlative  
21 rights.

22 As this Court is aware, NGPA makes no provision  
23 for the protection of the small, independent, non-contracting  
24 owners. Well, Rule 48 provides for that such protection.  
25 It does so merely because it provides that if you participate

1 and if you do purchase the Rule only says that you must  
2 at least offer, no more than offer, to purchase the gas  
3 at a reasonable or current price.

4 Now, if --

5 QUESTION: That is even though there is no contract?

6 MR. NOBLE: That is if there is no contract, that  
7 is correct, Justice Rehnquist.

8 Let us assume that that particular owner, operator,  
9 or producer refuses, what can he do? Then he merely runs  
10 the risk of being able to recover his property; that is  
11 his oil or natural gas that he owns at a later date. Rule  
12 48 merely gives him the opportunity or protection of being  
13 able to recover during the purchase time at a fair rate.

14 If the producer is not permitted to purchase and  
15 to sell and to get his fair market price at the time in  
16 which the pipe line does, in fact, purchase, then there  
17 is a possibility that since he will not be compensated,  
18 then he would seek other markets in intrastate, thereby  
19 defeating the purpose of NGPA by reducing by whatever means  
20 the particular oil and gas which might flow into intrastate.

21 The State of Mississippi does not mandate taking  
22 by strict allowables or production. It is that the Oil  
23 and Gas Board sets maximum allowables for a specific period  
24 of time which means that if you do produce in the State  
25 of Mississippi you can take anywhere from the well being

1 shut in, that is zero, to the maximum allowable with would  
2 be 100 percent.

3 We would suggest to the Court that in doing so  
4 we have, in effect, a market. The producer is ready to  
5 surrender his gas to the pipe line. The pipe line determines  
6 what it wishes to take and if it takes within the allowables  
7 according to state law in a particular field, it may take  
8 from zero to 100 during that period of time.

9 So, we suggest --

10 QUESTION: May I ask you one question? I just  
11 want to be sure I understand correctly.

12 Under the Mississippi rule, must the pipe line  
13 pay the non-contract purchaser the same price that it pays  
14 the contract purchaser?

15 MR. NOBLE: No, sir.

16 QUESTION: You can have a price discrimination  
17 and there is no state problem with --

18 MR. NOBLE: That is right. As a matter of fact,  
19 so long as the state is assured that that person will receive  
20 his fair market price, we do not -- The State of Mississippi  
21 does not interfere in negotiations for what the price may  
22 be.

23 QUESTION: Well, does it at least insist that  
24 the price paid to the non-contract purchaser by the fair  
25 market price?

1 MR. NOBLE: If there is no contract, there is  
2 no take or pay.

3 QUESTION: I understand, but could they -- Say  
4 the market price is \$1.00 a thousand cubic feet or whatever  
5 it might be, could they just pay a nickel and would that  
6 satisfy the --

7 MR. NOBLE: No, sir. As the Supreme Court of  
8 the State of Mississippi said, at least that person should  
9 be assured of a fair market price for his gas.

10 In other words, at least, if the fair market price  
11 will not interfere with commerce or will not interfere with  
12 FERC -- Will not come into play with FERC, because all we  
13 are addressing is either market price or fair market price  
14 or below.

15 QUESTION: Well, the Supreme Court of Mississippi  
16 remanded the case to the trial court for determination of  
17 that issue, didn't it?

18 MR. NOBLE: It did, Mr. Justice Rehnquist.

19 QUESTION: So, we really don't know what price  
20 will finally be determined by the Mississippi State Court.

21 MR. NOBLE: That is correct, sir.

22 In allowing for a fair market price and creating  
23 a market in interstate commerce, we would also suggest that  
24 Rule 48 protects the consumer. That is all it says is that  
25 the owner, operator, or producer will have its opportunity

1 to be compensated and that there is no incidental hinderance  
2 to the market place because if, in fact, the end result  
3 of more production, more gas, will, in essence, create a  
4 market where there is by supply a lesser price at the well  
5 head to be paid by the consumer.

6 I would like to address another question posed  
7 by Justice O'Connor and that is what, if anything, would  
8 be the standard which might be or could be applied by the  
9 State of Mississippi or what should be applied?

10 We would suggest that the rule of the State of  
11 Mississippi is a fair one and is constitutional.

12 The import of NGPA is that there at least be a  
13 competitive market at the well head and it suggests that  
14 the Mississippi ratable take is a policy which is carefully  
15 calculated to reflect competitive markets.

16 I would suggest to the Court that this rule or  
17 any other rule would be a minimum interference with the  
18 participants at the market and particularly so that it would  
19 not injure the consumer or the public interest.

20 If there are no questions from the Court, thank  
21 you very much.

22 CHIEF JUSTICE BURGER: Do you have anything further,  
23 Mr. Grower?

24 MR. GROWER: Yes, Mr. Chief Justice, I am afraid  
25 I do.

1 ORAL ARGUMENT OF JOHN MARSHALL GROWER, ESQ.

2 ON BEHALF OF THE APPELLANT -- REBUTTAL

3 MR. GROWER: There are a number of matters that  
4 I would like to address, but I will try to address a few  
5 of them.

6 Let's first take the statement that Mississippi  
7 has not required Transco to purchase any gas. What kind  
8 of choice is that? We have got contracts that require <sup>us</sup> to  
9 take a minimum quantity of gas pursuant to the regulatory  
10 scheme under the NGA and the NGPA. We have got that gas  
11 to purchase to supply our customers' needs. That is part  
12 of the federal regulatory scheme.

13 All right. We don't have to buy that gas because  
14 of the State of Mississippi.

15 QUESTION: Why should the validity of the state's  
16 ratable take policy turn on the fortuity of whether your  
17 company enters into a take or pay contract?

18 MR. GROWER: Justice O'Connor, the take or pay  
19 contract has been a part of the regulatory scheme for almost  
20 50 years, since 1938 when the NGA came into effect. The  
21 contractual relationship between the producer and the pipe  
22 line's customer have been a part of this regulatory scheme.  
23 The pipe line must contract for supplies of gas. They are  
24 required by federal regulation to enter these contracts.

25 QUESTION: But, you are not required today, are

1 you, to enter into a take or pay contract for this kind  
2 of gas by any federal requirement that you do so?

3 MR. GROWER: Your Honor, that is correct, but  
4 at the time these contracts were entered into it was still  
5 part of the regulatory scheme recognized by the FERC and  
6 they had regulations dealing with the manner in which take  
7 or pay, the costs were passed on to the consumer.

8 QUESTION: Well, would the question be different  
9 here if these contracts, these take or pay contracts had  
10 been entered after the time that the FERC ceased to require  
11 them?

12 MR. GROWER: Well, if these contracts had no take  
13 or pay obligation, then there would be nothing to prevent  
14 the pipe line, if they had no minimum take requirements --  
15 You also may have minimum take requirements which require  
16 you to buy a certain amount of gas or pay for it, period,  
17 with no right to ever recoup it.

18 But, if there are no minimum take requirements,  
19 there is nothing to prevent the pipe lines from purchasing  
20 all of the gas because they don't have to take it.

21 QUESTION: What if they had take or pay contracts  
22 and there were clauses that were voluntarily entered into  
23 by the pipe line without any requirement that it do so from  
24 the federal government.

25 MR. GROWER: Well, if the Court please, the take

1 or pay problem today has been made a serious problem because  
2 of the extreme prices we have in the market.

3 QUESTION: Are you trying to answer my question?

4 MR. GROWER: Yes, sir, I am. And, the fact that  
5 there could have been contracts without take or pay, I just  
6 can't answer that directly, because there are contracts  
7 for take or pay and they were a part of the regulatory scheme  
8 and if there were no contracts with take or pay, then there  
9 would be nothing to prevent the pipe lines from purchasing  
10 this, because it would not increase their cost.

11 QUESTION: My question to you was if there were  
12 take or pay contracts voluntarily entered into by the pipe  
13 line company without any requirement they do so from the  
14 federal government.

15 MR. GROWER: Well, yes. There is not a requirement  
16 under the federal government, but it has been part of the  
17 regulatory scheme because --

18 QUESTION: What do you mean, part of the regulatory  
19 scheme if it is not a requirement?

20 MR. GROWER: It has been recognized as part of  
21 the regulatory scheme because the producers wanted to be  
22 assured that they would have a share of the market.

23 QUESTION: So, all you are saying is it was permitted

24 MR. GROWER: It was permitted because the producers  
25 wanted a share of the market and there would be no reason

1 for a producer to enter into a contract without some minimum  
2 take obligations because they would never have any assurance  
3 that the gas would ever be produced. It was a necessary  
4 part of the contractual process and because it was necessary  
5 it was recognized in the federal scheme.

6 CHIEF JUSTICE BURGER: Your time has expired.

7 QUESTION: Mr. Chief Justice, may I ask a question?

8 CHIEF JUSTICE BURGER: Yes. Justice Powell has  
9 one more question.

10 MR. GROWER: Yes, sir.

11 QUESTION: I think you undoubtedly, counsel, have  
12 answered this, but I am not entirely clear about it. It  
13 is agreed, I assume, that Section 601 of the 1978 Act  
14 removes well head sales, deep wells, 15,000 feet or under,  
15 from federal commission regulations.

16 MR. GROWER: It removes the price regulations.

17 QUESTION: Well --

18 MR. GROWER: It removes the price regulation,  
19 but it does not remove the regulation over the pipe line  
20 concerning the transportation and resale of that gas in  
21 interstate commerce and this was made clear, if the Court  
22 please, in Mid-Louisiana by Justice Stevens.

23 QUESTION: The Solicitor General's brief says  
24 the NGPA makes clear that Congress, in removing certain  
25 well head sales from the Commission's regulatory jurisdiction,

1 intended that they be deregulated.

2 MR. GROWER: As to price. I agree with that as  
3 to price.

4 QUESTION: Well, it doesn't say anything at this  
5 point in the brief about the price.

6 MR. GROWER: It changed --

7 QUESTION: Let me follow up with another question.

8 MR. GROWER: Yes, sir.

9 QUESTION: If it is deregulated, is it your position  
10 the state has no authority whatever to regulate this gas?

11 MR. GROWER: Yes, sir, and that has been so held.

12 QUESTION: Well, will that result in Transco being  
13 able to drain gas --

14 MR. GROWER: No, sir.

15 QUESTION: -- as it has been done in the past?

16 MR. GROWER: No, sir.

17 QUESTION: Who will control that?

18 MR. GROWER: The state still controls that, because  
19 they control what can be produced by these wells. It is  
20 only being drained because the state is permitting the  
21 producers to produce the gas.

22 QUESTION: If the ratable take rule doesn't apply,  
23 what will keep Transco from taking gas only from parties  
24 with whom it had contracts?

25 MR. GROWER: Transco does not determine how much

1 gas is delivered to it. It limits how much it can take.  
2 But, as to the amount, that is regulated by the state as  
3 to what can legally be produced.

4 Now, the regulation -- ratable take also implies  
5 and includes ratable production. The state can have  
6 jurisdiction and regulate production from the wells over  
7 the producer and this is what was said in Northern Natural;  
8 that you can require the producers to produce ratably and  
9 to share the market. This is the concept, if the Court  
10 please, of the market demand allocation. You are requiring  
11 the producers with the market to share their market and  
12 you are limiting their production to their share of the  
13 market. Thereby, you are eliminating the take or pay problem.  
14 By requiring the producer to share the market and to produce  
15 only their share of the market, you are taking care of the  
16 problems.

17 Pipe line doesn't regulate how much can be produced  
18 by the state.

19 QUESTION: May I repeat it once more?

20 MR. GROWER: Yes. I am sorry.

21 QUESTION: Is there any federal regulation that  
22 prevents Transco from doing what it was doing when the ratable  
23 take rule is applied here, that is drain gas from other  
24 producers, from other owners? Is there any regulation any-  
25 where that prevents that?

1 MR. GROWER: No, sir, because there is no regulation  
2 that deals with that, because, in the first place, I take  
3 issue with the premise that Transco is draining, because  
4 the producer is draining. The producer gets the gas, the  
5 producer gets the money. Transco is merely purchasing it.

6 They could take the same gas and the state could  
7 require that producer to share that market and to pay those  
8 proceeds to these other producers. I mean, that is a state  
9 function. That is regulation over the production and gathering  
10 of gas that has been traditional regulation that nobody  
11 contests the state has a right to.

12 QUESTION: I don't have any further questions.  
13 Thank you very much.

14 MR. GROWER: Thank you.

15 CHIEF JUSTICE BURGER: Thank you, gentlemen.

16 The case is submitted.

17 (Whereupon, at 1:50 p.m., the case in the  
18 above-entitled matter was submitted.)  
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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1076 - TRANSCONTINENTAL GAS PIPE LINE CORPORATION, Appellant v.

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STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., ET AL.

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BY Paul A. Richardson

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