STATEMENT, WITH AUTHORITIES, IN OPPOSITION TO SENATE BILL 46.

[*By* HERBERT FITZPATRICK *and* IRA E. ROBINSON.]

Before giving to the House and Senate Judiciary Committees before which this bill is now pending, the authorities which bear upon the constitutional questions involved, it is considered advisable to state briefly the local situation in the State of West Virginia.

There are certain companies in the State of West Virginia engaged in the gas business, which, in accordance with their corporate and franchise duties to the State, furnish gas to various municipalities and industries in the State, and, in addition thereto, transport gas into the states of Pennsylvania, Ohio, Kentucky and Maryland. In these states a great business has been built up and expenditures of large amounts have been made in the construction of pipe lines and other facilities.

The bill, as proposed, has for its real object, whatever may be its language, the curtailing of the supply of gas furnished to the various states mentioned, in order, as is urged in argument, to increase the supply of gas in the State of West Virginia for West Virginia consumption. If this be not the purpose of the bill, then there is urged no good reason for its passage, and it is submitted that it may be now taken as an admitted fact that the intent of the bill is so to limit the amount of gas exported from the State of West Virginia that every municipality or company may, upon demand, have all of the gas desired for every purpose whatsoever, irrespective of the fact that the foreign markets were created when there were no local markets, and the fact that the business of these companies outside of the State may be wrecked, their plants, pipe lines and appliances turned into junk and the necessity arise for decided increase in local rates, due to the loss of foreign markets.

Of course, it is realized that every one of the companies affected acknowledges the legal obligations under which it lives in the State of West Virginia, and that, in accordance with such obligations, each one of them now serves the various communities or individuals which it has held itself out to serve. This is the extent, under the law, of

any company's duty, whether in the northern end of the State or in the southern end of the State.

No gas company is now known which fails to comply with its corporate obligations, unless it be some small or local company which has not taken the necessary steps to protect itself by keeping a sufficient acreage of reserve territory. If this were not true, the bill as proposed would be a useless thing, for the reason that, whenever there is a fixed obligation upon any public service company to furnish to any community gas, water or electricity, and that company fails so to do, when that company breaks its obligation there, under the present system, a clear and adequate remedy, either before the Public Service Commission of West Virginia, or in any Circuit Court by mandamus; so that it cannot be successfully contended that the gas companies are refusing or failing to comply with their obligations.

As a matter of fact, from a practical viewpoint, it is difficult to conceive why the companies which have an interest so great in the future of this State by reason of property investment, should do anything other than to comply with the laws of the State. The gas companies of West Virginia pay something like one-seventh of the total taxes paid in the State, and their rentals will run, in round figures, in excess of $4,000,000.00 the year to the people of the State. These things of themselves are sufficient to fix a strong primary interest in the State in the companies which are protesting against the passage of this bill.

If the gas companies are complying with their obligations to the people of this State as fixed by their basic duty to the State, which they hold themselves out to perform, then there is left in the question now presented nothing except the clear-cut legal proposition: Is the bill proposed valid under the Constitution of the United States? It is submitted that the bill, under the decisions of the Supreme Court of the United States and under the authority of all of the texts, is plainly unconstitutional.

Any doubt that ever could have existed as to the constitutionality of such a measure has been settled by the courts, particularly by the highest court in the land.

It cannot be contended that the bill proposed is a local measure, for the reason that the matter which it reaches is national, nor can it be said that because Congress has not acted definitely upon this subject the State may still act, because the power of Congress is exclusive, and it is not necessary to cite authorities which sustain the power of Congress over interstate commerce. All of these questions have been

succinctly and conclusively answered by Judge Sanborn of the Eighth Circuit Court of Appeals, in *Haskell* v. *Cowhan,* 187 Federal, 402, approved in the now well known case of *West* v. *Kansas Natural Gas Company,* 221 U. S., 35 L. R. A. (N. S.) 1193, in which Judge Sanborn says:

> "The power to regulate commerce among the states was carved out of the general sovereign power when the national government was formed and granted by the people by means of the Constituiton to the Congress of the United States. Article 1, Sec. 8. That grant is *exclusive.* The nation may exercise the power thus given *to its utmost extent,* and no state may lawfully restrict or infringe this grant or the plenary exertion of this power, for *they are paramount to all the powers of the state, and they inhere in the supreme law of the land.* Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject *national* in its character and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that interstate commerce therein shall be free, and *any law or act of a state or its officers* which prohibits it or *substantially* restrains its freedom is violative of the Constitution and void. *Welton* v. *State of Missouri,* 91 U. S. 275, 282, 23 L. Ed. 347; *Brown* v. *Houston,* 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Walling* v. *Michigan,* 116 U. S. 446, 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; Case of the State Freight Tax, 15 Wall, 232, 21 L. Ed. 146."

Therefore, attention is now directed to the three fundamental propositions established by all precedents:

FIRST: *Gas is a commodity, privately owned.*

SECOND: *As such commodity, it is a legitimate object of commerce.*

THIRD: *Neither the exercise of the police power of the state or of any quasi sovereign right of the state can forbid or interfere with the exportation of any of its natural resources in which an individual may acquire an absolute property.*

Considering these propositions *seriatim:*

FIRST: *Gas is a commodity, privately owned.*

The Supreme Court of the United States, in *West* v. *Kansas Natural Gas Company,* 221 U. S. 229, uses the following language:

> "Gas when reduced to possession is a commodity. It belongs to the owner of the land, and when reduced to posses-

sion, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce."

It is not necessary to go further, but we find that the same case goes further, and says that

> "Natural gas is as much a commodity as iron, coal or petroleum, or other products of the earth, and can be transported, bought and sold as other products; that it is not a commercial product when it is in the earth, but becomes so when brought to the surface and placed in pipes for transportation; that if it can be kept within the state after it has become a commercial product, so may corn, wheat, lead and iron."

SECOND: *As such commodity, it is a legitimate object of commerce.*

The West case, *supra,* went back after the hearing in the Supreme Court of the United States, in order that the final decree should be drawn therein in accordance with the doctrine laid down by the highest court of the land, and it came again to the Supreme Court of the United States, under the style of *Haskell* v. *Kansas Natural Gas Company,* 224 U. S. 217. The question there involved was as to the form of the decree. In the discussion of the decree presented, the court said:

> "This court has held that natural gas, after severance, is a commodity which might be dealt in like other products of the earth, as coal and other minerals, and *is a legitimate subject of interstate commerce."*

Therefore, the second proposition must be considered as established.

THIRD: *Neither the exercise of the police power of the state or of any quasi sovereign right of the state can forbid or interfere with the exportation of any of its natural resources in which an individual may acquire an absolute property.*

The statement of this conclusion is not only the opinion of counsel representing the gas companies before these committees, but it is the opinion of annotators and text writers. No authority so far decided by any court of last resort holds to the contrary. The Lawyers Reports Annotated, a series of law books edited with great ability, in the discussion of the West case, *supra,* uses the following language:

> "The decision of the Supreme Court of the United States

in the West case apparently settles the proposition that the state, either through the exercise of its police power or the exercise of any other of its *quasi* sovereign rights, cannot forbid the exportation of any of its natural resources in which a private individual may gain an absolute property, to the exclusion of any special property by the state; that the purpose of the state in forbidding the exportation of its natural resources is to conserve the same, does not cure the invalidity, since such *restriction* is an interference with interstate commerce."

And it is found that Thornton, in his valuable work on oil and gas, 1918 Ed., Sec. 396, states the law as follows:

> "As gas and oil are instruments of commerce, when refined in receptacles, a state cannot prevent their transportation beyond its boundaries, however desirable such prevention may be."

And so it is found that Judson on Interstate Commerce, Sec. 12, pointedly bring out the idea that, though a state may adopt reasonable methods of regulation of the *production* of oil and gas,

> "it cannot deprive the owner of his right to withdraw and sell oil or gas, when reduced to possession, in interstate commerce, and a state statute seeking to attain these unauthorized ends is void."

In the West case Justice McKenna quoted, with evident approval, from the opinion of the Circuit Court of Appeals in *Haskell* v. *Cowham*, 187 Federal, *supra*.

> "No state by the exercise of, or by the refusal to exercise, *any or all* of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof. No state by the exercise of, or by the refusal to exercise, *any or all* of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

It should be noted that the court says the end sought is beyond the power of the state by the use of *any or all* of its powers, and it should be likewise well considered that it is not necessary to charge the act with invalidity, that it should *in terms prevent* interstate commerce, it is equally invalid if it *substantially discriminates* against commerce between the states. In other words, the court in every instance looks through the shadows to the substance of the act, and the final test

is what the act actually accomplishes. This idea is put with exceptional clearness by Mr. Justice Day in the recently decided child labor decision:

> "A statute must be judged by its natural and reasonable effect."

To say anything else would be to vest in each state a power which would supersede the power of the national government:

> "If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare—a welfare which transcends that of any state. But rather, let us say, it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."
>
> West case, *supra*.

It is therefore submitted that each one of the propositions above laid down and upon which the passage of the bill must turn, is established, and that the bill proposed has, in reality, already been declared to be unconstitutional.