[¶ 61,267]

Buckeye Pipe Line Company, Docket Nos. IS80-76 and IS80-47, et al.

Order Terminating an Oil Pipeline Rate Suspension, Prescribing a General Rule for Determining the Appropriate Duration of Such Suspensions, Directing the Commission's Oil Pipeline Board to Refrain from Suspending for More Than a Single Day, and Further Directing That Body to Reform Its Previous Suspension Orders So as to Conform to the One-Day Standard Prescribed by This Order

(Issued December 24, 1980)

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., George R. Hall and J. David Hughes.

I.

The statutes that we administer are drawn on the premise that buyers of electric power, natural gas transportation services, and oil pipeline transit are in no position to bargain on an equal footing with the sellers of those things.[1]

In those areas of the economy Congress saw what it deemed an imbalance of economic power. To redress that imbalance, it:

(1) Required that the seller's rates and charges be "just and reasonable";[2] and

(2) Authorized and directed this Commission to put flesh on the bones of that vague and amorphous ideal,[3] to apply that fleshed out ideal to the kaleidoscopic variety of situations that arise in these complex and variegated industries and to see to it that the buyers actually receive the benefit of the protective shield that Congress intended them to have.[4]

II.

What happens when the Commission's preliminary review of a regulated seller's rate proposal leads it to see questions that warrant exploration?

Here we have a broad discretion. If we decide to do that, we can suspend for as much as five months in our electric power and natural gas pipeline work and for as long as seven months when we deal with oil pipelines where our jurisdiction stems from the Interstate Commerce Act. Those periods are statutory maxima.

But we need not exploit our powers to the fullest. We can proceed with a much lighter hand. We can content ourselves by suspending for a mere 24 hours. Such a suspension is not a ritualistic formality. It has significant consequences. True, the seller gets his money at once. But he collects that money "subject to refund", if his prices are ultimately found excessive.[5]

Of course, we are not confined to a choice between the minimum and the maximum. We are free to fix the duration of the suspension at some intermediate point.

III.

We have it on high authority "that Congress intended that the Commission have utmost freedom in exercising its discretion as to the length of rate suspensions." [6] However, the judicial opinion that made this observation went on to say:

> "But that . . . does not mean FERC can use the power in a capricious manner. Surely, Congress did not intend that the Commission treat regulatees placed in exactly the same situation in drastically different ways . . . . Unfettered power is never to be power exercised without reason—especially when Congress clearly called for the statement of reasons.
>
> And these reasons must relate to the time period of the suspension, not just to the necessity of some suspension, which is nearly always that the proposed rate must be examined as to its justness and reasonableness. *If there are no reasons for choosing different periods, then the choice is completely arbitrary and the Commission should settle on giving uniform suspensions.*
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> * * *
>
> Determinations as to whether a rate should be suspended and for how long have a substantial impact on consumers and companies, both are unreviewable by us, and we think both should be accompanied by reasons elaborated by the Commission . . . . Length is a significant part of the suspension decision; reasons must be given for the period selected.
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> * * * [7]
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> The same boilerplate . . . cannot possibly be a rationale for a one-day suspension and at the same time a ratonale for a five-month

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13 FERC ¶ 61,267 (1980).

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13 FERC ¶ 61,267 (1980).

This order changed the Commission's policy on the suspension period applied to oil pipeline rate filings. Previous policy provided that shorter suspension periods were warranted only when rigid adherence to the maximum statutory period led to harsh and inequitable results. Buckeye Pipe Line Company, 13 FERC ¶ 61,267, 61,593 (1980). Pursuant to the previous policy, Buckeye Pipe Line Company's (Buckeye) rate filing was suspended for seven months by the Oil Pipeline Board, the maximum period allowed under Section 15(7) of the Interstate Commerce Act. (49 App. U.S.C. § 15(7) (1988).

However, in this order, the Commission stated that at the time its overall suspension policy was formulated it had not "focused" on its applicability to oil pipelines as opposed to the policy's application to natural gas and electric rate filings. It further stated that this was the case because the Interstate Commerce Act permits the Commission to delegate its authority. Therefore, it created the Oil Pipeline Board (Board) and gave it suspension authority. The Board suspended Buckeye's filing for seven months. (Id. at 61,593).

The Commission found in this order that the duration of oil pipeline suspensions should be governed by a different rule than the one applied to electric power and natural gas cases. The Commission further found there was nothing in Buckeye's fact situation to warrant a suspension for more than one day. (Id. at 61,593).

The Commission then stated its reasons: (1) oil pipeline shippers who use the common carrier oil pipeline system are not the same as consumers in natural gas and electric rate cases. Gas and electric consumers tend to be migratory and therefore need longer suspension periods. This is because refunds of overcollections will not give full redress to those consumers who moved. (Id. at 61,593-94); (2) the statutory collection subject to refund enables utilities to force their customers to loan them money which the Commission believes should not be allowed; and (3) there is nothing to suggest that there have been or will be many cases in which oil rate increases that became effective subject to refund cause members of the shipper population to suffer hardship while they wait for their refunds. (Id. at 61,595).

Hence, a one-day suspension in oil pipeline cases became the Commission's policy and the Oil Pipeline Board was directed to act accordingly. (Id. at 61,595, 61,596).

suspension. The statutory requirement of a statement of reasons means reasons for the length of a suspension that fit the fact situation of the relevant case. The Commission, therefore, must ... build a set of standards ... to assure that its discretion is not exercised in an arbitrary way and to give guidance to parties filing and challenging rate increases." [8]

IV.

The judicial opinion from which we have just quoted required the Commission to formulate a suspension policy that was clear, consistent, and policy-based.

When we addressed ourselves to that task, we concluded that:

(1) "[R]ate filings should normally be suspended and the *status quo ante* preserved for the maximum period permitted by statute ... where preliminary study leads the Commission to believe that there is substantial question as to whether a particular filing complies with applicable statutory standards"; and

(2) Shorter suspensions are warranted only when it is clear that "rigid adherence to the general policy of preserving the *status quo ante* for the maximum statutory period makes for harsh and inequitable results." [9]

We found this rule implicit in the basic purpose of the statutes that Congress has directed us to enforce.

As our orders explain:

"Though the regulatory schemes that the Commission administers involve a subtle and a difficult balancing of ... interests, their primary purpose is to protect the consumer against excessive rates and charges. Hence ... the discretionary power to suspend should be exercised in a way that maximizes this protection.

The decision to suspend a proposed rate increase rests on the preliminary finding that the increase may be unjust and unreasonable or that it may run afoul of other statutory standards. The governing statutes say that "*any*[10] rate or charge that is not just and reasonable is hereby ... declared unlawful." [11] This declaration places on the Commission a general obligation to minimize the incidence of such illegality." [12]

V.

The policy of suspending for as long as we lawfully can and of reserving shorter suspensions for cases in which the general rule would subject the seller to undue hardship was framed for our electric power and natural gas transmission work.

At that time, we did not focus on its applicability to oil pipelines. That was so because there the governing statute permits us to delegate much of the authority that it vests in us to our staff.[13] Accordingly, we have created an Oil Pipeline Board. In the first instance the decision to suspend or not to suspend is for that body and not for us. The Board also fixes the duration of suspension periods. Our role with respect to its labors is appellate and supervisory.[14]

VI.

However, the Board looks to us for guidance. Its study of the suspension orders that we had issued led it to believe that we had prescribed a fundamental policy that was not limited to electricity and gas and that extended to the Board's sphere of activity. That was a reasonable view. Our orders were worded in a way that lent itself to that construction.

Accordingly, absent a showing of special circumstances warranting a shorter suspension period, the Board adopted a new policy of suspending for seven months. That new policy was articulated and applied in the order that the Board entered in these dockets on September 12, 1980. From that order the aggrieved carrier appeals to us.

VII.

We agree with the carrier that the duration of oil pipeline suspensions should be governed by a different rule from the one that we apply in our power and gas work, and that there is nothing here to warrant a suspension for more than a day.

Our reasons for so holding are stated below.

VIII.

When we work with electric power and with natural gas, we focus on the ultimate consumer of energy. He is the person we are here to protect.[15] And it was our view of *his* needs that led us to adopt the suspension policy we now follow in electricity and in gas.[16]

We found that his claim to a refund of a rate ultimately found excessive is not enough in itself to give him the protection that he ought to have.

Two factors led us to that conclusion. The first was that consumers are people and people move around. Ours is a migratory society. Hence a 1985 refund of an overcollection made in 1980 will not give full redress.

Some of those victimized by the excessive rate will have left the service area for other climes. Those people will never be made whole. And others who lived somewhere else in 1980 but who will nevertheless share in the 1985 refund will receive windfalls.

Secondly, the statutory collection subject to refund mechanism enables utilities to force their customers to lend them money. They do that by filing for more than they ultimately expect to get, by taking advantage of decisional delay, and by superimposing or "pancaking" one unadjudicated rate increase on top of another. True, it can be argued that the "loans" will ultimately be repaid with interest.[17] But that does not render them innocuous.

Electricity and gas are necessities. Millions of the Americans who use them live in poverty or on very tight budgets. Those people are in no position to lend money to anybody. A state of affairs that compels them to supply gas companies and electric companies with long-term credit in amounts that may sometimes seem minuscule on a per capita basis to the affluent [18] but that are almost always material to the poor and to those who are just getting by cannot be viewed complacently.[19]

The statutory scheme and the exigencies of the utility business make such forced loans inevitable. They may well be a necessary evil. But a necessary evil is nonetheless an evil. We think it our duty to do all we properly can to mitigate that evil and to lessen its incidence. That is the basic rationale for the suspension policy that we announced last summer.

IX.

But that rationale does not fit the oil pipeline case. In electric power and in natural gas we regulate the interstate wholesale aspects of industries whose intrastate and retail branches are subject to all-persuasive state regulation.[20] That regulation is "cost-based". So, as we have already noted, wholesale rate increases "flow through" to retail bills in short order. Conversely, the postponement of a wholesale increase delays the correlative price boost at retail.

In oil, however, we deal with a relatively small regulated portion (pipeline transit) of a vast unregulated whole (oil).[21] Hence the prices people pay for gasoline, for heating oil, and for other petroleum-based products are determined not by regulatory concepts, but by market forces. True, transportation costs enter into those market prices.[22]

Normally, however, the pipeline charge does not bulk large in the price of the end product. Moreover, market prices are influenced by such a variety of forces and factors that a pipeline rate increase (or for that matter a decrease) can well be rendered inaudible by, if it is not wholly lost in, the surrounding "noise". If the market for petroleum products is strong, prices will rise. And that is so even if pipeline charges stay the same. Conversely, if the cost of pipeline transit rises in a weak market for oil, producers and refiners will have to absorb much (and perhaps in some circumstances all) of the increased transportation cost.

It follows that:

(1) From a consumer-welfare standpoint, oil pipeline rate increases are a horse of an altogether different color from increases in the wholesale cost of electric power and natural gas—in the instant case, for example, even if the *total* increase were to be flowed through, the impact on a consumer using 20 gallons of gasoline a week would be only 58.4¢ a year[23]—; and

(2) A general policy of suspending oil pipeline rate increases for the full 7 months permitted by statute cannot be justified on consumerist grounds.

One would need a high-powered economic microscope to detect the good that such a policy would do the consumer.[24] But the damage to the carriers would be very real. Revenue foregone during a suspension period is lost forever.

X.

There are respects in which the relationship between a shipper of oil and the pipeline that carries his oil to market differs from that between a consumer and the utility from which he gets his heat and his light. Hence our gas and electric decisions are no guide to oil pipeline suspension policy. That area requires specialized treatment.[25]

XI.

As noted earlier, gas and electric suspension policy rests on two factors. One is the mobility of our consumer constituency. The other is that many members of that constituency suffer real hardship when they are hit in the pocketbook nerve by unadjudicated rate increases of dubious legality. These are truisms when we deal with consumers.

But they are of dubious validity when we deal with shippers of petroleum. To begin with, those shippers do not move from place to place. Some of them produce crude oil. The wells from which that oil comes never migrate. Those wells stay put.[26]

Other shippers own refineries. Those facilities are fixed. The capital invested in them is not nearly so mobile as is the capital invested in such "light" manufacturing operations as textiles, apparel, shoes, or printing. Seldom, if ever, does the owner of a refinery pack up and move lock, stock, and barrel from Philadelphia to Houston. It follows that we need not worry much about the plight of the migratory shipper.

Of course, there will be instances in which a shipper who was overcharged in 1980 is out of business in 1986, when the refund comes through at last. Nevertheless, that ex-shipper will get his refund. Unlike the consumers who look to this agency for protection, that shipper deals *directly* with the entity we regulate.[27] He does not have to look to some distributor-intermediary. Nor is he at the mercy of an extremely fallible flow-through mechanism that deals with populations in gross and that is thus inherently incapable of doing justice to each and every *retail* consumer victimized by an excessive *wholsesale* rate.

The wronged *consumer* may get his refund. Or he may not. It depends on the luck of the draw. But the wronged *shipper* always gets his refund.[28] That difference makes a difference. And the difference that it makes is a very big difference indeed for present purposes.[29]

XII.

Another significant difference between the consumers of electricity and gas, on the one hand, and the shippers of oil, on the other, comes to the fore when we look at the economic status of the two populations.

Nothing that has come to our attention suggests that there is a significant number of poor people who own oil wells or oil refineries. True, there is always somebody at the margin. And it is also true that even at today's prices, there are some people in the oil business who are having a difficult time.[30] Even for those marginal entrepreneurs, however, a pipeline rate increase is unlikely to have an impact at all comparable to the impact of a substantially higher gas bill or an inflated electric bill on a household that subsists wholly or almost wholly on social security benefits, unemployment compensation, the statutory minimum wage, or an inflation-ravaged fixed income.

And even when we go up the economic ladder, we encounter millions of consumers in circumstances far more necessitous than those of all but the merest handful of producers and refiners.[31]

Now there is no virtue in long suspensions for the sake of long suspensions. Suspensions are not ends in themselves. They are means to an end. That end is the striking of a fair and equitable balance between competing social interests. One of those interests is the social interest in the financial viability of regulated enterprises supplying essential public services and hence in a regulatory system that enables those enterprises to raise their rates in relatively short order, when necessary. That interest collides with the social interest in seeing to it that the rates that the regulated enterprises are actually collecting conform to the "just and reasonable" ideal and that the gap between statutory rhetoric and economic reality is of minimal dimensions.

The balance between these clashing interests tilts very sharply in favor of suspending for as long as we lawfully can when we deal with statutes that seek "to protect consumers against exploitation at the hands of natural gas [or electric utility] companies." [32] That is so because there a most substantial segment of the protected class suffers real hardship whenever its members are compelled to advance money to the regulatees and to wait until the mills of the law grind out refunds that may never in fact reach the precise destinations that they ideally ought to reach.

But the balance tilts just as sharply (or perhaps even more sharply) in favor of suspending for the shortest period that will assure the customer of an eventual refund in the event that the adjudicatory process ultimately shows that he has indeed been overcharged when we deal with the Interstate Commerce Act's oil pipeline provisions, which are primarily designed to promote equity among entrepreneurs. That is so because nothing in either the voluminous polemical literature about the oil pipeline problem (or as some in the industry would have it the oil pipeline non-problem) or in our three years of regulatory experience with the oil pipeline industry suggests that there have been or will be many cases in which rate increases that become effective subject to refund cause many members of the shipper population to suffer real hardship while they wait for their refunds.[33]

XIII.

From what has thus far been said it follows that this suspension must terminate at once.

But this is not the only case of its type. There have been other instances in which the Board has suspended oil pipeline rate increases for the full seven months permitted by the Interstate Commerce Act. Those are indistinguishable from this one. And like cases should be treated alike.

Hence we now direct the Board to take on its own initiative and with all deliberate speed the same corrective action in those other cases that we have ourselves taken this day in the instant case.

XIV.

Up to now we have been concerned with what the general rule should be. Cases may arise from time to time that call for an exception to that rule. It is conceivable that there will now and then be a situation in which there is good reason to believe that:

(1) The particular unadjudicated oil pipeline rate increase there involved may have significant anticompetitive effects or impose undue hardship on a shipper or a group of shippers.

(2) A suspension for the maximum period permitted by the Interstate Commerce Act might well have sufficient mitigative effect to render such a suspension worthy of consideration.

These cases will be rare. And they will present nice questions of judgment. The Board should bring these questions to us. But in view of their gravity and of their delicacy we think it inappropriate for the Board to decide them.

Hence we direct the Board to refrain from suspending any future oil pipeline rate filing for more than a single day. If its preliminary review of a particular case leads it to believe that it calls for a longer suspension, it is to submit the matter to us. From this day on no oil pipeline rate filing is in any circumstances to be suspended for more than a single day unless the Commission itself so orders.

XV.

The Commission orders:

(A) The suspension period in these dockets is terminated.

(B) The rates herein proposed by the Buckeye Pipe Line Company may become effective as of the date hereof subject to refund and to the other conditions prescribed in the Oil Pipeline Board's order of September 12, 1980.

(C) The Oil Pipeline Board shall as soon as practicable grant the relief that this order gives to the carrier here involved to every carrier whose rates have been suspended by the Board for a period of more than a day; provided, however, that this paragraph shall apply only to suspension ordered by the Board on or after July 1, 1980.

(D) The Oil Pipeline Board shall with all deliberate speed enter any and all orders necesary or appropriate to implement the intent of the preceding paragraph.

(E) Henceforth the Board shall in no circumstances suspend any filing submitted to it for more than one day.

(F) Whenever the Board analysis of a filing leads it to believe that that such filing should be suspended for more than one day, the Board shall submit the matter to the Commission for the exercise of the Commission's discretion.

(G) The Secretary shall promptly publish his order in the Federal Register.

— **Footnotes** —

[1] Natural gas *production* presents a special case that has been the subject of a heated public policy controversy for decades. That controversy is of no moment for present purposes. So we put it to one side.

[2] That requirement is coupled with a ban on "undue" discrimination. In addition, the Interstate Commerce Act (see p. 3 infra) prohibits rebates. There is no such express prohibition in the Federal Power and Natural Gas Acts.

[3] Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944): "Congress . . . has provided no formula by which the 'just and reasonable' rate is to be determined. It has not filled in the details of the general prescription. . . . It has not expressed in a specific rule the fixed principle of 'just and reasonable' ". (Footnote omitted.)

[4] Of course, we are also under a correlative duty to do all that we can to keep the buyers from converting that shield into a sword that deprives the sellers of their rightful due.

[5] We use the word "prices" because "Rate-making is . . . but one species of price-fixing." *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944) and authorities there cited.

[6] *Connecticut Light and Power Company v. Federal Energy Regulatory Commission*, 627 F.2d 466, 472 (D.C. Cir. June 30, 1980). See also *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

[7] At this point the court censured us for "reciting only nonexplanatory boilerplate". That reprimand was followed by: "The Commission should have enunciated standards for rate suspension periods . . . years ago. That the Commission has consistently failed to comply with the statutory mandate does not require our acquiescence."

[8] 627 F.2d at 472-473. (Emphasis by the court.)

[9] These words appear in many of the suspension orders that we have issued during the past several months. See, e.g., our order of July 31, 1980, in *Oklahoma Gas and Electric Company*, Docket No. ER80-421 and our orders of August 1, 1980, in *Arkansas Power & Light Company*, Docket No. ER80-373 and in *Kansas City Power & Light Company*, Docket Nos. ER80-315 and ER80-450. Those orders involved electric rates. For cases involving natural gas pipeline rates see our orders of August 22, 1980, in *Eastern Shore Natural Gas*

Company, Docket No. RP80-84, in *Trunkline Gas Company*, Docket No. RP80-106, and in *Valley Gas Transmission Inc.*, Docket No. RP80-98.

[10] The emphasis is not in the statutes. But it is in our orders.

[11] At this point a footnote cited Section 205(a) of the Federal Power Act, Section 4(e) of the Natural Gas Act, and Section 15 of the Interstate Commerce Act.

[12] See the orders cited in n. 1 on p. 5, *supra*.

[13] Section 17(2) of the Interstate Commerce Act authorizes the agency or agencies that administer that statute to delegate functions to boards of employees. Neither the Federal Power Act nor the Natural Gas Act contains any such provision.

[14] See our Order No. 3 (February 10, 1978).

[15] True, our ratemaking jurisdiction under the Power and Gas Acts reaches only whoesale transactions. But those transactions are regulated because their results are bound to show up in people's utility bills and because Federal regulation at the wholesale level was found an essential supplement to state regulation at retail.

[16] The text deals with the primary purpose of our gas and electric labors. There is also a secondary purpose. That involves the fostering of competion and the extirpation of practices that give integrated companies that sell electric and gas energy to smaller entities who redistribute that energy at retail an undue advantage in the struggle for existence at the retail level. See, e.g., *Federal Power Commission v. Conway Corp.*, 426 U.S. 271 (1976).

[17] But some maintain that there are situations in which they are never repaid. These cynics point out that continual filings for new increases, which become effective after five months (unless they are so patently outlandish that the Commission rejects them summarily) permit a wholesale seller to postpone the day of reckoning to the end of this geological epoch. In Section 207(b) of the Public Utility Regulatory Policies Act of 1978 Congress expressed its concern about this syndrome. In response to the direction given in that section the Commission's Chairman commented at some length on the problem and on its public policy implications. See the report to the Congress by Charles B. Curtis, Chairman of the Federal Energy Regulatory Commission, on *Decisional Delay in Wholesale Electric Rate Cases: Causes and Consequences and Possible Remedies* (January 23, 1980) at pp. 17-22.

[18] But the aggregate amounts involved are often very substantial indeed. Ten dollars per head may not sound like much. But when 2 million heads are involved, we have a fund of $20 million.

[19] Revisiting the illustration in the preceding footnote, we note that there are millions of Americans for whom $10 is no trivial sum.

[20] When such regulation is lacking, the unregulated retail sellers are almost always puublicly or cooperatively owned, which means that their "profits" inure to the benefit of the community as a whole or to the benefit of the cooperators who own the retail system.

[21] Though oil prices have been *"controlled"* from time to time in periods of national emergency, they have never been *"regulated"*. Control is not be be confused with regulation. Regulation seeks to set just and reasonable prices. Controls do not purport to have much to do with the justice or the reasonableness of an *individual price*. Controls simply seek to keep prices from rising. They do that by making the price as of some more or less arbitrarily chosen date or base period the maximum lawful price to which sellers must thereafter limit themselves.

[22] See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 644 (1978): "in the absence of suspension authority unreasonable [oil pipeline] rates will almost certainly be passed along to the consumer."

The presence of the word *"almost"* is significant. Had the Court been speaking of wholesale electric rates or of natural gas pipeline charges, it would probably not have used that qualifying adverb. In those contexts the work "almost" would be unnecessary. Indeed it would be misleading.

[23] A far cry indeed from the consumer impact of the electric and gas rate increases that come before us.

[24] And instruments still more powerful would be needed to measure the precise extent of that good. These devices are unavailable to us.

[25] "Eccentricities" of the particular industry must always be kept in mind. We take the word "eccentricities" from Mr. Justice Jackson's provocative dissent in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 628-660 (1944) in which he observed at page 629 of 320 U.S. that "Solutions of these cases must consider eccentricities of the industry which gave rise to them . . ."

Nothing that we say here and now should be read as a holding that the "eccentricities" of oil pipelining call for a radically different approach to the *substance* of regulation from the approach that we follow in the areas of responsibility that we inherited from the former Federal Power Commission. That question is not now before us. And we express no opinion as to the way in which it should be answered. Our answer to the substantive questions will be given when we issue our opinion or opinions in the first phase of *Trans Alaska Pipeline System*, Docket No. OR78-1 and in the first phase of *Williams Pipe Line Company*, Docket No. OR79-1. All that we deal with here and now is suspension policy. That is not to be confused with and has no necessary bearing on the substantive content of the "just and reasonable" standard.

[26] Of course, they run out. And eventually they run dry. But that has no bearing on our problem.

[27] As an old fashioned lawyer would say, the shipper of oil is "in privity" with the pipeline. The ultimate consumer of natural gas, on the other hand, is not in privity with the gas pipeline that sells to the distributor from whom he, the consumer, gets his gas. Nor is there any contractual relatiionship between the people who buy electric power from a distribution system that is municipally or cooperatively owned and the electric company from whom that distribution system gets its power. The end-user of electricity and of gas may not, and often does not, even know the name of either the pipeline company that carries gas to his town or of the electric company that actually generates the energy that enables him

to read his evening paper. The shipper of oil always knows the identity of the pipeline with which he deals.

[28] If he gets it with interest at a rate that compensates him for the time value of the over-collections made from him, whatever semblance of an analogy there might otherwise be between his situation and that of the consumers who never get the refunds to which they are equitably entitled and that they would get in a perfect world vanishes into thin air.

[29] Of course, it does not necessarily follow that this difference is material for other purposes. Cf. n. 26 on page 11, *supra*.

[30] However, we see no reason to believe that this is a numerous class.

[31] We adduce no statistical studies to support this proposition. It is also true that we have no statistical studies at our fingertips to support the proposition that the senior partners in New York's 20 largest law firms have more discretionary income as a class and are, on the whole, in significantly better financial condition than a representative sample of working and retired New York City legal secretaries and legal file clerks. We recognize that there is a chance that there are a few insolvent senior partners and that some of the solvent members of that class may have been dogged by misfortunes that have rendered their financial situations somewhat less comfortable than they would like. We have also heard of rich legal secretaries. And we support that there may very well be a couple of retired legal file clerks in New York who have performed prodigious feats of thrift, who have also inherited money, and who have in addition done very well in the stock market. Nevertheless, we have considerable confidence in the validity of both the generalization stated in the text and the generalization stated in this footnote. Neither proposition calls for an elaborate supporting demonstration. Both are truisms.

[32] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[33] The carrier-appellant contends that the inference to be drawn from that is that there should be no suspension at all. It supports that proposition by pointing out that if we fail to suspend an electric rate or a natural gas pipeline rate, the consumers are left without any remedy at all. It then goes on to argue that a shipper of oil over a pipeline needs no suspension in order to protect his interests. He can obtain redress and can recover the overcharge, if any, whether we suspend or not. That is so because the Interstate Commerce Act (§§ 13(1) and 16(1)) authorizes reparation proceedings that make the injured person whole.

This, argument raises more questions than it answers. If reparation proceedings give the shipper all the protection that he can possibly need, why on earth did Congress authorize suspension? That looks at first blush like a clear case of statutory overkill.

Appellant's answer to this is that the power to suspend was granted for the sole purpose of providing "the opportunity for the Commission to determine the justness and reasonableness of proposed rates before they are allowed to go into effect." It then points out with great cogency that becuase of the current state of flux in oil pipeline regulatory methodology, because of the basic nature of the questions of oil pipeline rate doctrine that we have to decide in two other cases now pending before us, and because the instant case cannot possibly be disposed until those earlier cases are decided there is absolutely no chance of getting the instant case over with before the seven month suspension period runs out. We follow the reasoning. But we disagree with the conclusion.

A reparation proceeding is no substitute for a suspension order. In the inquiry touched off by a suspension the burden of proof on the reasonableness issue is on the carrier. It has to show that its rates are just and reasonable. In a reparation proceeding, on the other hand, the burden of proof is on the complaining shipper. He has to show that the carrier's rate is unreasonable. Moreover, a shipper has to act affirmatively in order to initiate a reparation proceeding. Such a proceeding is, in effect, a lawsuit by the aggrieved shipper against the carrier. Like other litigation, it is expensive and vexatious. The inquiry that follows a suspension proceeding is in sharp contrast. There the shipper doesn't have to do anything. The Commission carries the ball. Hence the industry's preference for reparation proceedings over suspensions is only natural. See *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

So we would be strongly tempted to make the very argument that it makes were we in this carrier's shoes. But we are not in its shoes. Nor are we here to protect the carrier. We are here to protect its presumably disadvantaged customers. Hence we are not at liberty to eviscerate the state that Congress passed for those customers' benefit by construing that enactment in a way that deprives the customers of the significant advantages that they derive from suspension orders.