

JOHN

FURMAN

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The attached transcript contains the remarks made by Mr. John Furman on October 24, 1973 before the Senate Resources Committee. It is a verbatim transcript of Mr. Furman's remarks. There is occasionally a word missing or other minor gaps in certain places, which are due to the speaker's testimony being indecipherable at that point. However, it is believed that these occasions are rare and the transcript presents a fair picture of the thoughts expressed by the witness before the committee.

Senator John Sackett
Chairman
Resources Committee

SENATE RESOURCES / COMMERCE

October 24, 1973

TESTIMONY OF MR. JOHN FURMAN

CHAIRMAN: As Senator Thomas indicated, many of us questioned the status of ICC and how far their regulations went and in what area. I asked Mr. John Furman of Washington D.C. to testify. Mr. Furman had previously under the governorship of Senator Miller did a memorandum for Arthur D. Little back in 1970 relative to ICC regulations. Mr. Furman is a member of the Bar of the United States Supreme Court, the District of Columbia and Maryland. He is a partner in Cox, Langford and Brown in Washington D.C. A Yale graduate of 1946, cum laude, he has served in the office of Price Administration, a department of State from 1956 to 1962 he was a consultant with Foster Associates, a firm with offices in Washington, Tulsa and Calgary Alberta specializing in problems of rate regulations. He is a member of the American Bar Association. At this time, I would like to turn over the floor to Mr. Furman.

MR. FURMAN: Thank you sir. I'm sorry to tell you the Chairman was reading from something I wrote, I think, three years ago, when I was asked to give my background. I want to make one change in it. I withdrew from the law firm of Cox, Langford & Brown in January of this year and now have my own office.

I assume that what I really am being asked to do here today is to say whether there have been any changes since I was here before and speak to the question of function and role and level

of activity of the ICC. First of all, I want to say that there has certainly been no changes which affect the right of Alaska to regulate intrastate pipelines or, and I think this is very important, intrastate activities on interstate pipelines. There is a tendency in the discussions and in the drafting of the House Bill No. 6 to support that there are two kinds of animals. Intrastate pipelines and interstate pipelines; and that while the State may have jurisdiction over the first, the ICC has jurisdiction over the latter and it therefore follows that the State has no jurisdiction over the latter. This is simply not the case, if only because of the responsibility of the State of Alaska to regulate intrastate pipelines and to regulate the intrastate activities of interstate pipelines. I feel very strongly that you need something like your existing Alaska Pipeline Commission Act. As I read the proposals for changing that act, I think the rate of escalation is not too strong. I think the consequences would be not only the limitation of your rights with reference to the intrastate activities of interstate pipelines, but to create a body with much less effectiveness in dealing with ___ __ problems which are clearly within the jurisdiction of the State.

Now, have there been any changes in the last three years to indicate that the ICC has some new conception of its role. The first point might be that there's certainly been no changes in any of the statutory authorizations under which the ICC operates.

I think we have to recognize that the ICC is the oldest regulatory commission in Washington. Its also the least respected regulatory commission in Washington. And its the least self-confident regulatory commission in Washington. There's even talk in this administration about abolishing the ICC. Not necessarily have to do with its regulations of pipelines because thats pretty inoffensive, but because of the philosophy of this administration that much of the regulation that has been built up over the last generation is unnecessary and anti-competitive. And this, in fact, is true. The ICC for years has sought to protect railroads from competition from other forms of transport, it has sought to regulate motor carriers in ways that this administration would say is better left to the competitive process. So that you're not talking about what I would call a vigorous and effective agency even within its own terms.

Furthermore, the system and authority of the ICC resulting from the Hepburn Act is very limited. There's been no change in that since three years ago and I want to endorse what Professor Witherspoon told you yesterday about the authority of the ICC. I won't go through that with you. I do want to make one point-- and that is that the fault that the ICC has with reference to railroads and with reference to motor carriers is a fairly wide range of authority..For example, the case of _____ certificate authority does not mean that also it has the authority with reference to pipelines.

I went through the Interstate Commerce Act once, and x'd out all those provisions which because of the definition or because of their terms were applicable only to railroads or motor carriers. I ended up x'ing out most of it. There was really very little that the ICC has authority to do. Furthermore, there is now pending before the Senate a proposal by Senator Stevenson connected with the problems of how do you regulate natural gas producers and to what extent do you exempt them from federal regulations in the interest of getting more gas to market. A proposal which would transfer the jurisdiction of the ICC over all pipelines, such as it is, to Federal Power Commission. And I think this again is a reflection of the general view in Washington as to the very limited function which the ICC has been performing in this area. What I do think it means is that Governor Egan is right when he says that there are clear indications that the ICC may _____

If I were the ICC I would be doing a lot of re-examining, if only because of this proposal for the transfer of authority of pipelines to some other agency. This is the quickest way to get an agency in Washington to re-examine something.

I don't know, however, what he means when he says that the ICC has been primed to begin responding in a new way. It takes staff, as well as interest, to accomplish anything. It takes Statutory authority, and I know with reference to the ICC that there is no effort by the ICC to seek more money for the staff

it has working on pipelines and its hard for it to do it, because it doesn't have any staff that works on pipelines. Before I left Washington, I got ahold of a copy of the telephone directory of the Interstate Commerce Commission, which is arranged in functional order, with all the titles of the various offices and divisions and subsections and so forth. Now, you can go through that telephone directory and you can find that under the heading of _____, sections having particular responsibility for railroads or for motor carriers. You can look at the Bureau of Operations and you can find a section of Motor Carriers and a section of railroads. But there isn't one single mention of the word pipeline in the whole bureaucratic structure of the ICC--and that's from 1970. and In anticipation of my testifying here today, I've made and I've had my office make several efforts to make sure that I'm right in believing that there just isn't anybody at the ICC, who really devotes his time and attention to the problems that you're wrestling with here.

Now, it is true that because the ICC has certain limited functions to perform, and because in particular it performs a function for the pipelines with reference to the--specifically--pipeline's final form _____ back in 1940, when he was pursuing the oil industry with a rather broad anti-trust action and the war came along and the oil industry said, "if you want us to help you in the war effort, then we better settle this." And he settled for a one provision, relating

to the charges which oil pipelines make to their own affiliates in comparison to the charges they make to other parties for the transportation of oil. This has placed on the ICC the informal function of conducting evaluations to see whether the pipelines are making more than--I think the figure is 7%. It is also true that the ICC keeps house while by interstate pipelines, and that if a change is filed on a tariff, anyone who is interested has 15 days within which to make that interest known to try to persuade the ICC to prevent the change from going into effect. The ICC must be notified 30 days in advance of the proposed change in rate.

I know of no proceedings which has resulted from this particular procedure of the ICC, nor do I know of any effort the ICC since World War II, on its own initiative to investigate any of the aspects of a pipeline--of all pipelines--in the manner in which they are administered and their affect on the general public welfare. In an effort to confirm my impression, while I've been up here and in view of the statement of the Chairman of the ICC and the statements made by the Governor which have been circulating here, I asked my office to check around and see if they could find any basis for saying that the ICC is somehow taking on a new lease on life. They talked yesterday to the legislative counsel of ICC, Larry Reda, and we were told that the ICC is trying to see whether in fact it is using its power to the full. But I get the impression that again, that this is

a by-product more of the proposal to transfer the functions of the overall pipelines to the Federal Power Commission than it is because of the special problems that relate to the TransAlaska pipeline.

This leads me to the conclusion that you certainly ought not, as is proposed in Bill No. 6, to adopt a provision which says that you will not exercise whatever power you have waiting to see or until the ICC affirmatively decides that it has no jurisdiction. Even if the ICC were to begin a proceeding today to decide whether or not they had jurisdiction; if it took as long as the rate case they ran before World War II, it would take them ten years to come to a concrete and affirmative decision that they have jurisdiction over this or that or whatever the issue might be. I would say that quite apart from the merits of that particular drafting device, its not well-suited to the problem.

Now, I think you have a special problem here, that as far as I know the ICC has never fully faced. And that is, how do you regulate an undivided interest pipeline? When I talked to some people in the ICC in 1970, one thing that they really threw up their hands on was a regulation of undivided interest pipelines. And I think its worth pausing on that for a minute. To the extent that the ICC has jurisdiction, to the extent that the ICC has an interest in regulation, its interest is focused on the pipeline companies as companies. Exxon Pipeline Company, for example, rather than Exxon's particular piece of the braided

line, as its sometimes called, which is going to be the taps line. That means as to whether the Exxon pipeline is in a healthy condition or its rates are too high or too low, the ICC based on past cases is going to look at Exxon Pipeline Company as a whole. It has a national function to perform, and its not necessarily going to be raising the question as to the appropriateness of that portion of Exxon Pipelins Company's earnings which are attributable to the operation of Exxon's share in the taps line. For this reason, I like one proposal that I see in Senate Bill No. 6, and that's a sentence in Section 6 which proposes to add to your Sec. 42.06.430 (6), a sentence that would require a pipeline owning interest in an undivided interest pipeline to make reports to the commission on an individual pipeline basis, for any pipeline located wholly or in part in the State. I think as you go ahead into what I'm sure is going to be a very complicated and difficult problem, one of the things that you're going to need most desperately, are facts.--are going to be hard to come by and I think you have to rely on yourself to get those facts because I'm very doubtful of the extent to which you're going to be able to pick up the long distance phone and call an expert on oil pipelines in the ICC and get the facts from him.

I would leave, except for this one possible change, I would leave your existing pipeline Commission Act as it is.

It's not my understanding that the lawsuits which have been filed and I have read the briefs of both Mobile and the other plaintiffs, its' not my understanding that it is Pipeline Commission Act that is their principle target. I do understand that they have a problem with the certification section, but their main focus, as I understand it, are on other pieces of legislation. Its therefore hard, frankly, for me to understand how a negotiation to settle the lawsuits could have wound up with the proposals to make the drastic changes in the Alaska Pipeline Commission Act, which are embodied in Senate Bill No. 6.

For anyone like myself who practices law in Washington before the regulatory commission, its always a little confusing to see a piece of legislation such as the one you have before it, that treats natural gas pipelines and oil pipelines as though they were similar in character and as though the regulatory problems were similar. The Federal Power Commission and the Natural Gas Act are both a different commission and a very different regulatory statute from the ICC and the Hepburn Act. The way in which gas is bought and sold and taken to market is very different from the way in which oil is bought and sold and taken to market. I do think that the Natural Gas Act provides an instructive lesson as it were, how in our federal system, state commissions and a federal commission can work together to accomplish effective regulations. I don't believe that the most regulation is the most effective regulations and it

frequently is the worst. I think what you have to do in any case is to find some reasonable balance. Not only between how much regulation you need, but in our federal system between what the federal government is to do and what the state government is to do. And there is simply no constitutional black line that you can draw between the authority of the states and the authority of the federal government only because the facts are usually so complicated that you're dealing with. At the same time, both matters of federal interest and matters of state interest. The Federal Power Commission is a commission of limited jurisdiction in the sense that it was created in 1938, as to its jurisdiction over natural gas pipelines I should say, it was added in 1938, the Commission having existed since 1920 to regulate electric utilities. It was created to fill a gap between the state regulations at the production end of the pipeline and the state regulation at the distribution end of the pipeline, the consuming _____ end of the pipeline--the distribution end--and if you go through the Natural Gas Act, you will find, time and time again, conditions under which it is anticipated that the federal agency and the state commissions will work together. There are provisions for joint hearings, for example, over problems that affect both. There are provisions for the Federal Power Commission to provide assistance to State commissions. So that to think of the problem as one in

which it either belongs to the Alaska commission or it belongs to the ICC, I think, misses what is the real point. That what you need to do is to develop a method of regulation here in Alaska which would be appropriately complementary to whatever regulation exists in Washington, recognizing always that to the extent that Congress acts, and to the extent that the ICC acts, the action of the federal agencies will undoubtedly preempt the field. But until such action is taken by the federal government, and in areas where the federal government does not act, you're either going to have, as you did in the Natural gas pipeline field before 1938, a void where no regulations exist, or you're going to have state action.

I think this is not an easy line to draw, and I have no doubt that down the road in the process of drawing the line, there could very easily be situations in which the decision as to where to draw the line is one that everyone will _____.

I'm not sure that need necessarily be the case. I'm not sure that its necessary that the Alaska Pipeline Commission must from the day it starts out, push its powers to the full possible limit until it meets the ICC coming the other way. But for the Pipeline Commission to be effective, I think you have to have a strong commission. And I must say the proposals to reduce the Commission to a situation in which you would really have only one full-time Commissioner, I personally believe would be a great mistake. The Alaska Pipeline Commission does no more in the next several years

than to gather information, to gain a better understanding of what does in fact go on in Washington with reference to the regulation of oil pipelines, it will certainly be earning what little amount from your treasury it will take to pay a few more full-time commissioners with adequate staff personnel. I just don't think you can hope to deal with this set of problems by having this legislature, as able as it is, assemble on an ad hoc basis, from time to time, experts to tell them what would be a wise thing to do. I think you've got to have some continuity of expertise and I think a strong pipeline commission is exactly the place in which to attempt to accomplish that. To the extent to which the existing pipeline commission act conflicts with federal jurisdiction, or is in some sense unconstitutional, I frankly don't see it. I agree with the question Senator Rader posed the other day to Mr. Heard, when he pointed to Sec. 150 which says that the provisions apply only to the extent not preempted in federal legislation. From the point of view of an attorney, I think that solves the problem. I think the problem is also solved in the particular case of the taps line and the possibility that it may be required to jump over the same hurdles here that it had to jump over in Washington, because although you now have a TransAlaska pipeline authorization act, or will soon have, and although in that act in Sec. 212 the Congress has made certain determinations to

the effect that the taps line is in the national interest, that really accommodates itself very well to Sec. 240, where your existing legislation says that the requirements for a certificate shall not operate to impose state regulations which has been preempted under the Interstate Commerce Act of 1906, the Natural Gas Act of 1938. When federal law has preempted state regulation, the commission shall accept the finding made under the federal scheme of regulation. I can't imagine the Alaska Pipeline Commission not accepting the findings which Congress has now made to the effect that the taps line is in the national interest.

I agree with what Mr. Levy said a few moments ago. He is not award that the ICC has taken any steps in the recent past, to increase its sensitivity to oil pipeline problems. I do not agree with the next statement that he made, because I don't think it puts in quite right. He said I would not place my trust in princes, even if they are located in Washington. I think speaking to you as a friend of Alaskans, I would say I would not place my trust in princes, especially if they are located in Washington.

I would be glad to answer any question anyone would have:
SENATOR PALMER: The existing legislation specifically says then, that any certificate of authority that the state pipeline commission might have is null and void and preempted by the federal government in that respect. You're saying then that that really poses no

threat to Alyeska Pipeline companies, or should pose no threat but from the state standpoint might be quite important in the future when we do have intrastate pipelines not regulated by the federal government and this certificate of authority may be vital at that time. Is that what you're saying?

A. I quite agree with that, yes.

SENATOR KERTULIA: Once again,(rest of question unintelligible)

A. That's right.

SENATOR GROH: Mr. Furman, I really appreciate your comments and your help. Insofar as intrastate pipeline is concerned, there is no question is there, either about lines as to the effect of or existing regulatory legislation. It will work, won't it, in your opinion.

A. You're talking about the 1972 legislation--Yes I think it will.

Q. Senate Bill 6 has not endeavored to deal with that issue. That is the issue of intrastate pipeline.

A. Well, I'm in much the position that Mr. Levy is in, which is that I have not had time to take Senate Bill 6 and do what he recommended--that is to take all the existing legislation and lay it out then see exactly the way in which bill No. 6 would affect it.

Q. I might mention that Senator Lewis has done this; I don't know whether anybody shown where the changes are in the act.

Now, for intrastate pipelines, the regulatory _____

This is where I have a problem, and you're obviously an expert in this field. Would you say if the pipeline is interstate commerce and within the jurisdiction of the ICC, would you say that the State has the power to exercise concurrent regulatory jurisdiction?

A. I would, and I can illustrate that if you like most easily by reference to the way in which the federal-state system works with reference to natural gas pipelines. There's no question but what the Federal Power Commission has jurisdiction over natural gas companies, that is, those companies that transport gas in interstate commerce and _____ that gas for resale. But that doesn't mean that state commissions, who also have authority over exactly the same companies with reference to those activities, which don't come within the jurisdiction of the Federal Power Commission.

Q. Let's limit ourselves to oil pipelines, because that's our primary concern. Are you saying that in your view we have concurrent regulatory jurisdiction; then my question is, where does that concurrent regulatory jurisdiction end? Does it end as the courts have defined it at such point as that concurrent regulatory jurisdiction imposes a burden on interstate commerce-- is that the cut-off point that we can go to?

A. No sir. There is such a cut-off point, but its not the cut-off point that I would refer to. In other words, whether or not the Congress had seen fit in 1906 to adopt the Hepburn Act,

I think the State of Alaska is barred from imposing any burden on interstate commerce. That's a separate legal issue--an independent ground on which the State of Alaska operates subject to limitations. Before we go on from there, I would like to point out that the word concurrent was one of your choice, and not, I think, not _____ . Because what I-- I think the way I would put it is this: that it may well be that Congress under the Constitution has the power to limit even more severely, then, as the case with natural gas pipelines, the power of the State of Alaska to regulate in particular areas. The fact is, as I read the Hepburn Act, it hasn't come close to doing that and I think it would be a gross mis-construction of Congressional intent to say that that also represented a decision by Congress that no one should perform the regulatory function that the ICC does not perform.

Q. I'm trying to reach the point beyond which _____ . I won't use the term concurrent regulatory. In case, it is established that we cannot go beyond the point, that is the decisions of the Supreme Court of the United States, that we cannot go beyond the point where we create a burden on Interstate Commerce, is that a valid statement of the law?

A. That is correct.

Q. So that is the limit to which we can go, as I understand the state of the existing law, in your view.

A. That is one test; what I'm also trying to say is that I think you have an independent problem arising from the fact that Congress has, in fact, acted with reference to interstate pipelines.

But so much of this depends upon the particular fact situation. Let me suppose this fact situation: Suppose that for reasons of the economics of transporting oil products vs. crude oil that it is in the interest of the oil companies to build a highway at Valdez and to process all the oil coming down the taps line at Valdez. I think that would change the situation. I think there wouldn't be any question then, whether the oil was being transported from the North Slope to Valdez was all moving in interstate commerce in the sense that you would somehow be barred from regulating that commerce, quite apart from any other intrastate aspects of it. So that what you're doing here, as I see it is to try to create a structure of regulation _____ and you're dealing not only with the particular fact situation that you've got in front of you now, but you're trying to set up a system into which you will be able to deal with a whole variety of fact situations which may arise down the road.

Q. Let me ask this question and maybe. . . Assuming an interstate pipeline which presumably we're all agreed its going to carry oil in interstate commerce, do you think that its within our regulatory powers under the existing state of the law involving interstate commerce to require a certificate of public convenience in the form in which it exists in our present regulatory law?

A. I think you can, subject to the qualification which the law already provides for. . . that to the extent that the Congress or

any other branch of the federal government has made findings with _____ to this line as to its being in the public interest. I think that you are foreclosed from _____ those findings. And I think that your statute that contains the means of accommodation.

Q. I'm not sure I understand you. In fact, with the existing law the way it is and Congress acting on the pipeline bill, under our present regulatory bills, as I understand it, Sec. whatever it is--the one that sets up a certificate of public convenience and necessity and one that sets up the _____.

Do you think that under your understanding, that the State of Alaska has the present power to require, considering what this line is and what has transpired, a certificate of public convenience and necessity?

A. Yes, I think you probably can. Let me also say that what has been referred to as certificate provisions, includes a lot more than just getting an initial certificate of public convenience and necessity. Now I'm not addressing myself as to whether, with reference to the particular case of the taps line, that this legislature should or should not do something like Congress is in the process of doing. We've discussed this thing about whether its going to influence the environment for so long that there's no point in discussing it any further. we will therefore, as a legislative act, decide that in this one case we're not going to go through the legal procedures. For this

one case, because we've been discussing so long, because the Congress has acted in this unique and unusual fashion, we will make that effort as a legislative body, whatever determinations with reference to public convenience and necessity our statute requires. And thereby avoid, perhaps, an administrative proceeding which might otherwise be necessary.

SENATOR THOMAS: Is there anything at all in this new act that's coming out of Congress that tends to encourage cooperation between the state regulatory body and the ICC? Is there any language there at all to handle this?

A. I don't think there's anything off-hand. I think that certainly the Congress was looking at the problem of the taps line from a national point of view and the national shortage of oil, and its desperately needed. I think everyone in this room wants to see the taps line built as fast as possible.

Q. The reason I asked was that one of our senators back there had suggested that we could in fact do this very successfully to have a strong regulatory commission. . .(rest inaudible)

A. Yes, I certainly think so.

SENATOR KERTTULA: I'm not quite ready with my question.

SENATOR RETTIG: Mr. Furman, do you see any reason why, I think you made reference to _____, (rest of question inaudible)

A. I certainly think you're free to amend, to the extent which you can strengthen--of course, the more history _ _

the less you can influence that _____.

Q. Do you see any area in regulations that we could adopt in the future?

A. I think a legislative body like this is always free to amend previous legislative enactments.

Q. Is there something we're doing in considering this--if we should adopt this, or we shouldn't--that there's something we can't act on in the regular session next month.

A. That's right--or I assume that's right. Although I would say that how you approach this problem this session will be taken by all parties involved to be of great significance.

A. The matter of convenience and necessity certificate--in the case of interstate commerce, wouldn't that statute required to issue a certificate be an exercise in complete futility. There could be no way that such a hearing or such an exercise could stop the construction of that pipeline.

A. First, the Interstate Commerce Commission has no authority to issue, and therefore has no authority to refuse the issuance of a certificate. At the federal level, that question doesn't even arise. Furthermore, I think Congress is in the process of speaking formally, certainly at least with reference to the exercise of federal power with reference to this particular pipeline.

Q. Can't we seek through this device to impose a burden on the ICC?

A. No, and I think you. . .

Q. So, the provision is really inoperative at this time.

A. I'm not sure which provision we're talking about. Are you talking about the provision in your own legislation which calls for the issuance of a certificate. . .Yes. Well, I have in front of me the Title 2 of the federal Leasing Act amendments and I would hesitate to preempt the function of your own Attorney General. . .

Q. Can we through this device of requiring a certificate of convenience and necessity stop the construction of the pipeline? So isn't that certificate an automatic thing, anyway?

A. I would suppose that it was.

SENATOR PALMER: Is there any reasonable way of assuming that requiring this certificate as we have our 1972 legislation, requiring it when applicable, when it has already been preempted by the federal government, that this can be construed legally to be an _____?

A. I'm not sure I understood the point of the question; but if you are saying that the provision already in the statute which says that these _____ will apply only if not preempted, could lead to the commission taking the position that it has no function to perform in the issuance of a certificate. I can well imagine that line of reasoning.

Q. It seems the point the Senator was driving at was this would cause an undue burden, and therefore was impossible for us

to do. My question was, does it really constitute unde burden?

A. Well, I think it depends on--to be frank with you, I don't consider myself as master of the certificate provisions of your existing law, and I hesitate to address myself to the specifics.

SENATOR RADER: Have you any views that you could give us as to the Right-of-Way Leasing Act. . .

A. No, sir.

Q. Whether or not that would be in your opinion an undue burden on ICC?

A. I prefer not to speak to that, I simply haven't--to be frank with you, I have read the briefs of the oil companies on these issues, I have not read the state's briefs and I would hesitate under those circumstances to issue a ruling.

MR. CHAIRMAN: Are there any additional questions? If not, then thank you, Mr. Furman, very much.

SENATOR RETTIG: Mr. Chairman, I have one more question. Mr. Furman, I'm concerned about the oil getting through the Valdez terminal, the docking facilities--how far does ICC regulate? Does it regulate until it gets on the vessel, and therefore will prove itself part of the common carrier. Or do we have to worry about that? Must we concern ourselves with being a public dock?

A. I think you better concern yourself with it, because I doubt if anybody at the ICC will.