

# Natural Gas Lawyer, Natural Gas Justice

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During oral argument before the Supreme Court of the United States on November 3, 2009, in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, a case involving Federal Energy Regulatory Commission review of contracts setting wholesale prices for electricity, Justice Stephen Breyer had an interesting exchange with Richard Blumenthal, Connecticut’s Attorney General. At one point, Blumenthal argued that the law should not leave a State that is not a party to the electricity contract but whose residents are being affected by its unreasonably high prices without a meaningful way to challenge them. Justice Breyer, in response, suggested that the State could petition the FERC for relief—“that why they’re there, agencies,” he continued. “They are there to listen to you and give you a remedy, and the remedy is— If you convince them you shouldn’t be subject to [less protective review], they’ll say fine, and otherwise, not.”<sup>1</sup>

Justice Breyer’s next sentence was interestingly candid if potentially off-topic: “Why are you coming to us who know nothing about natural gas and asking us to do it?”<sup>2</sup> He soon clarified that the issue in the case is, of course, electricity (and perhaps he meant that he regards electricity as not an area of Supreme Court expertise). After a further exchange with Blumenthal, Justice Breyer, reaching into his papers and starting to read, revealed why he had slipped and said “natural gas”:

...[M]y point is this. I just found the quote I was looking for—I have been sort of thinking, sort of thinking, natural gas. It applies to electricity capacity, too. Justice Jackson:

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For a selected archive of Jackson List posts, see my homepage at [www.law.stjohns.edu](http://www.law.stjohns.edu). To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to [barrettj@stjohns.edu](mailto:barrettj@stjohns.edu).

<sup>1</sup> No. 08-674, *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, Transcript at 32-33 (Nov. 3, 2009), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-674.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-674.pdf).

<sup>2</sup> *Id.* at 33.

“[t]he wealth of Midas and the wit of man cannot produce or reproduce a natural gas field.” That applies to electricity capacity. We can't reproduce it. You can't. The Commission devises a system for trying to get it done, and if they do it reasonably, they win.<sup>3</sup>

This Jackson line comes from his separate opinion in *Federal Power Commission v. Hope Natural Gas Company*,<sup>4</sup> a Supreme Court decision regarding review of federal agency orders setting prices for natural gas. The decision, which also featured Justice William O. Douglas's opinion for the Court,<sup>5</sup> dissenting opinions by Justices Stanley Reed<sup>6</sup> and Felix Frankfurter<sup>7</sup> and a joint separate opinion by Justices Hugo L. Black and Frank Murphy,<sup>8</sup> is complicated but interesting. Jackson's opinion is particularly well-written and accessible. More generally, Justice Breyer and many others admire Jackson's distinctively great writing and memorable turns of phrase in his books, articles, opinions, speeches, legal briefs and courtroom arguments.

What might be less well appreciated, but what Jackson's *Hope Natural Gas* opinion plainly demonstrates, is that Jackson, in addition to writing beautifully, knew quite a bit about natural gas. The reason was that he had been, in two decades of private law practice that preceded his service in national government, a very serious and accomplished oil and natural gas lawyer. Jackson came from northwestern Pennsylvania and for most of 1913-1933 practiced law from a base in Jamestown, New York. That region marks, geologically and in the history of U.S. energy development, the northern tip of the Appalachian oil and natural gas field. Many of Jackson's private clients were oil and gas companies and individuals who were deeply involved in those businesses. Jackson's active participation in bar association oil and gas section activities was an important part of his rise, as a rather young lawyer during the early 1930s, to prominence and national leadership positions in the American Bar Association. He also served at various times as a municipal attorney and adviser in Jamestown, and part of what he handled and knew well was its energy business and,

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<sup>3</sup> *Id.* (quoting *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 629 (1944) (Jackson, J.))

<sup>4</sup> 320 U.S. 591 (1944).

<sup>5</sup> *Id.* at 593-619.

<sup>6</sup> *Id.* at 620-24 (Reed, J., dissenting).

<sup>7</sup> *Id.* at 624-28 (Frankfurter, J., dissenting).

<sup>8</sup> *Id.* at 619-20 (Black & Murphy, JJ.).

sometimes, the city's energy-related litigation. Jackson also was involved in the work of, and he handled many matters before, New York State's Public Utilities Commission.

All of that, from his broad expertise to numerous references to locations in his native region, is reflected in Jackson's *Hope Natural Gas* opinion—it is a demanding but delightful read.