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Gas Groups Ask Justices To Undo 9th Circ. Price-Fixing Ruling

By **Allissa Wickham**

Law360, New York (September 30, 2014, 7:14 PM ET) -- Several natural gas trade associations and free enterprise advocate the Washington Legal Foundation have asked the U.S. Supreme Court to reverse the Ninth Circuit's decision to revive state-law claims in multidistrict litigation over natural gas price-fixing, claiming the ruling could have a destabilizing effect.

In two separate amicus briefs filed Sept. 25, the trade associations and the WLF argued that the Ninth Circuit's **April 2013 ruling** might allow local juries to reach conclusions that differ from those of the Federal Energy Regulatory Commission regarding how to regulate of natural gas company actions that impact wholesale rates.

"Unless reversed by this court, the Ninth Circuit's decision thus threatens to disrupt the uniform federal regime envisaged by Congress by allowing attorneys motivated by large jury awards rather than regulatory aims to create potentially 50 different (often conflicting) state regulatory regimes binding the natural gas industry," WLF argued.

The Natural Gas Act, as the WLF points out, gives the federal government the exclusive power to regulate the wholesale natural gas market, with the law authorizing FERC to make sure the rates for most wholesale sales of natural gas are reasonable.

But in the Ninth Circuit ruling at issue, the appeals court held in that Congress did not give federal energy regulators the right to oversee first sales or retail sales of natural gas. The appeals court also held that the NGA didn't preempt state antitrust challenges to energy rates and practices related to those types of sales.

The case stems from multidistrict litigation brought by Learjet Inc., Arandell Corp. and others accusing Shell Energy North America LP and others of illegally manipulating the price of natural gas, causing an energy crisis in the early 2000s.

The plaintiffs, all retail buyers of natural gas, claimed the energy companies manipulated the price of natural gas by reporting false information to price indexes published in trade publications and engaging in prearranged "wash sales," according to the Ninth Circuit's opinion.

The district judge in charge of the sprawling MDL granted the energy companies — more than a dozen that buy, sell, transport and store natural gas — summary judgment in mid-2011, with the trial court reasoning that the NGA gave FERC jurisdiction over the practices at issue in the case. But the Ninth Circuit overturning the ruling, citing a Supreme Court decision finding that the NGA provided "a regulatory role for the states" in the production of natural gas

On Sept. 18, the petitioners, which include a slew of energy companies, argued in a brief to the high court that under its precedent, state regulations fall within the field occupied by the NGA when they are aimed at issues over which the FERC has exclusive authority.

Because the plaintiffs' state-law claims deal with so-called index manipulation by wholesale sellers within FERC's jurisdiction, their suits are preempted by the NGA, the companies argued.

The trade associations, which include the Interstate Natural Gas Association of America, the Natural Gas Supply Association and the Independent Petroleum Association of America, contended in their amicus brief filed Thursday that the energy industry needs predictability, and argued that allowing states jurisdiction over any practice affecting non-jurisdictional rates, like wholesale rates, could subject companies to a "hodgepodge of regulation."

The associations also argued that allowing states jurisdiction over practices associated with retail and wholesale sales would undermine the NGA's establish of a uniform regulatory regime.

The WLF, a law firm devoted to defending "individual and business civil liberties, contended that the Ninth Circuit's holding cannot "be squared" with the Supreme Court's preemption precedents under the NGA. The court has repeatedly recognized that the NGA was meant to unify regulation in the natural gas wholesale market, and hasn't taken kindly to attempts to impact the uniformity of that federal scheme, the WLF said.

"Thus, even though the conduct at issue in this case allegedly affected both retail and wholesale rates, it still counts as a practice that affects wholesale rates for preemption purposes," the WLF said in a statement accompanying its brief. "The relevant question is simply whether plaintiffs' state-law claims are directed at conduct in the field that the NGA occupies — and they are."

The U.S. government also filed an amicus brief in the appeal Thursday, but that filing wasn't immediately available.

Attorneys for the petitioners and respondents, as well as representatives for the natural gas trade associations, were not immediately available for comment on Tuesday.

The natural gas trade associations are represented by Thomas C. Goldstein and Kevin K. Russell of Goldstein & Russell PC, as well as Joan Dreski for the Interstate Natural Gas Association of America and Dena E. Wiggins of the Natural Gas Supply Association.

The Washington Legal Foundation is represented by Cory L. Andrews and Markham S. Chenoweth.

The energy companies are represented by Neal Kumar Katyal, Robert B. Wolinsky, Dominic F. Perella, Elizabeth B. Prelogar and Sean Marotta of Hogan Lovells.

The natural gas purchasers are represented by Jennifer Gille Bacon of Polsinelli PC and Donald D. Barry of Barry Law Offices LLC, among others.

The case is Oneok Inc. et al., v. Learjet Inc. et al., case number 13-271, in the U.S. Supreme Court.

--Additional reporting by Keith Goldberg. Editing by Chris Yates.

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