



**THE ATTORNEY GENERAL
OF TEXAS**

PRICE DANIEL
ATTORNEY GENERAL

AUSTIN, TEXAS

March 6, 1947

Hon. H. L. Winfield, Chairman
Oil, Gas and Conservation Committee
State Senate
Austin, Texas

Opinion No. V-62

Re: Senate Bill 227 providing
for the sale of sweet or
sour gas for the manufac-
ture of carbon black and
establishing a minimum
price

Dear Sir:

We have your letter of February 28, 1947,
reading as follows:

"At a public hearing of the Oil,
Gas and Conservation Committee February
26th, Senate Bill 227, as amended, by
Hazelwood, on motion of Senator Harris,
was sent to a sub-committee with in-
structions to obtain an opinion from the
Attorney General of Texas on the validity
of the bill as amended, with instructions
to report back one week from that date.

"Attached hereto is Committee Amend-
ment No. 1 which represents the entire
bill as amended. As Chairman of the Oil,
Gas and Conservation Committee, and at
the request of the Committee, I am request-
ing an opinion on (1) the validity or le-
gality of the bill as a whole; and (2) the
validity or legality of the following pro-
vision contained in the amended bill; and
provided (2) that the price paid for such
gas at the wellhead at least equals the mar-
ket price paid at the wellhead in the area
for gas used for light and fuel purposes."

"You will observe the fact that this
bill would amend, if passed, a conserva-
tion statute now on the books, and that

the placing of the minimum price to be paid for the gas as quoted above is done in connection with the conservation features of the existing law. You will also observe that the language quoted does not in itself fix the price of the gas purchased under its provisions at any definite or fixed amount, but the price would fluctuate with the ordinary market price in the field as it is established from time to time by ordinary competitive methods for gas which is used for fuel and light purposes."

You informed us in a supplemental letter of March 3, 1947, as follows:

"In connection with the request for the opinion on Senate Bill 227 which was given to you recently, may I add, as Chairman of the Committee, that there was certain testimony and evidence before the Committee introduced in behalf of this bill that there now exists a considerable number of gas wells in the area affected by this proposed legislation which have no pipe line connections or market outlets for the gas. In this connection, it is also in evidence that a lack of connection necessarily results in drainage of non-producing gas wells in the area.

"There is also evidence of the variation in prices paid for gas used in the manufacture of carbon black, the history of such prices for such gas having been at times exceptionally low."

The proposed amendment reads as follows:

"SECTION 1. Section 3, Article 6008a, Title 102, of Vernon's Civil Statutes of the State of Texas, Annotated, Revision of 1925, being Senate Bill No. 407, Acts of the Forty-fifth Legislature, of the year 1937, is amended by adding a new section thereto to be known as subdivision (e), shall hereafter read as follows:

"(e) Gas from any well producing either

sweet or sour gas from any common reservoir producing both sweet and sour gas may be used for the manufacture of carbon black without the prior extraction of its gasoline content provided (1) it is utilized in a plant producing an average recovery of not less than one and one-half ($1\frac{1}{2}$) pounds of carbon black per thousand cubic feet of such gas, and provided (2) that the price paid for such gas at the wellhead at least equals the market price paid at the wellhead in the area for gas used for light and fuel purposes. In arriving at such market price, in the case of sour gas, a reduction not to exceed one-half ($\frac{1}{2}$) cent per thousand cubic feet shall be allowed for purifying such gas to render it suitable for light and fuel purposes. If such gas be used by a producer, any royalty paid shall be paid on the same basis."

It is undoubtedly within the province of the Legislature, under its general powers in connection with natural resources and conservation, to allow sweet or sour gas to be sold for the use of making carbon black. There is no constitutional provision to the contrary.

Further, it is our opinion that the Legislature has the power to require that the price paid for such gas shall not be less than the market price paid in the same producing area for gas used for other purposes. True, this fixes the market price to be paid for such gas, but no certain amount is set. The provision still permits the minimum price to fluctuate with the market price paid for other gas in the fields. It is the recognized law of the land today that a state legislature could go even further and fix a definite minimum price to be paid on gas if the Legislature finds such action necessary for conservation and to protect the public interest.

In *Nebbia v. New York* (1933), 291 U.S. 502, 89 A.L.R. 1416, the Supreme Court concluded as follows:

"Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-

making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. * * *." (Italics ours)

In *Sunshine Coal Co. v. Akins* (1940), 310 U.S. 381, the Court upheld a statute fixing the price of coal. In *Federal Power Commission v. Natural Gas Pipe Line Co.* (1942), 315 U.S. 575, the court upheld an act fixing the price of natural gas where the enactment declared that "the business of transporting and selling natural gas and ultimate distribution to the public is affected with a public interest." In a concurring opinion of Justices Black, Douglas and Murphy, it is said, "In a recent series of cases, this Court has held that legislative price fixing is not prohibited by the due process clause. We believe that, in so holding, it has returned, in part at least, to the constitutional principles which prevailed for the first 100 years of our history."

The fixing of the minimum price for gas as that price received in the area for gas used for light and fuel purposes is just and reasonable. Using natural gas for the manufacture of carbon black requires enormous quantities of the State's natural resources which cannot be replaced. The fixing of a minimum price on the gas used for such purposes will insure that competition among the various gas owners will not drive the price thereof down to the point where the gas will be wasted and improperly used.

The act does not conflict with the anti-trust statutes. It could in no wise be construed as an agreement between individuals or corporations as to a minimum price. The act does not exempt those selling or buying gas for carbon black purposes from the anti-trust statutes. If those persons combined to fix the market price

of gas at an arbitrary rate, they would be subject to prosecution. If freedom of enterprise and competition should be violated by any combination of gas buyers in an attempt to set a market price in a field, the buyers could be prosecuted the same as if this Act did not exist.

The requirement of this act is that the price to be paid must at least equal the market price paid for gas in the area for fuel and light purposes. It is a maximum of long standing that "that is certain which can be made certain". The market price for gas in a given area for fuel and light purposes can be ascertained by a court or fact-finding body. It is a matter susceptible of proof. For tax purposes the Comptroller is required to determine the market value of gas produced. Article 7047b(3). The Railroad Commission is required to fix the reasonable price of gas for certain purposes. Article 6053.

But for individuals or corporations about to enter into a contract under this Bill, it may be very difficult to know exactly what the market price in the area is. There may be different prices within the area, all of which prices are not known to those contracting. Such prices may be changed from hour to hour or day to day, without knowledge on the part of the persons contracting. The word "area" itself is capable of different constructions. How much territory is included? Does it mean the producing area, the entire field, or only a segment? If a segment, how large a segment? It is recommended that the word "area" be defined more particularly.

In order to obviate any danger of the act's being declared unconstitutional because it does not speak in definite and specific terms (see Lone Star Gas Co. vs. Kelly, 140 Tex. 14, 165 S.W. (2d) 446, which held void for indefiniteness an order of the Railroad Commission as to malodorant used in gas) it is recommended that the act included a section providing that the market price paid at the wellhead in the area for light and fuel purposes shall be determined by the Railroad Commission after notice of hearing; that the Commission shall thereafter publish such price in its main and branch offices; and that parties contracting under this Bill be permitted to accept such posted price as the minimum price fixed by this Bill.

It is further recommended that the act contain

a recitation within itself and in the emergency clause that the production and sale of sweet or sour gas for the purposes of manufacturing carbon black is affected with the public interest. Suggested amendments in that regard are herewith attached.

SUMMARY

Committee Amendment No. 1 to Senate Bill No. 227 which provides that sweet or sour gas may be sold for the purpose of manufacturing carbon black under conditions stated in the amendment, including requirement that the price paid therefor shall not be less than the market price paid for other gas in the same producing area, is constitutional and does not conflict with the anti-trust laws of Texas.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By 

Joe R. Greenhill
Assistant

JRG/acm/lh

APPROVED: March 6, 1947


ATTORNEY GENERAL

SUGGESTED AMENDMENTS TO SENATE BILL 227

I.

Committee Amendment No. ____ to Senate Bill 227.

Amend Senate Bill 227 by inserting after Section ____ a new Section to be numbered Section ____ to read as follows:

"SECTION ____ . The production and sale of sweet or sour gas for the purpose of manufacturing carbon black is hereby declared to be a matter which is affected with a public interest."

II.

Committee Amendment No. ____ to Senate Bill 227.

Amend Senate Bill 227, Section 6 (the emergency clause) by inserting after the word "land owners" and before the word "creates" in Line 4, the following:

"and the fact that the manufacture of carbon black from sweet or sour gas is a matter and business which affects the public interest."

III.

Committee Amendment No. ____ to Senate Bill 227.

Amend the caption by inserting after the word "purposes" in the third from the last line, the following:

"declaring the sale of sweet or sour gas for the purpose of manufacturing carbon black to be a matter and business affecting the public interest."