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**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES**

**CAPTION:** NORTHWEST CENTRAL PIPELINE CORPORATION, Appellant  
V. STATE CORPORATION COMMISSION OF KANSAS, ET AL.

**CASE NO:** 86-1856

**PLACE:** WASHINGTON, D.C.

**DATE:** November 29, 1988

**PAGES:** 1 thru 55

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 NORTHWEST CENTRAL PIPELINE :  
4 CORPORATION, :  
5 Appellant :  
6 v. : No. 86-1856  
7 STATE CORPORATION COMMISSION OF :  
8 KANSAS, ET AL. :  
9 -----x

10 Washington, D.C.

11 Tuesday, November 29, 1988

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 10:05 o'clock a.m.

15 APPEARANCES:

16 HAROLD L. TALISMAN, ESQ., Washington, D.C.; on behalf of  
17 the Appellant.

18 FRANK A. CARO, JR., ESQ., General Counsel, Kansas  
19 Corporation Commission, Topeka, Kansas; on behalf of  
20 the Appellees.

21 MICHAEL R. LAZERWITZ, Assistant to the Solicitor General,  
22 Department of Justice, Washington, D.C.; as Amici  
23 Curiae supporting Appellees.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 86-1856, Northwest Central  
5 Pipeline Corporation v. The State Corporation Commission  
6 of Kansas.

7 Now, Mr. Talisman, you may proceed whenever  
8 you're ready.

9 ORAL ARGUMENT OF HAROLD L. TALISMAN

10 ON BEHALF OF THE APPELLANT

11 MR. TALISMAN: Mr. Chief Justice, may it  
12 please the Court:

13 This is another case involving a regulation of  
14 the Kansas Corporation Commission which is designed to  
15 alter the purchasing practices of interstate natural gas  
16 pipelines that are regulated under the Natural Gas Act.

17 I say it's another case because on two prior  
18 occasions, in 1958 in Cities Service Gas Company versus  
19 The Kansas Corporation Commission and in 1963 in  
20 Northern Natural Gas Company versus The Kansas  
21 Corporation Commission, this Court held invalid Kansas  
22 Corporation Commission regulations which intruded on  
23 federal regulation under the Natural Gas Act. There as  
24 here the Kansas Corporation Commission contended that  
25 those regulations were necessary for it to carry out its



1 functions in the regulation of production from Kansas  
2 fields.

3 In Northern Natural Gas Company, this Court  
4 squarely held that the Kansas Corporation Commission  
5 could not either directly or indirectly intrude on  
6 federal regulation of purchasing practices of interstate  
7 pipeline companies. And it therefore held that a Kansas  
8 regulation which had directed a pipeline company to take  
9 gas in a certain manner in that field to be invalid  
10 under the supremacy clause.

11 More recently, in 1986 in Transcontinental,  
12 this Court upheld and it reaffirmed the Northern Natural  
13 decision although the gas in that case was federally  
14 deregulated.

15 Since the gas in this case is old gas, gas  
16 that remains subject to federal regulation, it's our  
17 view that this case falls squarely within the confines  
18 of the Northern Natural decision and a fortiori,  
19 Transcontinental.

20 Now, the Kansas Commission contends they have  
21 -- that they have circumvented this Court's prohibitions  
22 in Northern Natural and in the Transco case because the  
23 regulation in this case is nominally addressed to  
24 producers. But the record shows clearly that the  
25 purpose and effect of the regulation is to alter the

1 purchasing practices of interstate pipelines. Indeed,  
2 it was justified on the basis that it would cause  
3 interstate pipelines to buy more Kansas gas at the  
4 expense of gas from other sources outside of Kansas on  
5 pain of suffering an economic penalty.

6 It's for this reason that we contend that the  
7 regulation in this case is the same type of case that we  
8 had in Northern Natural, but it's in sheep's clothing.

9 With that brief introduction, let me outline  
10 the facts. The regulation that we're talking about in  
11 this case applies to the Kansas Hugoton Field. It is  
12 one of the largest, if not the largest, gas field and  
13 one of the old gas fields in the United States.

14 Northwest Central is one of several interstate  
15 pipeline companies that purchased gas from the Kansas  
16 Hugoton Field under long-term contracts.

17 The natural gas pipeline companies that  
18 purchase gas in this field have invested hundreds of  
19 millions of dollars in pipeline facilities to take gas  
20 in the field. And those facilities were authorized by  
21 the Federal Energy Regulatory Commission upon a showing  
22 that there would be sufficient reserves to support the  
23 investments that were made.

24 The gas which Northwest Central and other  
25 pipelines take in this field is commingled with gas

1 which they take from other sources in other states.

2 This gas is transported and sold in interstate commerce  
3 to retail -- to distributors that resell the gas for  
4 ultimate consumption for residential, commercial and  
5 industrial use.

6 The rates that are charged by Northwest  
7 Central and other pipelines are regulated by the Federal  
8 Energy Regulatory Commission under the Natural Gas Act  
9 on a cost-of-service basis. And the cost to purchase  
10 gas is probably the -- no doubt the largest item in the  
11 cost of service, and the mix of gas affects that cost.  
12 And, therefore, the cost to purchase gas is subject to  
13 very, very close scrutiny by the Federal Energy  
14 Regulatory Commission including prudence reviews as to  
15 the mix of gas being used.

16 Now, the Kansas Commission has authority to  
17 regulate production in Kansas. Under Kansas law, the  
18 objective is for the regulation to provide that each  
19 owner in a common pool will get its fair share of the  
20 gas in place. So, the purpose of the law is not to  
21 promote Kansas gas, but rather to provide a basis upon  
22 -- in which each producer will get his share of the gas.

23 In doing that, Kansas establishes allowables  
24 for each well on a monthly basis. The allowables are  
25 basically a limit on how much well -- how much each well

1 can produce. And because wells in the Kansas Hugoton  
2 Field do not produce uniformly because the purchaser's  
3 requirements are for different or for other reasons,  
4 wells can either over-produce or under-produce. And  
5 where there is an accumulated underage, the underage is  
6 cancelled. But it is --

7 QUESTION: Mr. Talisman, excuse me. Could I  
8 ask a question at this point?

9 MR. TALISMAN: Yes.

10 QUESTION: You say the purpose is to give each  
11 producer his fair share of the --

12 MR. TALISMAN: Yes.

13 QUESTION: -- of the common pool of gas.

14 MR. TALISMAN: Yes.

15 QUESTION: Well, why couldn't fairness be  
16 decided on a -- on a first-take/first -- first win rule,  
17 whoever captures the gas is entitled to it, which is the  
18 way some other natural resources are by some states  
19 treated? Why can't Kansas say the fair rule is if  
20 you're all tapped into the same pool of gas, whoever  
21 takes it out gets it?

22 MR. TALISMAN: The -- the entire purpose of  
23 the -- of the Kansas statute was to amend the rule of  
24 capture. That is, the Kansas statute provide --  
25 basically it was to amend that provision and to -- to



1 obtain a method of allocation and production which would  
2 enable each party to take that out.

3 QUESTION: I understand that.

4 MR. TALISMAN: And the reason for that was --  
5 was that the view that the rule of capture would lead to  
6 -- to waste.

7 QUESTION: Well, they've changed their mind,  
8 and they're going closer back to a rule of capture.  
9 Would the rule of capture violate in and of itself the  
10 Natural Gas Act?

11 MR. TALISMAN: Well, if -- if there was a rule  
12 of capture under the -- if you were to, say, repeal the  
13 Act and go back to the rule of capture -- just take that  
14 as an illustration -- in that event there wouldn't be  
15 any restriction on our producers in producing later on.  
16 There would be no limits on what they could produce in  
17 order to catch up.

18 But Kansas hasn't repealed the statute. What  
19 Kansas is doing is continuing the process of having  
20 allowables, but what it's saying is that the  
21 reinstatement provision, the provision that has existed  
22 previously in the law, that permits a producer who was  
23 underproduced an opportunity to get the allowables that  
24 were cancelled reinstated so it could catch up and get  
25 its fair share of the gas, that that no longer will

1 exist.

2 And the purpose of that, the clear purpose as  
3 shown by the -- by the record in this case -- the clear  
4 purpose of their doing that was basically to confront  
5 the interstate pipeline companies with a Hobson's  
6 choice. Either they had to start taking more gas out of  
7 the Kansas Hugoton Field under the timetable that Kansas  
8 wanted us to take it out of the field, or else they  
9 would forego their contractual opportunities to take  
10 that gas at a -- at a -- at a later time.

11 QUESTION: I understand that, but before we  
12 get to whether the purpose invalidates it, I'm trying to  
13 -- trying to establish whether you assert that the mere  
14 fact of the rule that they have, regardless of its  
15 purpose, invalidates it. I don't see how their rule is  
16 any worse than a rule of capture. You acknowledge a  
17 rule of capture would be all right, in and of itself --

18 MR. TALISMAN: Well --

19 QUESTION: -- not -- not looking to its  
20 purpose.

21 MR. TALISMAN: Well, I -- I don't know that --  
22 and I think you have to look at its purpose. But --

23 QUESTION: Let's leave that for the moment.

24 MR. TALISMAN: -- if there was a --

25 QUESTION: Would a rule of capture be all

1 right?

2 MR. TALISMAN: Not if it --

3 QUESTION: Apart from purpose. Apart from  
4 purpose.

5 MR. TALISMAN: A rule of -- I assume that a  
6 state is not required to impose a law which regulates  
7 taking of gas from a field.

8 QUESTION: All right. Now -- now, is this any  
9 worse than a rule of capture? Surely it's no worse.

10 MR. TALISMAN: In some ways, yes, I think it  
11 is.

12 QUESTION: How is it worse? It seems to me  
13 that --

14 MR. TALISMAN: Well, because --

15 QUESTION: -- all this rule says is that  
16 whatever you take out -- If somebody else takes out more  
17 this year than you do --

18 MR. TALISMAN: Yes.

19 QUESTION: -- you won't be able to make up  
20 that next year. That's all. That's all it says, isn't  
21 it?

22 MR. TALISMAN: Justice Scalia, here's why I  
23 think it's worse. If you had a rule of capture, there  
24 would be no limit, for example, on the producers  
25 connected to our pipeline and producing gas in the

1 future in order to try to recapture their share of the  
2 gas. But under the -- under the regulation --

3 QUESTION: There would be if somebody took out  
4 the entire -- the entire pool this year, wouldn't there?  
5 There would be nothing left.

6 MR. TALISMAN: Well, certainly if that were  
7 the case in that extreme situation, there would be --  
8 would be nothing left.

9 QUESTION: Whereas in this case, they can't  
10 take everything out. There is some limit set, and the  
11 only difference is if you don't take out that amount  
12 this year, you won't have a right to make it up next  
13 year. I don't see how that's any worse than a rule of  
14 capture.

15 MR. TALISMAN: Well, because -- because the  
16 intent of the statute is that you be permitted to take  
17 your fair share of the gas. And once they're  
18 regulating, the way in which they regulate has to be a  
19 way which is not intended to interfere with the  
20 purchasing mix regulation under the Natural Gas Act.

21 QUESTION: (Inaudible).

22 MR. TALISMAN: Once they assume the job of  
23 regulating --

24 QUESTION: Mr. Talisman?

25 MR. TALISMAN: -- they have to do it in a way



1 which does not interfere with federal regulation.

2 QUESTION: Mr. Talisman, don't all state  
3 regulations such as numbers and spacing of wells and  
4 other safety regulations also affect in a sense the  
5 interstate mix of gas?

6 MR. TALISMAN: Justice O'Connor, they probably  
7 have some incidental effect, and that was considered --

8 QUESTION: Well, there's no doubt they do.

9 MR. TALISMAN: -- that was considered in the  
10 Northern decision. In fact, that was discussed in the  
11 dissent in the Northern --

12 QUESTION: It just seems to me allowables are  
13 -- are more on the order of that kind of traditional  
14 state regulation.

15 MR. TALISMAN: Well, I agree that allowables  
16 are under traditional state regulation, but you have to  
17 look at the central purpose of the regulation that's  
18 being adopted. It's the same kind of test that the  
19 Court adopted in the Schneidewind case, and that is you  
20 have to look at the central purpose of what they're  
21 doing. And here the record is absolutely clear -- no  
22 question -- that the purpose of this regulation, its  
23 central purpose, was to cause interstate pipelines to  
24 take gas out at a faster rate on the timetable  
25 prescribed by the state because --

1 QUESTION: Well, don't you think --

2 MR. TALISMAN: -- because they --

3 QUESTION: -- we have to look at what Congress  
4 intended?

5 MR. TALISMAN: You have to look at what  
6 Congress --

7 QUESTION: Don't we have to --

8 MR. TALISMAN: Yes.

9 QUESTION: -- determine --

10 MR. TALISMAN: Yes.

11 QUESTION: -- whether Congress intended to  
12 allow the states to take this role?

13 MR. TALISMAN: Yes. And -- and -- and that  
14 was --

15 QUESTION: And under Silkwood, pervasive  
16 regulation alone doesn't tell us that.

17 MR. TALISMAN: Yes.

18 QUESTION: And we do have some indications  
19 that Congress did, indeed, intend states to have some  
20 role in regulating the production of gas.

21 MR. TALISMAN: Yes, and we don't contend  
22 otherwise. What we do contend, however, that in  
23 conducting that -- in that sphere of regulation, which  
24 is within their jurisdiction, they cannot do it in a way  
25 which interferes with --

1 QUESTION: Do other states have --

2 MR. TALISMAN: -- federal regulation.

3 QUESTION: -- similar regulations that require  
4 gas to be taken or lost?

5 MR. TALISMAN: Other states --

6 QUESTION: (Inaudible).

7 MR. TALISMAN: Other -- other -- other states  
8 have cancellation provisions.

9 QUESTION: Right.

10 MR. TALISMAN: But -- but they -- but one big  
11 difference between the way in which they have regulated  
12 and the way Kansas has regulated is they have fixed  
13 allowables from a very close relationship to the actual  
14 market demand from the field. What Kansas has done for  
15 a great many years is to fix allowables far above what  
16 is the actual demand for the field, and what that has  
17 done -- that -- and that was done to try to induce  
18 pipelines to take more gas out of the field because they  
19 were dissatisfied with what pipelines -- the amount they  
20 were taking. They wanted them to take more from Kansas.

21 Now, what that did is that led to a disparity,  
22 a substantial disparity, between those wells which were  
23 underproduced and those wells which were overproduced.  
24 And the overproduced wells were generally tied to the  
25 intrastate Kansas buyer, whereas the underproduced wells

1 were tied to interstate pipelines.

2 Now, having created this great disparity, they  
3 then came in and said, well, that didn't work. We  
4 didn't get -- we didn't induce more takes that way. Now  
5 we're coming up with what Chief Justice Schroeder of the  
6 Kansas Supreme Court said in his dissent. Now we're  
7 coming up with the ultimate weapon, and that is, now  
8 we're going to say if you don't take these underages  
9 which have accumulated based on their allowances which  
10 are too -- were too high, you're going to lose the right  
11 to obtain these in the future.

12 And so, he basically was giving the pipelines  
13 -- they have been basically giving the pipelines a -- a  
14 -- a Hobson's choice: either they start taking gas out  
15 on the timetable prescribed by Kansas or -- and which  
16 means we can't take gas from other states -- we'd have  
17 to cut back there on the basis we're doing it -- or else  
18 we lose the right to buy this gas in the future.

19 Now, the order, as I say, was nominally  
20 addressed to the producer.

21 QUESTION: Well, you don't argue for a rule of  
22 capture.

23 MR. TALISMAN: No.

24 QUESTION: And you don't argue against the old  
25 allowable system.



1 MR. TALISMAN: No.

2 QUESTION: You argue against the new allowable  
3 system because in part it's inconsistent with your  
4 take-or-pay provisions in other states.

5 MR. TALISMAN: Well, it's -- it's -- what it  
6 does is it interferes with the purchasing mix under  
7 regulation by the Commission. Let me give you an  
8 example.

9 QUESTION: You don't -- you don't say it has  
10 no relation to conservation purposes, do you?

11 MR. TALISMAN: We feel it does not.

12 QUESTION: It has no relation to  
13 conservation --

14 MR. TALISMAN: No.

15 QUESTION: -- purposes at all.

16 MR. TALISMAN: No.

17 QUESTION: Cannot -- cannot --

18 MR. TALISMAN: It doesn't -- It doesn't make  
19 sense to us to -- to say to people who are underproduced  
20 that we're going to cancel the underages and not permit  
21 you to catch up. Now --

22 QUESTION: That's -- that's given this market.

23 MR. TALISMAN: In -- in the -- in this  
24 situation. Now, I think --

25 QUESTION: I take it -- I take it if the price

1 of gas radically escalated, that the case would be  
2 different, wouldn't it?

3 MR. TALISMAN: Well, if the markets improved.

4 QUESTION: It would be a much different case.

5 MR. TALISMAN: We -- we would -- we would be  
6 able to take perhaps this gas. In fact, that's what  
7 we're saying. In the 1970s when there were very strong  
8 markets, the interstate pipeline companies were able to  
9 take greater volumes of gas, and many of the underages  
10 that had accumulated before that time were taken. And  
11 -- and so, the natural flow of the market was permitted  
12 to operate, and we did. The producers connected to us  
13 were able to basically produce the underages, a great  
14 many of their underages.

15 QUESTION: So, then Kansas -- so, then Kansas  
16 has to change its scheme every time the interstate  
17 market changes.

18 MR. TALISMAN: No, it doesn't have to change  
19 its scheme. I'm saying simply that what they -- what  
20 they should have done was let the thing alone, but they  
21 should not basically introduce regulations that are  
22 intended to mix into the purchase mix for pipelines.  
23 And I --

24 QUESTION: I don't quite understand your  
25 overriding principle. If you said that Kansas simply

1 has no jurisdiction to do this and it has to be a law of  
2 capture and the federal government has to regulate it,  
3 fine. But you want a very precise kind of regulation  
4 that benefits you.

5 MR. TALISMAN: No. What we're saying in  
6 effect is that if the central purpose of the regulation  
7 is to change the purchasing mix of pipelines, that is a  
8 -- a area which is preempted under the Natural Gas Act.

9 QUESTION: Well, I -- I would think that you  
10 would make the same argument if a state which has the  
11 rule of capture, if any of them does, suddenly changed  
12 to a -- a proration, an allowable system, because then  
13 you are -- you are just invalidating the rule of  
14 capture. And surely your so-called mix would change when  
15 you shifted from capture to proration. I don't see how  
16 you can possibly --

17 MR. TALISMAN: I would --

18 QUESTION: -- accept just an ordinary  
19 proration order then.

20 MR. TALISMAN: I would -- I would say that if  
21 a state adopted a -- a -- went from a rule of capture to  
22 a proration plan, that it would be our -- and if the  
23 central purpose of that was to prevent waste and to  
24 assure that people got their fair share of the gas, we  
25 would consider that to be a legitimate function of the

1 state within --

2 QUESTION: Well, I know but --

3 MR. TALISMAN: -- within the producing --

4 QUESTION: Well, I know but -- but you could  
5 make the same argument there that the purpose of the  
6 state was to -- was to prevent the producers from  
7 producing from Oklahoma in the Hugoton Field instead of  
8 Kansas.

9 MR. TALISMAN: Yes. And if there's -- if the  
10 -- if the intent was to interfere with the purchasing  
11 mix of pipelines, I would say that that would be a --

12 QUESTION: And I don't see --

13 MR. TALISMAN: -- that would be preempted.

14 QUESTION: And I would -- I would -- I would  
15 think that Kansas wouldn't be prevented from having a  
16 proration system from the outset where no underages  
17 would accumulate. They just -- if you didn't produce  
18 your -- your allowable, that's just too bad.

19 MR. TALISMAN: Yes, but the -- but the --

20 QUESTION: Isn't that right?

21 MR. TALISMAN: Well, there are other states  
22 that have that system, and in -- in --

23 QUESTION: Well, you don't say that's  
24 unconstitutional, do you?

25 MR. TALISMAN: Well, if -- if the way they use



1 it is the way to influence the purchasing mix, yes. But  
2 if -- but where you have a situation like you have in  
3 Kansas where they have had fixed market demand --  
4 allowables far in excess of the actual market to create  
5 this sort of excess amount of allowables, and then say  
6 now if you don't take all of this within a certain  
7 period of time, you're going to be -- you're going to  
8 lose all that, that opportunity to take that, that is  
9 attempting to interfere with the purchasing mix.

10 And it was clear from the record. The witness  
11 who sponsored the exhibit said and testified  
12 unequivocally that -- that the purpose of the regulation  
13 was to induce pipelines to take greater volumes from the  
14 Kansas Hugoton Field given the limited market.

15 And the -- the Kansas District Court in its  
16 decision said that this regulation will cause a loss --  
17 permanent loss of underages and change the mix of  
18 pipelines which are transporting gas miles away. And  
19 the Supreme Court of Kansas in its majority decision  
20 said that this order gives us pause. It's obviously  
21 intended for the pipelines.

22 And -- and it's for this reason we say this  
23 case falls within Northern Natural.

24 QUESTION: But it was still --

25 MR. TALISMAN: We don't believe the mere

1 fact --

2 QUESTION: It was still a regulation of  
3 production. It has just had this consequence on --

4 MR. TALISMAN: Yes, well, you're not -- but  
5 you cannot use -- you cannot regulate in production in a  
6 way which interferes with federal regulation. In  
7 Mississippi Power --

8 QUESTION: No. Anytime you regulate  
9 production, you're going to have an impact on --

10 MR. TALISMAN: Well, but it's the question of  
11 -- and I -- I go back to the question of what is the  
12 central objective of the regulation. If the central  
13 objective -- and that is clear on the record here. If  
14 the central objective of the regulation is to basically  
15 change the mix for pipelines, that's a precluded area.

16 QUESTION: Well, what is your preemption? Is  
17 it that it interferes with the jurisdiction of the  
18 Energy Commission?

19 MR. TALISMAN: Yes.

20 QUESTION: Or is it just that there's such a  
21 pervasive federal regulation that the states just can't  
22 do anything that has an effect on the price of gas or  
23 that -- or the -- or the purchasing practices of the  
24 pipelines?

25 MR. TALISMAN: What I'm saying -- what I'm

1 saying is is that they cannot regulate in an area which  
2 its intended purpose is to change the mix of pipelines.  
3 In Northern, this Court held squarely that that was a  
4 field occupied under the Natural Gas Act.

5 QUESTION: (Inaudible).

6 QUESTION: (Inaudible).

7 MR. TALISMAN: And that applies -- and that  
8 applies to this case as well.

9 QUESTION: Under your view what's left of the  
10 reservation of the authority in the Act that says the  
11 states can regulate the production in gathering?

12 MR. TALISMAN: Well, we think a great deal is  
13 left. We have indicated in our -- in our briefs that  
14 there are actions which they could take to bring the  
15 field into balance. They could, for example, fix  
16 allowables which are more nearly in line with what's  
17 going on in the market.

18 QUESTION: But anything -- anything directed  
19 by its terms to regulate production or gathering is bad  
20 if there's an attempt to -- to influence the purchasers?

21 MR. TALISMAN: If -- if -- if what they're  
22 doing is trying to regulate the takes from the field of  
23 the purchasers in terms of trying to change their mix,  
24 yes. We contend that that's preempted under the Natural  
25 Gas Act --

1 QUESTION: So, then you --

2 MR. TALISMAN: -- for the same reasons this  
3 Court held to in Northern.

4 QUESTION: So, then you take the position that  
5 the state must take interstate commerce and interstate  
6 markets into account.

7 MR. TALISMAN: Well --

8 QUESTION: Which is precisely the opposite of  
9 what I thought our Commerce Clause cases --

10 MR. TALISMAN: No. I don't say that it must  
11 take that into account. I -- I say that it cannot issue  
12 a regulation which is intended to change the mix.

13 Let me show you the conflict here. While this  
14 -- after our notice of appeal was filed in this case, in  
15 fact, after our initial brief was filed, the Federal  
16 Energy Regulatory Commission issued an order concluding a  
17 long proceeding relating to the purchase mix of  
18 Northwest Central Pipeline Corporation. The Kansas  
19 Corporation Commission was an intervenor in that case.  
20 And a number of parties presented their views as to what  
21 the purchase mix of the company should be, including  
22 some parties saying that they thought that we should be  
23 taking greater amounts of gas from the Kansas Hugoton  
24 Field.

25 And -- and the Commission heard these various

1 claims. There was a pretty extensive hearing,  
2 administrative law judge's decision. And the Commission  
3 concluded that it rejected the proposals of parties that  
4 more gas should be taken from the Kansas Hugoton Field  
5 and it approved as prudent the purchasing mix being used  
6 by the company.

7 And the -- the mix being used by the company  
8 was to take a mix of low-priced and high-priced gas and  
9 to blend it together and to try to arrive at a target  
10 market price which would enable it to compete against  
11 alternative fuels. And by not taking all of the Kansas  
12 Hugoton gas, which was lower priced, and reserving that  
13 for mixing with some of the higher priced gas for future  
14 use, the company was able to be able to reserve some to  
15 be competitive in the future. And it was able also to  
16 avoid incurring payments for gas not taken in other  
17 areas.

18 Now, the record in that case showed that had  
19 we taken the volumes of gas from the Kansas Hugoton  
20 Field that the parties wanted us to take, we would have  
21 incurred some \$77 million of take-or-pay payments in  
22 just a period of eight months. And the Commission found  
23 this -- found what we were doing to be prudent.

24 Now, we see this as --

25 QUESTION: Well, has that got any impact on



1 this case?

2 MR. TALISMAN: Yes, because what -- what we  
3 have, therefore, is a sort of a -- what as I see as a --  
4 an obstacle between the program that Kansas wants and  
5 the program that the Corporation Commission --

6 QUESTION: Well, you mean -- but is -- is that  
7 company that you mentioned -- is that a party here?

8 MR. TALISMAN: That's our company.

9 QUESTION: That's your company.

10 MR. TALISMAN: Yes.

11 QUESTION: But then is it your argument now  
12 simply that this -- this Kansas system is invalid as  
13 applied?

14 MR. TALISMAN: No. I'm saying that --

15 QUESTION: You're saying -- your argument --

16 MR. TALISMAN: We're saying -- I'm -- I'm --

17 QUESTION: -- is that it's just plain invalid.

18 MR. TALISMAN: I'm just giving you an  
19 illustration of how you have a conflict. The conflict  
20 is that we can't obviously comply with both programs.  
21 We can't take gas out in the mix which has been approved.

22 QUESTION: Well, that's quite a different  
23 argument. You're saying now that it's inconsistent with  
24 a Energy Commission order.

25 MR. TALISMAN: I'm saying that -- that -- that

1 it shows that there is an obstacle, that it presents an  
2 obstacle to following the mixes that are approved by the  
3 Commission.

4 And the Kansas Commission intervened in that  
5 case so that it seems to me that if -- if Kansas can do  
6 this, so can other states which would try to issue  
7 regulations which will favor them in terms of your  
8 taking gas. And if you have that, then what you're  
9 going to have is a situation where the kind of  
10 uniformity of regulation that was --

11 QUESTION: Well --

12 MR. TALISMAN: -- intended under the Natural  
13 Gas Act --

14 QUESTION: The Commission doesn't --

15 MR. TALISMAN: -- would be destroyed.

16 QUESTION: The Commission doesn't seem to  
17 think that -- that this system is inconsistent with any  
18 orders of it.

19 MR. TALISMAN: Well, the --

20 QUESTION: Does it? Does it?

21 MR. TALISMAN: The Commission is now  
22 supporting the Kansas position. Earlier it filed a  
23 brief in which it contended that the Kansas order was  
24 preempted.

25 QUESTION: Well, yes, but -- but I would --

1 MR. TALISMAN: Now, the --

2 QUESTION: I would think they know -- they  
3 would know better than we would whether -- whether the  
4 order -- the prudent -- the order that you mentioned as  
5 being prudent that says your practices were prudent --  
6 they would know whether that is inconsistent with the  
7 Kansas system. They say it isn't.

8 MR. TALISMAN: Well, I don't -- I don't  
9 believe that if you -- that you can square their  
10 position with that order. The -- the order disapproved  
11 proposals to take more gas from the Kansas Hugoton  
12 Field, and basically approved as prudent the purchase  
13 mix obtained by the companies. I don't believe you can  
14 square their position in this case that there's no --

15 QUESTION: That order -- that order was  
16 entered after you filed your initial brief?

17 MR. TALISMAN: After the initial brief, but we  
18 refer to it in our reply brief.

19 QUESTION: In your reply brief.

20 MR. TALISMAN: Yes.

21 If there are no further questions, I'll close  
22 at this point.

23 QUESTION: Very well, Mr. Talisman.

24 Mr. Caro, we'll hear from you now.

25 ORAL ARGUMENT OF FRANK A. CARO, JR.

1 CN BEHALF OF THE APPELLEES

2 MR. CARD: Mr. Chief Justice, may it please  
3 the Court:

4 The purpose of my argument is to show that the  
5 Kansas Corporation Commission's order amending paragraph  
6 P of the basic proration order for the Kansas Hugoton  
7 Field was an exercise of the state's legitimate interest  
8 to conserve its natural resources by preventing waste  
9 from occurring in the field and in protecting  
10 correlative rights of adjoining leaseholders in that  
11 field.

12 Second, the action of the Kansas Commission --  
13 the action the Kansas Commission took fits squarely  
14 within the production and gathering exemption of the  
15 Natural Gas Act.

16 And finally, the effect of the Kansas  
17 Commission's order does not interfere with the  
18 comprehensive federal regulatory scheme, nor does it  
19 unconstitutionally burden interstate commerce.

20 The problem in the field, in the Kansas  
21 Hugoton Field, was that the field was out of balance.  
22 Pressures in the Kansas Hugoton Field indicated that gas  
23 was draining from a non-producing well to the producing  
24 well. The reason for that is that when a well is not  
25 producing or is shut in, pressures accumulate in that

1 well. Gas migrates in the field -- in a common source  
2 of supply in this field, in the Kansas Hugoton Field,  
3 from a high pressure zone to a low pressure zone, the  
4 low pressure zone being the area in which the well is  
5 timely producing its allowables.

6 That's what was happening here in the Kansas  
7 -- in the Kansas Hugoton Field. The field was being  
8 used as a storage facility. Some producers were not  
9 timely producing their production allowable, and by not  
10 timely producing that production allowable, it was  
11 causing the drainage of that gas from the high pressure  
12 area, from the shut-in well area, to the low pressure  
13 area which was violating correlative rights and causing  
14 waste to occur in the field.

15 The Commission --

16 QUESTION: I don't understand that. Why isn't  
17 that its own punishment? If you don't produce, the gas  
18 goes away from your well. Why does the state have to --  
19 I mean, that's its own punishment. Why isn't that alone  
20 enough to induce somebody to produce?

21 MR. CARO: Because -- because of the  
22 Commission's decisions or the Commission's action prior  
23 to the amendment of paragraph P, it gave these producers  
24 the right to bank these allowables or to bank these non-  
25 -- these non-produced allowables or these underages



1     indefinitely. These -- the producers in the field  
2     thought that they could accumulate these unproduced  
3     allowables and at a later date come in and produce them.

4             QUESTION: What if I don't believe all that,  
5     Mr. Caro? What if I think Kansas really did this just  
6     to get more gas produced in Kansas --

7             MR. CARO: Justice --

8             QUESTION: -- and make more money for Kansans?  
9     Suppose I think that was the whole purpose of this? Do  
10    you lose? You concede that you lose?

11            MR. CARO: No. No, we don't. I think -- I  
12    think it's important to understand that what the Kansas  
13    Commission did was encourage the timely production of  
14    those allowables because only through timely producing  
15    those allowables -- producing those allowables pursuant  
16    to the proration order -- in other words, making sure  
17    that each well produces its fair share of the gas in  
18    conjunction with other wells that are producing in the  
19    field.

20            And it's only -- when you -- when you let them  
21    do that, when those wells produce in a timely manner,  
22    when -- when you encourage the timely production of  
23    those allowables does the field become back -- get back  
24    into balance. And when the field is back into --

25            QUESTION: Well, suppose -- suppose your

1 statute said In order to ensure that Kansas has a  
2 greater share of the interstate market, the following  
3 rule is enacted. It's the same as Justice Scalia's  
4 question. Suppose we find that the purpose is to favor  
5 Kansas producers and Kansas consumers. Then what?

6 MR. CARD: Well --

7 QUESTION: Do you automatically lose?

8 MR. CARD: That's not -- that's -- I know I'm  
9 not answering your question.

10 QUESTION: I know it's not that case.

11 MR. CARD: This is not --

12 QUESTION: But it tests the legal proposition  
13 which is what we're here for. Do you lose in that case?

14 MR. CARD: I think we lose in that case. The  
15 problem is that that's not what happened here.

16 QUESTION: Even though the --

17 MR. CARD: We have to look --

18 QUESTION: Even though the statute says that  
19 you can regulate production?

20 MR. CARD: What we need to look at is the  
21 reason why Kansas is -- is doing what it's doing.

22 QUESTION: What you're saying is that that's  
23 not the purpose.

24 MR. CARD: The purpose -- we need to look at  
25 why --

1                   QUESTION: Why -- why do you need to look at  
2 the purpose when the statute says you can regulate  
3 production and gathering?

4                   MR. CARD: Mr. Chief Justice, because I think  
5 if -- we're not forcing more Kansas gas on -- on the  
6 interstate markets. That -- we're encouraging the  
7 production, the timely production, of those allowables.  
8 Yes, more gas is going -- may go to the interstate  
9 markets. More gas may be produced in Kansas. And it  
10 may go into the interstate markets as a result of the  
11 Kansas Commission's order.

12                   But this order does not force the pipelines to  
13 take more gas. It does not force the Appellants to take  
14 more gas out of the field. It merely encourages the  
15 timely production.

16                   And that -- and it only does that to bring the  
17 field back into balance. We saw that waste was  
18 occurring. Waste was occurring in the field, that --  
19 that uncompensated drainage from the non-producing wells  
20 to the producing wells was occurring. And by giving  
21 them an incentive -- by giving a producer an incentive  
22 to timely produce that gas, to timely produce the  
23 allowable that's assigned to them do we -- do we bring  
24 the field back into balance in the long run. And that's  
25 the -- that's the purpose of the Commission's order.

1 QUESTION: Do we look to the legislative  
2 history? I mean if you say purpose is crucial, I  
3 suppose we have to look to the legislative history. And  
4 it really comes down to whether we believe Mr. Talisman  
5 or whether we believe you as to what the purpose was.  
6 Right?

7 MR. CARD: The purpose of the Kansas  
8 Commission's order?

9 QUESTION: Right, right. We sort of sit as a  
10 jury to decide what the purpose was, and if we -- if we  
11 agree with Mr. Talisman, then you lose.

12 MR. CARD: No. I think if you look at what  
13 Mr. -- what the Appellant is saying is that it's not --  
14 it's not true. We're not forcing -- we're not -- the  
15 reason we're forcing more Kansas gas to be produced, the  
16 reason we're encouraging timely production of that  
17 allowable is to bring the field back into balance, to  
18 conserve the natural resources in the field, to protect  
19 correlative rights and prevent waste from occurring.  
20 That's what the problem was. The Commission in its  
21 expertise found that to be the problem that was  
22 occurring in the field.

23 As I said --

24 QUESTION: One -- one more point. Do you  
25 agree with the characterization of the petitioners or

1 the Appellants that the Kansas Supreme Court held that  
2 the purpose of this regulation was to increase Kansas'  
3 share of interstate gas?

4 MR. CARD: I don't believe they said it was to  
5 increase Kansas' share of interstate gas. What they  
6 said is that -- to increase the production of gas from  
7 the Kansas Hugoton Field, and that it was the purpose to  
8 encourage the timely production of that gas because by  
9 -- by these producers not producing, by the pipelines  
10 not taking the gas in the field, it was causing a  
11 problem.

12 And the Commission had to address that  
13 problem. If we didn't address the problem, the field  
14 would become out of balance, waste would occur and,  
15 therefore, we wouldn't be conserving our -- the natural  
16 resources in the field.

17 The second thing to look at is this order is  
18 no different than any -- than what any other state does.  
19 The two largest states in the -- the two largest natural  
20 gas producing states in the country --

21 QUESTION: Is Northwest a producer?

22 MR. CARD: Northwest Central is a interstate  
23 pipeline.

24 QUESTION: And it -- it just buys from  
25 producers.



1 MR. CARD: It buys from producers in the -- in  
2 the field.

3 QUESTION: And -- and so it complains because  
4 this rule has an effect on it.

5 MR. CARD: It complains because it -- it says  
6 that this rule is going to have an effect on them. It's  
7 going to affect the price that they ultimately charge  
8 for their gas because they believe that they're going to  
9 have to take less from -- take less of these high  
10 take-or-pay contracts, these private contractual  
11 agreements that they've entered into that the state --  
12 that they believe the state ought to consider when it --  
13 when it wants to adjust the allowable formula in the  
14 field.

15 QUESTION: What is your -- if you'd tell me.  
16 Do you think that this -- this order of the Commission  
17 that was entered after the filing of the Initial brief  
18 here -- do you think that order has any impact on this  
19 case?

20 MR. CARD: The order of the FERC?

21 QUESTION: No, no, of the Federal -- the  
22 Energy Commission.

23 MR. CARD: The order of the Federal Energy  
24 Regulatory Commission has no impact on this case.

25 What -- what FERC does is to look at whether

1 the purchasing practices of -- of the Appellant were  
2 prudent in light of the -- in light of the state  
3 regulatory scheme, in light of -- in light of all of the  
4 situations faced -- facing that pipeline. I think that  
5 if this Court upholds this decision, it's not going to  
6 affect what -- how FERC looks at it. FERC's own brief  
7 indicates that.

8 QUESTION: Well, the purchasing practice,  
9 though, that FERC said was -- was prudent -- can it any  
10 longer be followed in light of the Kansas scheme?

11 MR. CARD: Yes, it can, Justice. I believe  
12 that order came out in late 1988. The Commission's --  
13 the Kansas Commission's order took effect in 1983.

14 QUESTION: I know.

15 MR. CARD: So, I believe it may have even --  
16 it may even consider the -- the state regulatory scheme  
17 in effect in Kansas just like it also considers the  
18 state regulatory schemes in effect in Oklahoma, in Texas  
19 and other states --

20 QUESTION: So, the producers have had to  
21 comply with -- with this 1983 order all these years?

22 MR. CARD: They have -- they have had to  
23 comply.

24 QUESTION: Or was it -- or was it stayed?

25 MR. CARD: No. This order has not been

1 stayed. It has been moved back -- the implementation of  
2 it. What the order did -- it said that --

3 QUESTION: Moved back to when?

4 MR. CARD: To I believe 1986. The -- the --  
5 the producers in the field had different periods of time  
6 in which unproduced allowables were cancelled off,  
7 permanently cancelled. One period of time was pre-1975.  
8 Well, those unproduced allowables, if not reinstated,  
9 are -- have been cancelled. The period of time from  
10 1975 through 1986 is still in place, and the -- and the  
11 producers have until December 31, 1989 to -- to petition  
12 the Commission to reinstate those cancelled underages,  
13 those past 11 years of cancelled underages, and then  
14 have -- and then once reinstated, they have 60 months to  
15 produce it.

16 The Commission in its order is not permanently  
17 cancelling underages. What we're doing is tightening  
18 the production tolerances in the field.

19 QUESTION: Do we -- do we know what the  
20 standard is for the Commission's agreeing to reinstate  
21 them?

22 MR. CARD: I don't understand the question.

23 QUESTION: Well, I mean, I -- I asked the  
24 Commission to reinstate them. What are the criteria on  
25 the basis of which the Commission determines that?

1 whether what? It's a Tuesday? Or what is -- is there  
2 any standard at all?

3 MR. CARD: That's all that -- that's all you  
4 have to do to reinstate -- to reinstate is show that you  
5 have an accumulation of cancelled underage --

6 QUESTION: Right.

7 MR. CARD: -- that you want to have it  
8 reinstated, and --

9 QUESTION: And that's it.

10 MR. CARD: And that's it.

11 QUESTION: Well, then there is really no  
12 prohibition at all you're saying. Is that the  
13 commitment Kansas is going to make here now, that  
14 there --

15 MR. CARD: You mean there's no prohibition --  
16 you mean what --

17 QUESTION: So long as you want to get your  
18 cancelled underages, you can get them.

19 MR. CARD: That's correct.

20 QUESTION: You have an entitlement to get them  
21 even though they've been cancelled.

22 MR. CARD: No. Underages can be accumulated.  
23 Cancelled underages under the -- under the Commission's  
24 order can be accumulated for three years. Once they've  
25 been accumulated to that three-year period, they have

1 three years to reinstate those cancelled underages.  
2 Once reinstated, for whatever reasons, because they say  
3 that they can -- because the producer thinks that they  
4 can produce them, they have 60 months to produce those.  
5 So, you have an eight-year period here. Clearly  
6 reasonable to contemplate any market trends that may be  
7 in effect.

8 What the Commission's order did prior to the  
9 amendment --

10 QUESTION: Well, I must say I didn't  
11 understand that reinstatement was a matter of right.  
12 You're saying you have a right to get them reinstated so  
13 long as you say I want them reinstated.

14 MR. CARD: The Commission will reinstate those  
15 underages as long as --

16 QUESTION: Automatically.

17 MR. CARD: Automatically as long as they have  
18 not been -- as long as it's not longer than a three-year  
19 period under the Commission's amendment. So, you can  
20 carry those cancelled underages for three years. If you  
21 don't reinstate them --

22 QUESTION: I understand that.

23 MR. CARD: -- they're permanently cancelled.

24 Now, once they're cancelled, once they're  
25 permanently cancelled, doesn't -- doesn't -- I don't



1 want you to be -- I don't want you to misunderstand that  
2 they don't have a right to produce further reserves in  
3 the field. They're assigned -- they're constantly  
4 assigned a new allowable formula, a new allowable that  
5 they can produce in the field. That allowable takes  
6 into consideration the fact that they may not have been  
7 producing because of the allowable -- because the  
8 allowable formula is made up of three factors.

9         It's made up of acreage, which is the spacing  
10 unit, which in the Hugoton Field is 640 acres equals one  
11 unit.

12         It takes into the second factor which is well  
13 pressure or deliverability. And if you recall, well  
14 pressure is going to be higher if your well has not been  
15 producing. Therefore, you're going to get a higher  
16 allowable assignment in the field.

17         And the third factor is market demand which is  
18 set by the Commission based on the nominations of the  
19 producers and purchasers of what they -- what they  
20 anticipate to use in the -- in the upcoming six-month  
21 period.

22         So, they're not being -- they're not being --  
23 they're not -- they are -- they do have a chance to  
24 produce that -- that -- those reserves in the field.  
25 what we're doing is -- is merely asking them to -- we're

1 encouraging the producer to timely produce those  
2 reserves in the field to prevent the waste that the  
3 Commission found in its expertise was occurring in the  
4 field, to balance off the field, to balance off the  
5 pressures in the field.

6 This case is distinguishable from Northern.  
7 The reason this case is distinguishable from Northern is  
8 because in Northern, the Northern decision or the action  
9 the Commission took or the orders taken in Northern were  
10 directed at purchasers. It ordered the pipelines to  
11 take gas rateably in the field.

12 In our decision the Commission is not ordering  
13 the pipelines to do anything. The pipeline doesn't have  
14 to -- doesn't have to buy more Kansas gas if the  
15 pipeline doesn't want to. If in the pipeline's  
16 discretion it decides that it doesn't -- that it wants  
17 to take that -- that high take-or-pay -- those high  
18 take-or-pay gas that it has contracted on its own to  
19 take, it can take it. And if it does, does it lose its  
20 rights to the reserves in the field? Clearly not  
21 because a new allowable, even if their -- even if their  
22 underages are cancelled, a new allowable is assigned.

23 The Commission's order is reasonable in light  
24 of Northern. The effect of the order is reasonable.  
25 It's not going -- you know, the effect of this order is

1 incidental on the pipeline's purchasing practices. It  
2 becomes merely a consideration to have to take, merely a  
3 consideration that the pipeline has to make when it's  
4 purchasing gas, just like it makes a consideration on  
5 whether to buy gas from Wyoming, Oklahoma, Texas or any  
6 other state, just like it makes a decision to buy more  
7 take-or-pay gas or less take-or-pay gas. It becomes  
8 merely a consideration and the effect is incidental.

9           The effect of this decision could impact -- as  
10 the amicus brief filed by the Council on State and Local  
11 Government indicates, 17 states across the country have  
12 similar law, have laws similar to Kansas that regulate  
13 the proration in the field. Proration in the field  
14 means that gas -- that each well is producing its fair  
15 share in proportion to other wells' production in the  
16 field.

17           So, the impact of this decision means a lot to  
18 about 17 states that produce natural gas in the field.  
19 Every state has some form of proration, some form of an  
20 assignment of an allowable to the field to assure that  
21 that state conserves its natural resources by the  
22 orderly production of natural gas in the field.

23           Therefore, I ask this Court to affirm the  
24 Kansas Supreme Court's decision upholding the Kansas  
25 Commission order.

1           This would conclude my argument. I'd like to  
2 entertain any questions if there are any.

3           QUESTION: Thank you, Mr. Caro.

4           MR. CARO: Thank you.

5           QUESTION: We'll hear now from you, Mr.  
6 Lazerwitz.

7           CRAL ARGUMENT OF MICHAEL R. LAZERWITZ  
8 AS AMICI CURIAE SUPPORTING APPELLEES

9           MR. LAZERWITZ: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11           At bottom the pipeline here is complaining  
12 about the state's decision to rescind its unrestrictive  
13 policy towards the reinstatement of production credits.  
14 The pipeline does not and cannot challenge the state's  
15 authority to impose a system for controlling the  
16 production of natural gas in a common field.

17           QUESTION: Mr. Lazerwitz, does the purpose of  
18 Kansas regulation make any difference in our analysis?

19           MR. LAZERWITZ: For the preemption question,  
20 which is the main focus of our position, no. The  
21 preemption question calls for two separate inquiries.  
22 First, is the state regulating in an area where federal  
23 law occupies the field and therefore leaves no room for  
24 state action? And the second preemption question is  
25 whether the state rule conflicts with federal law, in

1 other words, whether it interferes with the federal  
2 regulatory scheme.

3 The Natural Gas Act itself essentially answers  
4 the first preemption inquiry. The state has the right  
5 to control the production of natural gas. Federal law  
6 simply doesn't occupy the entire regulatory field at the  
7 production end.

8 QUESTION: Now, that was not -- the SG has  
9 taken a different position now than when the case was  
10 here before. Is that right?

11 MR. LAZERWITZ: Yes, Justice O'Connor. When  
12 we filed our first brief, we were focusing more on the  
13 question whether this -- the Kansas judgment -- how it  
14 should be treated in the light of Transco. And the  
15 focus of our brief was that it should be held and then  
16 sent back in light of the decision in Transco. On  
17 further reflection, as our -- the most recent brief  
18 shows, we have now focused precisely on what the Kansas  
19 rule does and how it might or might not conflict with  
20 the federal regulatory scheme.

21 QUESTION: Well, do you think the Court went a  
22 little too far in Transco in some of its language?

23 MR. LAZERWITZ: If it's taken out of context,  
24 there is language in Transco that seems to be  
25 problematic. But the context is in that case we were



1 talking about field preemption where federal regulations  
2 cover the entire field, that is, regulating interstate  
3 pipeline purchasers.

4 QUESTION: Well, that system like Northern  
5 Natural was directed at pipelines.

6 MR. LAZERWITZ: Yes, direct regulation.

7 QUESTION: Directly.

8 MR. LAZERWITZ: And this -- and this Kansas  
9 rule is far different. It's controlling production, and  
10 therefore that's why the first preemption question is  
11 relatively easy. The second preemption question,  
12 whether the Kansas order conflicts with the federal  
13 regulatory scheme, is somewhat more difficult. But in  
14 our judgment there is no conflict.

15 First of all, the Kansas rule tells producers  
16 that in a certain situation you might not be able to  
17 bank your production credits. It doesn't tell the  
18 pipeline that it has to buy anything. If the pipeline  
19 is risk-averse and worried that this gas might not be  
20 there ten years down the road, it can choose to buy the  
21 gas now. But it's not forcing them to buy the gas, and  
22 that's a critical distinction between this case and the  
23 cases in Northern Natural and Transco and that is  
24 because the Kansas rule by itself isn't going to change  
25 anything.

1           The pipeline -- first of all, the producer is  
2 going to have to decide whether to produce more gas and  
3 we recognize that the producer -- that that decision  
4 whether to produce more gas is obviously tied to a  
5 pipeline's decision whether to purchase more gas. But  
6 the pipeline's decision is going to be based on Kansas'  
7 rules, other states' rules, available sources of other  
8 natural gas, its take-or-pay liability.

9           QUESTION: Well, given take-or-pay liability  
10 that exists and the price of new gas versus old gas,  
11 it's fairly obvious that the pipeline is not going to  
12 purchase any more gas, isn't it, in the existing market?

13          MR. LAZERWITZ: The pipeline is fighting this  
14 case. We assume that the pipeline is not -- does not  
15 want to purchase more gas, but that doesn't mean it will  
16 not.

17          And more importantly, the producers -- the  
18 Federal Energy Regulatory Commission's policy is trying  
19 to free up more gas and not to have it simply sold from  
20 the producers to the big interstate pipeline. For  
21 example, the Federal Commission has an order allowing  
22 the producers to try to get out of their contracts with  
23 the -- contracts where gas is dedicated to interstate  
24 commerce to sell it to someone else who is willing to  
25 buy it if the pipeline with whom it has a contract

1 doesn't want to pay a certain price.

2 QUESTION: Mr. Lazerwitz, I don't understand  
3 what you're -- what you're describing to me. As I  
4 understand these pipeline contracts, they are long-term  
5 contracts like -- it almost amounts to the pipeline  
6 purchasing the pool of gas, doesn't it? I mean, it has  
7 a right to take a certain amount from the -- from the  
8 well over -- over the next 12 years or whatever.

9 MR. LAZERWITZ: The contracts that are at  
10 issue in this case or that are involved in this case,  
11 these long-term contracts with the Hugoton Field, are  
12 those where the pipeline essentially -- they're great  
13 contracts to the pipeline. They can buy whatever is  
14 produced.

15 On the other hand, under the Federal Energy --

16 QUESTION: And the -- and the producer, if he  
17 takes it out, has to give it to the pipeline. He can't  
18 give it to somebody else, can he?

19 MR. LAZERWITZ: Yes, he can.

20 QUESTION: Can he?

21 MR. LAZERWITZ: He can seek Commission  
22 authority to abandon, in the sense to find another  
23 purchaser, if he doesn't want to sell it to -- for  
24 example, the pipelines are now not buying a lot of the  
25 cheap Hugoton gas. If a producer wants to get that gas

1 out of the ground, perhaps in response to the Commission  
2 rule, the State Commission rule, he can seek out new  
3 purchasers and not be stuck with the major interstate  
4 pipeline that is -- that years ago was controlling the  
5 flow of gas from the field. And the Federal  
6 Commission's policy is to try to foster that.

7 On the other hand, the pipelines themselves --

8 QUESTION: Breaking his contract. He would be  
9 breaking his contract with the pipelines, right, even  
10 though --

11 MR. LAZERWITZ: Yes, in the sense that's what  
12 abandonment is, asking the Commission authority to  
13 change the contract, and the Commission will take a look  
14 at that.

15 On the other hand, the pipeline has an out too  
16 under the Commission's rule and that is that the  
17 pipeline, instead of buying the gas, can act as a  
18 transporter and sell the gas to a local distributor.  
19 And in that situation, the Federal Commission will give  
20 credits to an interstate pipeline who is willing to do  
21 that. The federal policy, the regulatory policy today  
22 is to free up the gas, to get more of this cheap gas  
23 into the market, and everyone will be better off.

24 On the point mentioned before about the  
25 Federal Commission's approval of the purchasing

1 practices, there's no doubt that the Federal Commission  
2 did last -- over the summer approve Northwest Pipeline's  
3 purchasing practices for 1984 and in doing so, held --  
4 concluded that it was prudent to bank some of this gas,  
5 not to buy it.

6 But that doesn't become a federal policy  
7 approving the long-term banking of production credits.  
8 That was a narrow proceeding saying that this was  
9 prudent at the time. Prudent under the Federal Energy  
10 Regulatory Commission's rules means a rational  
11 businessman would have done this facing the situations  
12 that he faced. But that doesn't at all mean that it  
13 would have been imprudent to buy more cheap gas.

14 QUESTION: At the very outset Justice O'Connor  
15 asked you if purpose were relevant, and you said not the  
16 preemption prong of the argument. Is it relevant to the  
17 claim that interstate commerce is being regulated in an  
18 impermissible manner?

19 MR. LAZERWITZ: Yes. In that sense the  
20 purpose and for purposes of the argument we'll concede  
21 -- let's assume there's a bad purpose. But the bad  
22 purpose would have to be encouraging more production of  
23 Kansas gas at the expense of another state's gas.

24 QUESTION: How strong is a negative Commerce  
25 Clause argument here where Congress has said the state



1 shall have authority to regulate production and  
2 gathering?

3 MR. LAZERWITZ: It's not very strong, but  
4 there is something in the sense that the Natural Gas Act  
5 didn't give the states anything and the idea that the  
6 states have this power to begin with. And under the  
7 Natural Gas Act, Congress reserved that power to the  
8 states. So, there is -- and we do recognize that there  
9 -- there could be a case where the state, for example,  
10 changed the production rules to say only producers for  
11 intrastate purchasers can produce a certain amount and  
12 those for interstate cannot. That would pose a problem  
13 under the Commerce Clause potentially. But that's not  
14 the case here. Kansas --

15 QUESTION: Do you read the Kansas Supreme  
16 Court opinion as holding that there is a purpose to  
17 regulate interstate commerce that's impermissible?

18 MR. LAZERWITZ: No, not at all. The Kansas  
19 Supreme Court and the District Court and the Commission  
20 -- the point of the rule is to remedy a problem, and in  
21 remedying the problem, part of the remedy is to  
22 encourage production but not at the expense of any other  
23 state.

24 QUESTION: Mr. Lazerwitz, I really think  
25 you're -- you're drawing a line that doesn't exist when

1 you say if their purpose was only to increase production  
2 of Kansas gas at the expense of gas from other states.  
3 I mean, we're in the real world here. Every time you  
4 produce more gas from Kansas, you're going to produce  
5 less gas. Is there an infinitely expandable market for  
6 gas?

7 MR. LAZERWITZ: Well, if the price --

8 QUESTION: There's not a limited market up --  
9 cut there?

10 MR. LAZERWITZ: The market changes. It's not  
11 -- It's not to say that Kansas by encouraging production  
12 from its field is necessarily going to hurt any other  
13 field. The market will change depending on price and  
14 the demand. It's not --

15 QUESTION: Well, I think the people in the  
16 business would be surprised to learn that, that the more  
17 gas you produce from Kansas, the less gas you won't be  
18 producing from somewhere else. I find that rather  
19 surprising.

20 MR. LAZERWITZ: Well, from a federal  
21 standpoint, the Kansas gas that's now sitting in the  
22 ground -- we would like that gas out of the ground.  
23 It's the cheapest gas around.

24 QUESTION: Fine.

25 QUESTION: Mr. Lazerwitz, is there any

1 practical means to store natural gas once it's taken out  
2 of the ground?

3 MR. LAZERWITZ: No. As I understand the --  
4 the field, it's too expensive.

5 Thank you.

6 QUESTION: Thank you, Mr. Lazerwitz.

7 Mr. Talisman, you have three minutes remaining.

8 REBUTTAL ARGUMENT OF HAROLD L. TALISMAN

9 MR. TALISMAN: Yes.

10 Justice Scalia, it is just not correct in the  
11 real world that if -- if we were to take more Kansas  
12 gas, we wouldn't be taking less gas elsewhere. And that  
13 was --

14 QUESTION: You don't have to spend a whole lot  
15 of time to persuade me of that.

16 MR. TALISMAN: I'm not going to spend much  
17 time on that.

18 (Laughter.)

19 MR. TALISMAN: And I think there -- and I  
20 don't think that they can really say there's no conflict  
21 between the purchasing mix case approved by the  
22 Commission. When he says the Commission would have  
23 approved more low priced gas coming out of Kansas,  
24 that's not correct. That was proposed in that case.  
25 The proposal in that case -- one of the proposals was we

1 should take more of that gas, and the Commission said  
2 no. They didn't think that was -- they found that there  
3 were reasons the company had given as to why it  
4 shouldn't be taken that were -- that were reasonable.

5 Now, with respect to the -- the -- the  
6 Solicitor takes the position that Northern is different  
7 than this case because in Northern the order was  
8 directed to Northern and because there were certain  
9 criminal penalties involved whereas here they say that  
10 the -- what we're faced with are certain economic  
11 consequences. And therefore, we are simply going to  
12 have to take that into consideration in deciding whether  
13 or not we want to buy more Kansas gas or suffer the  
14 possibility of not being able to buy it in the future.

15 Now, we submit that the modest kinds of  
16 criminal penalties that were involved in the Northern  
17 Natural case are far less significant than the sanctions  
18 of losing the supply. The gas supply is the lifeblood  
19 of interstate pipeline companies. And if we lose  
20 supply, we shorten the economic life of the pipeline  
21 system.

22 QUESTION: Well, it sounds like there's a lot  
23 of flexibility in the Kansas plan that you don't really  
24 lose it, and even if you supposedly lose it, you can  
25 have it reinstated and so on.

1 MR. TALISMAN: That -- Justice O'Connor, that  
2 is -- that is incorrect. The purpose of this rule was  
3 to permanently cancel. So, you do lose it. You do lose  
4 it. Now, you had a certain time period.

5 QUESTION: Well, do you disagree with the  
6 state's representation about the possibility of  
7 reinstatement, and that it's automatically granted and  
8 so forth?

9 MR. TALISMAN: Yes. The rule specifically  
10 provides for permanent cancellation. So, he is just  
11 wrong about that.

12 Now, the -- and he's also wrong about the  
13 fact --

14 QUESTION: In less than eight years?

15 MR. TALISMAN: No. You have a certain period  
16 of time to get -- to ask for reinstatement --

17 QUESTION: Well, he told us there was eight --  
18 he --

19 MR. TALISMAN: -- but once that's over with,  
20 that's a permanent cancellation. You have to ask --

21 QUESTION: But he --

22 MR. TALISMAN: I'm sorry.

23 QUESTION: The counsel for the state was  
24 correct insofar as he described the scheme within the  
25 eight-year period.



1 MR. TALISMAN: If -- if you -- you have three  
2 years to ask for reinstatement, five years to produce it  
3 once you did. He's correct about that. But after that,  
4 it's permanently -- permanently gone.

5 Now, I think it's important to note that the  
6 producers in this field who are underproduced were  
7 against this rule. And those producers are the ones who  
8 they say are going to get gas drained away permanently  
9 and that's why they're passing this rule to protect  
10 them. But they were against this rule. The people who  
11 were in favor of it were the people who were  
12 overproduced. And why? Because what this rule is going  
13 to do is --

14 QUESTION: Your time is expired, Mr. Talisman.

15 MR. TALISMAN: Thank you.

16 CHIEF JUSTICE REHNQUIST: The case is  
17 submitted.

18 (Whereupon, at 11:02 o'clock a.m., the case in  
19 the above-entitled matter was submitted.)  
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# CERTIFICATION

Alderson 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:

No. 86-1856 - NORTHWEST CENTRAL PIPELINE CORPORATION, Appellant  
V. STATE CORPORATION COMMISSION OF KANSAS, ET AL.

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