

THOSE WHO FAVOR FIRE: AN ODYSSEY OF FLARING IN TEXAS

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I. INTRODUCTION: UNIMAGINABLE WASTE

In light of the manifest benefits wrought by oil and gas, it is perhaps a damning indictment that, since their discovery, we have managed to find a way to waste them. In 1894, even before Spindletop, the City of Corsicana, Texas, unwittingly became Texas’s first oil boomtown and, by 1897, so many wells were drilled that production flooded the market.¹ Unable to find a market and with no forethought to storage, many operators simply dumped their surplus oil onto the bare ground.²

Natural gas took even longer to find a market.³ In the early days of the industry, an unlucky operator who discovered he had drilled a gas well would often simply cap it and forget it.⁴ It did not take long for the industry to discover that when natural gas is permitted to expand rapidly, as when the gas is emitted from a wellbore, a small fraction of it will condense to liquid.⁵

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1. Julia Cauble Smith, *Corsicana Oilfield*, TEX. STATE HIST. ASS’N (Aug. 11, 2020), <https://www.tshaonline.org/handbook/entries/corsicana-oilfield>.

2. *Id.*

3. See David F. Prindle, *The Texas Railroad Commission and the Elimination of the Flaring of Natural Gas, 1930–1949*, 84 SW. HIST. Q. 293, 294 (1980).

4. *See id.*

5. *Id.* at 295.

In the 1930s, this condensate could be used in automobiles like refined gasoline.⁶ Profit-driven operators found they could drill a gas well, strip out and save the condensate, and simply vent the leftover majority of gas into the atmosphere.⁷ Initially, we did not even have the good sense to burn it at the time, but once the hazard was made clear, oil companies started to flow the gas up pipes and ignite it.⁸ They flared it.⁹

Oil wells likewise invariably produce gas.¹⁰ This gas, often referred to as “casinghead gas” or “associated gas,” was often considered worthless in the early days of the industry and thus flared.¹¹ Industry lore is replete with stories of drivers capable of navigating the highways at night without their headlights due to the illumination provided by the flares.¹² Indeed, “you could drive from Dallas to Houston in the nighttime without ever turning on your headlights, so bright were the flames shooting from ubiquitous oil wells.”¹³ “Miles away from any major oil field, newspapers could be read easily at night by the light of these flares.”¹⁴

Regulating this waste (much less eliminating it) proved difficult.¹⁵ An 1899 law required any gas well to be shut-in unless and until the gas could be used for light, fuel, or power.¹⁶ A combination of court decisions and industry-backed lobbying had effectively nullified this law by 1933, however.¹⁷ Finally, in 1935, the Texas Railroad Commission (the Commission) was empowered to enforce an effective ban on flaring from gas wells.¹⁸

While obviously a step in the right direction, flaring from an “oil” well was still fair game. This in turn set off a game of cat and mouse between the Commission and creative producers attempting to classify their wells as oil.¹⁹ The law, still on the books today, classifying a gas well as one that

6. *Id.*

7. *Id.*

8. *Id.*

9. *See id.*

10. *See id.* at 295–96.

11. *See id.*; 40 C.F.R. § 98.238.

12. Prindle, *supra* note 3, at 296.

13. Judith Lewis Mernit, *The Race for an Obscure Texas Office Could Have a Lasting Impact on Climate Change*, CAP. & MAIN (Sept. 10, 2020), <https://capitalandmain.com/race-obscure-texas-office-could-have-lasting-impact-climate-change-0910>.

14. Prindle, *supra* note 3, at 296.

15. *Id.* at 298.

16. Bret Wells, *Please Give Us One More Oil Boom—I Promise Not to Screw it up This Time: The Broken Promise of Casinghead Gas Flaring in the Eagle Ford Shale*, 9 TEX. J. OIL, GAS & ENERGY L. 319, 352 (2014).

17. Prindle, *supra* note 3, at 301.

18. *Id.* at 301–02.

19. *Id.*

“produce[s] 100,000 or more cubic feet of gas for every barrel of oil,” can be traced back to this time period.²⁰

The Commission records indicate that the 1930s and 1940s witnessed approximately 100 Bcf of gas wasted per year in flaring (the Commission did not keep records before 1936).²¹ This may have been an underestimate.

The best estimate from the early 1940s is that one and a half billion cubic feet of casinghead gas was flared each day from Texas’s larger fields; that would make the state total for all fields about two and a half billion per day, or over nine-tenths of a trillion a year.²²

A. *The Rise of Bill Murray*

Every so often, fate delivers a man perfectly suited for the challenge at hand. In Texas, in the 1940s, that man was William “Bill” Murray, Jr.²³ Born in Coleman, Texas, Murray grew up in the oilfields by his father’s side.²⁴ After graduating as salutatorian from Cisco High School, Murray attended Simmons College (now Hardin-Simmons) on scholarship before transferring to the University of Texas.²⁵ He received a bachelor’s degree and then a master’s degree in petroleum engineering, graduating with the first class to complete the program.²⁶ He received a Dean’s medal “for the highest number of grade points in the Engineering School”—a record that apparently stood at least until his death.²⁷

Murray graduated in 1937 and, after a brief stint in the private sector, he joined the Commission as a senior petroleum engineer.²⁸ The Commission promptly sent him to the field to test wells for their oil-to-gas ratios, and it was there that Murray witnessed firsthand the enormous volumes of gas ignited and wasted through flaring.²⁹

20. TEX. NAT. RES. CODE ANN. § 86.002; see Prindle, *supra* note 3, at 299 (citing TEX. REV. CIV. STAT. ANN. art. 6008 §§ d, e).

21. *Historical Natural Gas Production and Well Counts*, TEX. R. R. COMM’N, <https://www.rrc.texas.gov/oil-and-gas/research-and-statistics/production-data/historical-production-data/natural-gas-production-and-well-counts-since-1935/> (last visited Feb. 8, 2022).

22. Prindle, *supra* note 3, at 297.

23. Not to be confused with William “Alfalfa Bill” Murray, Governor of Oklahoma, who challenged that state’s oil industry in the 1930s.

24. *William J. Murray, Jr. BSPE ’36, MSPE ’37*, UNIV. OF TEX. AT AUSTIN, <https://www.pge.utexas.edu/connect/distinguished-alumni/past-honorees/57-2011/206-william-j-murray-jr-bspe-36-mspe-37> (last visited Feb. 8, 2022).

25. *William James Murray*, TEX. STATE CEMETERY, https://cemetery.tspb.texas.gov/pub/user_form_822.asp?pers_id=8520 (last visited Feb. 8, 2022).

26. UNIV. OF TEX. AT AUSTIN, *supra* note 24.

27. TEX. STATE CEMETERY, *supra* note 25.

28. Prindle, *supra* note 3, at 303.

29. *Id.*

Labeled a conservationist, Murray left the Commission in 1941 to join the Petroleum Administration for War in Washington, D.C., after the United States joined World War II in December.³⁰ Murray raised his concerns about flaring there as well but was largely ignored.³¹ After the war ended in 1945, Murray returned to the private sector in Texas—first at the Wheelock & Collins Oil Company in Corsicana, then at the Houston Industrial Gas Company.³²

Meanwhile, confrontation was brewing between D.C., enlarged and expanded via a series of “New Deal” legislation,³³ and Texas where freedom from federal oversight was a cherished goal.³⁴ The Federal Power Commission, predecessor to the Federal Energy Regulatory Commission,³⁵ had long considered extending its authority over the entire gas industry.³⁶ In the mid-1940s, the leadership of the Texas Railroad Commission consisted of Ernest Thompson, Olin Culberson, and Beauford Jester: all stalwart defenders of states’ rights.³⁷ In an attempt to head off any attempted federal interference, the Commission announced a special hearing to address the topic of gas flaring.³⁸ The Commission presented official figures to establish that the Commission had the situation under control.³⁹ After all, the Commission flared only approximately 3.7 Bcf of casinghead gas in all of 1943, out of 400 Bcf produced, which is less than 1%—so what was the big deal?⁴⁰ Commissioner Thompson insisted these volumes were both reasonable and of no danger to conservation.⁴¹

Murray was in attendance and suddenly announced that, from his personal experience working for the Commission, he knew these figures to be a gross underestimation.⁴² Indeed, royalty owners and taxpayers knew only a fraction of the true amount of gas wasted.⁴³ The accusations produced

30. TEX. STATE CEMETERY, *supra* note 25.

31. *Id.*

32. UNIV. OF TEX. AT AUSTIN, *supra* note 24.

33. See generally William M. Emmons III, *Franklin D. Roosevelt, Electric Utilities, and the Power of Competition*, 53 J. ECON. HIST. 880 (1993).

34. See generally Richard C. Cudahy, *The Second Battle of the Alamo: The Midnight Connection*, 10 NAT. RES. & ENV’T 56 (1995).

35. *Id.*

36. Prindle, *supra* note 3, at 304.

37. *Id.*; see *State Oil Control Urged After War; Head of Texas Commission Bids Interstate Compact Fight to End Federal Rule*, N.Y. TIMES (Oct. 8, 1944), <https://www.nytimes.com/1944/10/08/archives/state-oil-control-urged-after-war-head-of-texas-commission-bids.html>.

38. Prindle, *supra* note 3, at 304.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Katherine Ann Willyard, *An Historical Political Economy Analysis and Review of Texas Oil and Gas Well Flaring Laws and Policy*, 128 ENERGY POL’Y 639, 642 (2019).

something of a sensation; the local press covered them, and the pressure forced the Commissioners to appoint a committee to look into the matter.⁴⁴

They asked Murray to chair the committee, but he refused, insisting on his own smaller committee consisting entirely of engineers.⁴⁵ Published in November 1945, the “Murray Committee Report” declared that the state’s oil companies were burning nearly 1.5 Bcf of gas per day, “57 percent of the state’s total production.”⁴⁶

Nothing happened as a result—at least not immediately.⁴⁷ Murray possessed a combination of expertise and civic duty that rarely succeeds in politics, and many of the state’s largest producers were enraged with his report.⁴⁸ All indications were that Murray would remain powerless to do anything material to stamp out flaring.⁴⁹

The Commission has long been a breeding ground for those lesser politicians seeking higher office, and the 1940s proved no exception.⁵⁰ The then Chairman of the Commission, Beauford Jester, was elected Governor of Texas in 1946, and—in an act of almost reckless political courage—nominated Bill Murray to serve the remainder of his unfinished term at the Commission in January of 1947.⁵¹

Murray was thirty-one, making him the youngest commissioner ever to serve.⁵² Under his watch, the “Railroad Commission became a conservation tiger,”⁵³ issuing a series of orders shutting in oil wells across multiple fields in Texas for flaring.⁵⁴ These orders generally prohibited oil or gas production until the gas associated with that production could be committed to a lawful purpose such as light, fuel, chemical manufacturing (other than carbon black), or reinjection.⁵⁵

B. The Flaring Cases

The industry pushed back. . . hard. The Seeligson Field in South Texas was one of the first targeted, and there were giants there in those days: Magnolia (Mobil), Sun, and Shell (among others) all filed suit.⁵⁶ Shell

44. Prindle, *supra* note 3, at 304–05 (citing FORT WORTH STAR-TELEGRAM, Dec. 22, 1944).

45. *Id.*

46. *Id.* at 305 (citing Internal Railroad Commission memo).

47. *Id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *Id.* at 306.

52. TEX. STATE CEMETERY, *supra* note 25.

53. Prindle, *supra* note 3, at 307.

54. *Id.* at 307–08.

55. R.R. Comm’n v. Sterling Oil & Refin. Co. 218 S.W.2d 415, 415–16 (Tex. 1949) (quoting VERNON’S ANN. CIV. ST. tit. 102, art. 6008, § 7(1)(a)–(d)).

56. Prindle, *supra* note 3, at 307.

retained Daniel J. Moody, a former governor, as their attorney.⁵⁷ The oil companies argued, among other things, that the Commission lacked the statutory authority to issue its order.⁵⁸ The Texas Supreme Court, while upholding a temporary injunction against the Commission, expressly sustained the Commission's authority over such matters.⁵⁹ The court noted:

the Commission has both the authority and the responsibility of prescribing fair and reasonable rules to prevent the waste of casinghead gas whenever, under the circumstances presented, it appears that a preventable waste of this natural resource either is occurring or is reasonably imminent, and that in this undertaking the Commission's acts are well within the perimeter of its delegated powers.⁶⁰

Emboldened by this latest development, the Commission ordered every oil well across sixteen gas-flaring fields shut down in 1949.⁶¹ The producers in those fields brought suit almost immediately.⁶² The operators, Sterling Oil and Refining Company as well as others, this time out of the Heyser Field, argued "that the order was illegal, unjust, unreasonable, arbitrary, and discriminatory. . . ."⁶³ Moreover, like *Shell*, they also insisted the Commission lacked statutory authority to issue the order.⁶⁴

Similar to *Shell*, the producers prevailed at the trial level, with the 98th District Court of Travis County declaring the Commission's order invalid and enjoining it from enforcement.⁶⁵ The Texas Supreme Court backed the Commission unambiguously, noting "[i]t is quite clear that the Commission, in the exercise of its duty as prescribed by the statutes, was trying to prevent waste in the flaring of gas."⁶⁶

The lawsuits continued; the Flour Bluff Oil Corporation, Humble Oil and Refining Company, and Barnsdall Oil Company filed suit for a similar order in the Flour Bluff Oil field.⁶⁷ Again, the trial court sided with the producers, and the Austin Court of Appeals backed the Commission.⁶⁸ The oil companies went to great lengths to establish that the permitted uses

57. *Id.*

58. R.R. Comm'n v. Shell Oil Co., 206 S.W.2d 235, 237 (Tex. 1947).

59. *Id.*

60. *Id.* at 241.

61. TOM SANZILLO ET AL., FLARING BURNS TEXAS ECONOMY: COMMISSION'S FAILURE TO STOP WASTE RUNS RISK OF LETTING THE STATE'S FINANCIAL FUTURE GO OFF THE RAILS 8 (Inst. Energy Fin. Analysis June 2020); Charles E. Crenshaw, *The Regulation of Natural Gas*, 19 L. & CONTEMP. PROB. 325, 328 (1954).

62. Crenshaw, *supra* note 61, at 334.

63. R.R. Comm'n v. Sterling Oil & Refin. Co., 218 S.W.2d 415, 415-16 (Tex. 1949).

64. *Id.*

65. *Id.* at 415.

66. *Id.* at 420.

67. R.R. Comm'n of Tex. v. Flour Bluff Oil Corp., 219 S.W.2d 506, 506 (Tex. App.—Austin 1949, writ ref'd).

68. *Id.* at 509.

prescribed by the Commission were simply too expensive.⁶⁹ The court was unconvinced:

If the prevention of waste of natural resources such as gas is to await the time when direct and immediate profits can be realized from the operation, there would have been little need for the people of Texas to have amended their Constitution by declaring that the preservation and conservation of natural resources of the State are public rights and duties and directing that the Legislature pass such laws as may be appropriate thereto. . . , for private enterprise would not need the compulsion of law to conserve these resources if the practice were financially profitable.⁷⁰

There were occasional victories for the oil sector during this time.⁷¹ Operators in the Spraberry field, including Magnolia Petroleum, Rowan Oil Company, the British-American Oil Producing Co., Shell Oil, and others, filed suit against the Commission.⁷² Magnolia Petroleum retained ex-governor Daniel Moody to represent them.⁷³ The Commission had once again shut down all the flaring oil wells in the field and in an attempt to protect correlative rights, had shut down the non-flaring wells too.⁷⁴ The order was struck down, but the power of the Commission to shut in a flaring well was confirmed inviolate.⁷⁵

These developments have been hailed as “a great milestone in conservation,”⁷⁶ with one historian insisting that “[t]he war had been won” and proclaiming the elimination of flaring.⁷⁷ With the benefit of hindsight, we can see that the battle, perhaps, had been won, but the war against flaring and waste would continue.⁷⁸

II. THERE ARE NO HEROES IN THE OIL PATCH: WILLIAMS, EXCO RESOURCES, AND THE RAILROAD COMMISSION

Flarers and pipeline companies have long been at odds with each other.⁷⁹ In Texas’s enormous Panhandle field in the 1930s, for example, operators sought simply to strip condensate from gas and flare the remainder.⁸⁰ These

69. *Id.* at 507–08 (noting that the utilization of gas for light or fuel required the installation of expensive compressors and that reinjection of gas into the reservoir was uneconomic).

70. *Id.* at 508 (internal citations omitted).

71. *R.R. Comm’n of Tex. v. Rowan Oil Co.*, 259 S.W.2d 173, 177 (Tex. 1953).

72. *Id.*

73. *Id.* at 175.

74. *Id.*

75. *Id.* at 176–77.

76. Crenshaw, *supra* note 61, at 334.

77. Prindle, *supra* note 3, at 308.

78. *See* Crenshaw, *supra* note 61; Prindle, *supra* note 3.

79. Prindle, *supra* note 3, at 301.

80. *Id.*

designs brought them into direct confrontation with pipeline companies that had discovered there was good money to be made transporting the gas to northern cities.⁸¹ They made convenient bedfellows for the conservationists.⁸² “The fight between pipeline and stripping interests over gas, therefore, took on the mantle of an argument over the public interest, with the public at large and the Railroad Commission as interested spectators.”⁸³ This continues to this day.

On November 20, 2019, the midstream powerhouse, Williams Partners, LP, and its subsidiary, Mockingbird Midstream Gas Services, filed suit against the Commission of Texas over the regulatory body’s decision to allow EXCO Resources to flare gas from the company’s Eagle Ford wells.⁸⁴ “Natural gas flaring has long been recognized as wasteful and environmentally harmful,” Williams stated in its petition.⁸⁵

The press could scarcely contain themselves: a battle between two juggernauts, one private and one public, over a hot-button environmental issue. The suit garnered a tremendous level of attention, not just from local outlets like the San Antonio Current⁸⁶ and the San Antonio Business Journal,⁸⁷ but the Houston Chronicle⁸⁸ and the Texas Tribune⁸⁹ as well.

81. *See id.*

82. *Id.*

83. *Id.*

84. *See Investor Relations*, WILLIAMS, <https://investor.williams.com/home/default.aspx> (last visited Feb. 8, 2022). Williams boasts that it owns and operates more than 30,000 miles of pipelines as well as owning the nation’s largest volume and fastest growing pipeline. *Id.* The company is responsible for transporting 30% of the United States’ natural gas. *See Energy Services, Williams Partners, FERC Tax Decision Forces Williams to Restructure – No More MLP*, MARCELLUS DRILLING NEWS (May 18, 2018), <https://marcellusdrilling.com/2018/05/ferc-tax-decision-forces-williams-to-restructure-no-more-mlp/>. Due to changes to the corporate tax rate and unfavorable rulings from FERC, Williams Partners LP now sits under the umbrella of the Williams corporation; *see* Original Petition for Judicial Review at 1, Williams MLP Operating v. R.R. Comm’n of Tex., No. D-1-GN-20-000120 (345th Dist. Ct., Travis Cnty., Tex. Nov. 20, 2019).

85. Kiah Collier, *Pipeline Giant Sues Railroad Commission Alleging Lax Oversight of Natural Gas Flaring*, TEX. TRIB. (Dec. 3, 2019, 12:00 AM), <https://www.texastribune.org/2019/12/03/railroad-commission-sued-lax-oversight-natural-gas-flaring/>.

86. Sanford Nowlin, *Lawsuit, Environmentalists Take Action at Texas Railroad Commission’s Lax Enforcement of Gas Flaring Rules*, SAN ANTONIO CURRENT (Dec. 3, 2019), <https://www.sacurrent.com/the-daily/archives/2019/12/03/lawsuit-environmentalists-take-aim-at-texas-railroad-commissions-lax-enforcement-of-gas-flaring-rules>.

87. Jessica Corso, *Pipeliners Takes Railroad Commissioner to Court Over “Needless” Flaring*, SAN ANTONIO BUS. J. (Dec. 6, 2019, 6:00 AM), <https://www.bizjournals.com/sanantonio/news/2019/12/06/pipeliners-takes-railroad-commission-to-court-over.html>.

88. Sergio Chapa, *Flaring Under Fire: Pipeline Operator Sues Railroad Commission*, HOUS. CHRON. (Dec. 3, 2019, 5:03 PM), <https://www.chron.com/business/energy/article/Flaring-Under-Fire-Pipeline-operator-sues-14879260.php>.

89. Collier, *supra* note 85.

Bloomberg weighed in,⁹⁰ and publications as far afield as Alaska⁹¹ covered the story. No less an authority than the Wall Street Journal breathlessly proclaimed it a “Texas Showdown” over flaring.⁹²

And then? Nothing. The parties quietly settled the case, and the court dismissed it the following summer.⁹³ The fiery story had fizzled as COVID-19 dominated the headlines and oil prices hit record lows.⁹⁴

What happened? How had this conflict come about, and why, after so much fanfare and saber-rattling, did the conflict seemingly fade away? It should come as no surprise to veterans of the U.S. onshore oil industry that the story—like so many others in the oil patch—started with Aubrey McClendon.⁹⁵

The year was 2012. That spring had seen oil prices comfortably above \$100 per barrel,⁹⁶ and oil and gas companies made up 12% of the S&P 500 Index.⁹⁷ Life was good. Chesapeake Energy was the second-largest leaseholder in the Eagle Ford, with nearly half a million net acres.⁹⁸ In the second quarter of 2012, they were running twenty-eight rigs in that basin and had brought online 121 new wells.⁹⁹

The company had just sold a third of their acreage position to the Chinese National Offshore Oil Corporation (CNOOC), in 2010, for the

90. Rachel Adams-Heard, *The 2020 Election to Watch for Climate Outcomes is in Texas*, BLOOMBERG L. (Jan. 27, 2020, 4:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglaw/news/bloomberg-law-news/XAQ14LEG000000?bc=W1siU2VhcmNoICYgQnJvd3NliiwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcv2VhcmNoL3Jlc3VsdHMvZTRmZWZlZWUyZWNIzdNhYzk5N2Y5MjBhNTM0NjVjYzMiXV0--3ee6d68ccd81fb9acb0d54fe58fbc83322b8764&bna_news_filter=bloomberg-law-news&criteria_id=e4feb3ee2eced3ac997f920a53465cc3&search32=6fdtbcOF82tW2pIwo3S7BQ%3D%3D7UEsn_44f_Ss5M6aIGsQJjecGV4tqkQK-yIsy_UhwJUGodf01ikK2w0MUtz42B-mOWM0ACQN8BZimfTes9hslvuaHgmlX5LnTKw6d8kbNmDFdsnLLx92A4Rg2KkTNzo3S8oe7m1PTacjg_nI2t4C5hV6PtUWtQHMIyrSQnmgJNM%3D.

91. Larry Persily, *Texas Gas Flaring Draws Lawsuits from Pipeline Company*, ALASKA J. COM. (Dec. 24, 2019, 1:21 PM), <https://www.alaskajournal.com/2019-12-24/texas-gas-flaring-draws-lawsuit-pipeline-company>.

92. Rebecca Elliot, *Texas Showdown Flares Up Over Natural-Gas Waste*, WALL ST. J. (July 17, 2018, 7:00 AM), <https://www.wsj.com/articles/texas-showdown-flares-up-over-natural-gas-waste-11563361201>.

93. Tex. R.R. Comm’n, *First Supplemental Proposal for Decision, Formal Complaint of GNOOC Energy USA, LLC, Against Williams MLP Operating LLC, and Mockingbird Midstream Gas Services, LLC*, Gas Util. Docket No. 10606, 9-10 (Hearings Div. June 30, 2020) (agreed order of dismissal with prejudice).

94. *Id.*

95. See Crenshaw, *supra* note 61; see Prindle, *supra* note 3.

96. *Cushing, OK WTI Spot Price FOB*, U.S. ENERGY INFO. ADMIN. (Feb. 2, 2022), <https://www.eia.gov/dnav/pet/hist/rwtcd.htm> (last visited, Feb. 2, 2022).

97. See Bespoke Inv. Grp., *S&P 500 Historical Sector Weightings*, SEEKING ALPHA (Jan. 18, 2012, 3:34 AM), <https://seekingalpha.com/article/320168-s-and-p-500-historical-sector-weightings>. However, it would dip to 2.3% in 2020. See Dino Grandori, *Big Oil Just Isn’t as Big as It Once Was*, WASH. POST (Sept. 4, 2020), <https://www.washingtonpost.com/business/2020/09/04/exxon-dow-jones/>.

98. Bespoke Inv. Grp., *supra* note 97.

99. *Chesapeake Energy Investor Presentation*, CHESAPEAKE ENERGY 15 (Sept. 11, 2012), <https://www.slideshare.net/Companyspotlight/chesapeake-energy-investor-presentation>.

princely sum of \$2.16 billion,¹⁰⁰ as part of a wave of foreign money that had seen companies like Mitsui & Co., the Korea National Oil Company (KNOC), Sasol,¹⁰¹ and Total¹⁰² paying enormous price tags (often with a hefty promote) to get a piece of the North American shale craze.

Chesapeake was in desperate straits, and they were eager to show investors that they could monetize their way out of a dangerously high debt load that totaled over \$13 billion at the end of 2012's first quarter.¹⁰³ Pressure was mounting on all sides; the company had just stripped McClendon of his chairmanship in the wake of news that he had taken over a billion dollars in loans out against personal stakes in the company's wells.¹⁰⁴ Equally scandalizing was the news that he (and co-founder Tom Ward) had been running a private hedge fund out of the company's headquarters.¹⁰⁵

Chesapeake was now on a deal-making spree in an effort to raise cash and assure shareholders.¹⁰⁶ McClendon (and thus Chesapeake) had become famous (even notorious) for the aggressive and innovative approach to raising capital.¹⁰⁷ By the end of the first quarter, he had announced deals totaling \$2.6 billion, which included a volumetric production payment sale to Morgan Stanley, flipping 58,400 acres to ExxonMobil subsidiary XTO, and the spinoff (and subsequent sale of shares to a Blackstone affiliate) of an Oklahoma leasehold subsidiary.¹⁰⁸

Chesapeake still had a long way to go, however. They had promised shareholders they would accomplish \$10 billion worth of asset sales before the end of the year.¹⁰⁹

Few assets were exempted from the auction block, and McClendon cast a hungry glance towards the company's gathering infrastructure: its network of flowlines, processing facilities, pumps, separators, tanks, treaters, valves,

100. *Chesapeake Energy Corporation and CNOOC Limited Announce Closing of Eagle Ford Shale Project Cooperation Agreement*, CHESAPEAKE ENERGY (Nov. 15, 2010), <http://investors.chk.com/2010-11-16-chesapeake-energy-corporation-and-cnooc-limited-announce-closing-of-eagle-ford-shale-project-cooperation-agreement> (explaining that CNOOC agreed to pay \$1.08 billion up front, plus 75% of Chesapeake's share of drilling and completing costs until the other \$1.08 billion as paid).

101. *Update 1-S. Africa's Sasol Finalizes Talisman Shale Deal*, REUTERS (June 10, 2011, 6:31 AM), <https://www.reuters.com/article/sasol/update-1-s-africas-sasol-finalises-talisman-shale-deal-idUSLDE75919020110610>.

102. *Total Increases Its Presence in the United States and Takes a Stake in the Gas and Condensate Fields of Utica, Ohio*, TOTAL ENERGIES (Jan. 03, 2012), <https://totalenergies.com/media/news/press-releases/total-accroit-sa-presence-aux-etats-unis-et-prend-une-participation-dans-les-gisements-de-gaz>.

103. Russell Gold, *Chesapeake CEO Issues Apology to Investors*, WALL ST. J. (May 2, 2012, 7:48 PM), <https://www.wsj.com/articles/SB10001424052702304743704577379982169571856>.

104. *See id.*

105. *See id.*

106. *See Chesapeake Energy Announces Three Asset Sales*, HART ENERGY (Apr. 10, 2012, 11:50 AM), <https://www.hartenergy.com/news/chesapeake-energy-announces-three-asset-sales-82212>.

107. *See id.*

108. *Id.*

109. Rebecca Elliot, *Texas Showdown Flares Up Over Natural-Gas Waste*, WALL ST. J. (July 17, 2019, 7:00 AM), <https://www.wsj.com/articles/texas-showdown-flares-up-over-natural-gas-waste-11563361201>.

compressors, dehydrators, and other various and sundry equipment responsible for transporting oil and (especially) gas from the wellhead to the numerous shipping points scattered across the edges of their many fields.¹¹⁰

A. Master Limited Partnerships and Gathering Agreements

The oil and gas industry had long ago discovered that these gathering systems could be the source of additional revenue.¹¹¹ The separate components being worth more than the sum of their parts, companies were siloing off their gathering infrastructure into separate entities, entering into contracts between their upstream entity and new gathering subsidiary with a guaranteed rate of return, and then spinning off the gathering entity into its own (often publicly traded) Master Limited Partnership (MLP).¹¹²

MLPs originated in the upstream oil and gas sector in the 1980s, mostly staying below the radar until spreading to the midstream sector during the early waves of the shale revolution.¹¹³ Historically, the MLP was valued for “the stability and predictability of its cash flow”,¹¹⁴ and midstream MLPs in particular were touted for their “minimal exposure to direct commodity price risk.”¹¹⁵ MLPs are structured around cash flow; indeed, they are required to distribute all available cash to the owners of the partnership units.¹¹⁶ Moreover, they are not taxed at the entity (MLP) level; instead, as a pass-through entity, the profits are taxed at the level of the individual unit holders.¹¹⁷

The source of a midstream MLP’s cash flow is its gathering agreements, the contracts that the MLP has with the upstream oil and gas producer to gather the gas at the wellhead and process and transport it to the requisite delivery point.¹¹⁸ There are numerous fee models employed by the contracts,¹¹⁹ but it is often a kind of tolling arrangement—the MLP gathers the gas, and the owner of the gas pays a toll on each unit (each Mcf, for

110. See *Gathering System*, SCHLUMBERGER OILFIELD GLOSSARY, https://glossary.oilfield.slb.com/en/terms/g/gathering_system (last visited Feb. 8, 2022).

111. See generally JAMES J. MURCHIE, INVS. & WEALTH MONITOR, MASTER LIMITED PARTNERSHIPS—LESSONS FROM HISTORY (2008), https://eipinvestments.com/wp-content/uploads/IW08MarApr_MasterLimitedPartnerships-reprint.pdf.

112. *Id.*

113. *Id.*

114. TIM FENN, LATHAM & WATKINS LLP, MASTER LIMITED PARTNERSHIPS (MLPs): A GENERAL PRIMER 1 (2012), <https://www.lw.com/admin/Upload/Documents/MLP/Resources/Latham-Master-Limited-Partnerships-20Primer.pdf>.

115. *Inside Master Limited Partnerships*, CALLAN INVS. INST. 7 (2012), <https://www.callan.com/uploads/2020/05/5c5c4ee7efd075dcca146b4cb3c2bdfa/callan-mlp-primer.pdf>.

116. *See id.*

117. *See id.*

118. *See id.*

119. Fee models employed by contracts include fixed fee, percent of proceeds, keep-whole, and cost-of-service. RBC EQUITY ENERGY & UTILS. TEAM, MASTER LIMITS PARTNERSHIP 53 (2013), https://www.mlpassociation.org/wp-content/uploads/2015/08/RBC_MLP_Primer.pdf.

example) for gas that passes through the gathering system.¹²⁰ This is why midstream MLPs are considered minimally exposed to commodity price, as their cash flow is based not on selling the commodity but merely transporting it.¹²¹

In 2010, Chesapeake partnered with a private equity fund, Global Infrastructure Partners (GIP), to launch Chesapeake Midstream Partners.¹²² By the end of that year, Chesapeake sold its Haynesville gathering system to the MLP.¹²³ It sold its Marcellus gathering infrastructure to the MLP at the end of 2011.¹²⁴

In mid-2012, with debts mounting and desperate for cash, Chesapeake sold all of its interest in Chesapeake Midstream Partners to GIP for \$2 billion.¹²⁵ Then at the end of the year, Chesapeake sold its remaining gathering infrastructure, including its Eagle Ford gathering system, to the MLP (now renamed Access Midstream Partners) for another approximately \$2 billion.¹²⁶ At the same time, midstream giant Williams purchased 50% of Access Midstream Partners.¹²⁷ As one industry commentator described it, “the two deals are connected. . . . On paper, Chesapeake sold its midstream properties to Access, but [in] practice it seems the sale was actually to Williams via Access Midstream.”¹²⁸

Chesapeake’s Eagle Ford gathering system was called the “Mockingbird System”, and it would eventually consist of approximately 1,000 miles of pipelines spanning the counties of Zavala, Webb, McMullen, La Salle, Frio, Dimmit, and Atascosa.¹²⁹ The original gathering agreement for the Mockingbird System was a simple fixed-fee arrangement.¹³⁰ Chesapeake (and their non-operated joint working interest owner, CNOOC)

120. *Id.*

121. *Id.*

122. See *Chesapeake Midstream Partners, L.P. Prices Initial Public Offering of Common Units*, WILLIAMS (July 28, 2010), <http://investor.williams.com/press-release-details/2010/Chesapeake-Midstream-Partners-LP-Prices-Initial-Public-Offering-of-Common-Units/default.aspx>.

123. *Id.*

124. *Id.*

125. Jay F. Marks, *Former Chesapeake Subsidiary Announces New Name*, THE OKLAHOMAN (July 25, 2012, 12:00 AM), <https://www.oklahoman.com/article/3695263/former-chesapeake-subsidiary-unveils-new-name>. One commentator insisted that this sale was “one of the main reasons that Chesapeake did not threaten bankruptcy in 2012.” Daniel Dicker, *Dicker: The MLP Craze*, THE ST. (July 31, 2013, 5:05 PM), <https://www.thestreet.com/opinion/dicker-the-mlp-craze-11995159>.

126. Dicker, *supra* note 125.

127. *Access & Williams in Complex 3-Way Midstream Deal*, MARCELLUS DRILLING NEWS (Dec. 12, 2012), <https://marcellusdrilling.com/2012/12/chesapeake-access-williams-in-complex-3-way-midstream-deal/>.

128. *Id.*

129. Proposal for Decision at 2, *Formal Complaint of CNOOC Energy USA, LLC, Against Williams MLP Operating, LLC and Mockingbird Midstream Gas Services, LLC*, Gas Utility Docket No. 10606 (Hearings Div. Feb. 11, 2020) [hereinafter Proposal for Decision].

130. *Id.*

paid \$0.36/MCF to its then wholly-owned gathering subsidiary under this arrangement, along with a small annual escalation of 2.5%.¹³¹

When Chesapeake sold the Mockingbird System to Access Midstream (and Williams), however, it renegotiated the gathering agreement. The company scrapped the fixed-fee arrangement and used a cost-of-service model.¹³² The Chesapeake leases and wells were dedicated under this agreement for twenty years, and the tolling fee was designed to ensure that Access Midstream earned a fixed rate of return on the \$1.6 billion it would spend acquiring and building out the Mockingbird System.¹³³

Cost-of-service models are popular with midstream MLPs precisely because of the fixed (sometimes referred to as guaranteed) rate of return. Given the high value associated with consistency of cash flow, the fixed rate of return for the MLP's capital expenditures proved a valuable selling point for yield-hungry investors.¹³⁴ The two biggest factors under a cost-of-service model are (1) the volume of gas and (2) the capital expenditures.¹³⁵ Each unit of gas is assessed a fee and the stream of payments is discounted to year zero to achieve the mandated internal rate of return.¹³⁶ The formula is recalculated annually to utilize the most updated production forecast and capex figures.¹³⁷ If the volumes of gas produced (or forecasted) go up, there are therefore more units of gas on which to collect a toll, and the individual fee goes down.¹³⁸ Conversely, if the volumes of gas go down, the fee goes up.¹³⁹

When the parties renegotiated the Mockingbird Agreement concurrent with the sale to Access, they set the rate of return at 18%.¹⁴⁰ Speculation abounded that Chesapeake had agreed to such a steep IRR to obtain top dollar on the sale of its gathering system.¹⁴¹

The following year, in the wake of McClendon's departure from Chesapeake, the company sold its interest in 130 of its wells to EXCO Resources.¹⁴² The sale, which included Eagle Ford and Haynesville interests, netted the company \$1 billion.¹⁴³

Neither EXCO nor CNOOC participated in the negotiations of the new Mockingbird Agreement, and technically, neither of them were parties to the agreement.¹⁴⁴ Chesapeake had separate arrangements with each, resulting in

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

a situation wherein it either purchased the gas outright and then nominated it on the Mockingbird system (as with EXCO),¹⁴⁵ or marketed the party's gas on its behalf (as with CNOOC).¹⁴⁶ Both CNOOC and EXCO, however, could, in theory, elect to take their production in kind and negotiate directly with Access Midstream to gather their gas. Such a scenario could have been disastrous for Chesapeake—the gas volumes owned by EXCO and CNOOC were from wells dedicated to the Mockingbird System.¹⁴⁷ If those entities took their production in kind, Chesapeake would no longer get credit for those volumes under the Mockingbird Agreement, and when volumes go down, the price Chesapeake would have paid to gather its remaining gas under the agreement would have gone up.

To avoid this scenario, Chesapeake again resorted to aggressive and innovative measures.¹⁴⁸ It included a provision in the Mockingbird Agreement that if Williams ever agreed to gather “third party” gas from dedicated wells (i.e. CNOOC or EXCO gas from wells already dedicated to the Mockingbird System), Chesapeake would be credited under the cost-of-service calculation as though Williams was receiving the full-system fee for those third-party volumes.¹⁴⁹

In 2014, Williams acquired the remaining half of Access Midstream Partners.¹⁵⁰ The giant midstream entity now owned 100% of the Mockingbird System.¹⁵¹

Over the course of the ensuing years, either one or both EXCO and CNOOC would seek to take their production in kind and negotiate directly with Williams to gather their gas.¹⁵² Not wanting to jeopardize the 18% rate of return that Williams had secured for itself for its vast capital outlay in acquiring and building out the Mockingbird System, Williams demanded the CNOOC and EXCO pay the same rate as Chesapeake was paying under the Mockingbird Agreement.¹⁵³

This extreme sensitivity to volumes underscores one of the fundamental weaknesses within a cost-of-service model. Under many other gathering fee models (such as a fixed-fee arrangement), a reduction in volumes will not, in and of itself, impact the fee charged on a per unit of gas basis.¹⁵⁴ With a

145. *Id.* at 1, 3, 10.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.* at 78. Technically, the agreement provides that Chesapeake could “approve” the third party gathering arrangement; failure by Chesapeake to approve the arrangement meant it was credited under the model (so Chesapeake had every incentive not to approve). *Id.* at 76.

150. *Id.* at 10.

151. OGI Editors, Williams to Buy Access Midstream Partners, OIL & GAS J. (June 16, 2014), <https://www.ogj.com/general-interest/companies/article/17271350/williams-to-buy-access-midstream-partners>.

152. Proposal for Decision, *supra* note 129.

153. *Id.*

154. *Id.*

cost-of-service model, however, a reduction in volumes will have an enormous impact.¹⁵⁵

In November of 2014, OPEC elected to vastly increase production, and the first of many crashes to the price of oil ensued.¹⁵⁶

As has been seen time and again, a reduction in the price of oil often leads to a reduction in wells drilled, as oil companies are forced to allocate their capital in a more disciplined manner (at least in theory).¹⁵⁷ A production forecast for the life of an oil field when oil is \$100/bbl can look very different than when oil is at \$70/bbl—or \$50, or \$30.¹⁵⁸

In the context of a gathering agreement under a cost-of-service model, this can lead to a death spiral. If an oil company plans to drill fewer wells in a given year because of a decrease in the price of oil, this will of course, negatively impact the total production coming from that field.¹⁵⁹ Under a cost-of-service gathering agreement, such a revised production forecast will yield an increase in the gathering fee.¹⁶⁰ Those increased costs negatively impact the profitability of a proposed well as much as a reduction in oil price, and as such, all things being equal, an increase in the gathering rate may cause an oil company to drill fewer wells. The spiral thus perpetuates itself as fewer wells means less volumes which result in still higher gathering fees.

Like a snake eating its own tail, the cost-of-service model begins to consume itself. By May of 2017, the gathering rate under the Mockingbird Agreement was \$6.67/MMBTU.¹⁶¹ The rate paid by other “similarly situated” producers was \$0.99/MMBTU.¹⁶²

EXCO (and CNOOC) refused to pay the Mockingbird Agreement rate, demanding that they pay a “market-based” rate which would yield something closer to the \$.099/MMBTU figure.¹⁶³ Williams refused to budge. As a result, EXCO chose to flare its gas.¹⁶⁴

B. The Rule 32 Exception

Rule 32, governing the flaring or venting gas, was adopted by the Commission in 1978.¹⁶⁵ It permits an operator to flare for ten days following the completion of a particular well, provided the volumes are measured and

155. *Id.*

156. *Oil Embargo, 1973-1974*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1969-1976/oil-embargo> (last visited Feb. 8, 2022).

157. *Lower Crude Oil Prices Will Mean Less Exploration and Development*, U.S. ENERGY INFO. ADMIN. (June 4, 2020), <https://www.eia.gov/todayinenergy/detail.php?id=43975>.

158. *See generally id.*

159. *Id.*

160. Proposal for Decision, *supra* note 129.

161. *Id.* at 26.

162. *Id.* at 13.

163. *See id.*

164. *See id.*

165. *See Wells, supra* note 16, at 329.

reported.¹⁶⁶ Beyond this ten-day window, the operator must seek an exception under Rule 32 from the Commission; which can last up to 180 days.¹⁶⁷ Further extensions beyond this 180-day window can be granted pursuant to a “final order” signed by the Commission.¹⁶⁸ A finding of necessity is required for any permitted exception to Rule 32.¹⁶⁹

Then, in 1990, the Commission modified the rule, expressly providing that the flaring of casinghead gas was necessary due to the “unavailability of a gas pipeline or other marketing facility.”¹⁷⁰ That gas pipelines were frequently unavailable in those oilfields subject to Bill Murray’s shut-in orders in the 1940s had apparently been forgotten by 1990.¹⁷¹

It was this regulatory framework that EXCO sought to avail itself. Despite the fact that a gathering system was present and connected, EXCO argued that because it had no gathering agreement with Williams (and EXCO and Williams were unable to agree to one) the system was thus “unavailable.”¹⁷² Assuming a market price of \$2.85/MMBTU for its gas, EXCO maintained that it would be uneconomical to pay over \$6/MMBTU to utilize the Mockingbird System.¹⁷³ The Commission agreed and granted the exception.¹⁷⁴ EXCO could continue to flare 100% of its casinghead gas on all of its 138 wells.¹⁷⁵

166. 16 TEX. ADMIN. CODE § 3.32(f)(1)(A) (2021) (R.R. Comm’n of Tex., Gas Well Gas and Casinghead Gas Shall be Utilized for Legal Purposes).

167. *Id.* § 3.32(h)(2); see DAVID PORTER, TEX. R.R. COMM’N, EASE FORD SHALE TASK FORCE REPORT 78 (2013).

168. 16 TEX. ADMIN. CODE § 3.32(h)(4) (2021) (R.R. Comm’n of Tex., Gas Well Gas and Casinghead Gas Shall be Utilized for Legal Purposes); see Tex. R.R. Comm’n, *Proposal for Decision, Application of EXCO Operating Company, LP for an Exception to Statewide Rule 32 for Sixty-Nine Flare Points on Various Leases, Briscos Ranch (Eaglefurd) Field, Dimmit and Zavala Counties, Texas*, Oil and Gas Docket No. 01-0308609, 6 (Hearings Div. May 20, 2019).

169. 16 TEX. ADMIN. CODE § 3.32(f)(2) (2021) (R.R. Comm’n of Tex., Gas Well Gas and Casinghead Gas Shall be Utilized for Legal Purposes).

170. *Id.* at (f)(2)(D).

171. See, e.g., R.R. Comm’n of Tex. v. Flour Bluff Oil Corp., 219 S.W.2d 506, 507 (Tex. App.—Austin 1949, writ ref’d).

172. Tex. R.R. Comm’n, *supra* note 168, at 11.

173. *Id.* at 13.

174. See Tex. R.R. Comm’n, *Proposal for Decision, Application of EXCO Operating Company, LP for an Exception to Statewide Rule 32 for Sixty-Nine Flare Points on Various Leases, Briscos Ranch (Eaglefurd) Field, Dimmit and Zavala Counties, Texas*, Oil and Gas Docket No. 01-0308609, 6 (Hearings Div. May 20, 2019) [hereinafter *Proposal for Decision II*]; Tex. R.R. Comm’n, *Application of EXCO Operating Company, LP for an Exception to Statewide Rule 32 for Sixty-Nine Flare Points on Various Leases, Briscoe Ranch (Eaglefurd) Field, Dimmit and Zavala Counties, Texas*, Oil & Gas Docket No. 01-0308609, 1 (Hearings Div. Aug. 6, 2019) [hereinafter *Final Order*].

175. See sources cited *supra* note 174 (noting the Commission’s decision to continue to allow flaring).

III. A BATTLE ON MANY FRONTS

The jousting between EXCO Resources and Williams was scattered along multiple fields of play.¹⁷⁶ Williams contested EXCO's application for the Rule 32 exception, something never done before in the history of the rule.¹⁷⁷ EXCO responded by filing an action in the Bankruptcy Court for the Southern District of Texas (EXCO had filed for bankruptcy in January of 2018) claiming that Williams' actions had violated the automatic stay.¹⁷⁸

Williams was undaunted, and, after the final order was issued approving EXCO's flaring request, the midstream juggernaut filed suit against the Commission seeking judicial review of the entity's orders permitting the flaring exceptions.¹⁷⁹

A. Williams v. The Railroad Commission

Williams alleged that the Commission, in granting the exceptions, "vitiate[d] and effectively negate[d] the statutory prohibition of waste and the requirements of the Commission's Rule 32."¹⁸⁰ The pipeline company sought the reversal of the order "so that Rule 32 is interpreted and applied consistently with the Texas Constitution, the waste prevention statute, and court precedent to prevent waste."¹⁸¹

Citing many of the same flaring cases from the 1940s, Williams sought to contrast the "dramatic shift in recent years from the previous policy . . . that eviscerates the no-flaring rule."¹⁸² Williams pointed to Rule 32's language requiring that all gas be utilized,¹⁸³ and that any exception to the prohibitions contained therein required a showing of "necessity."¹⁸⁴ Williams argued that there was no case for necessity in this flaring order.¹⁸⁵ The Commission had justified their order, in part, due to a finding that there was no available gathering system because there was no agreement in place between EXCO and Williams.¹⁸⁶ Williams insisted that this was not a situation where new wells were drilled in an exploration area beyond the reach of pipelines.¹⁸⁷ Rather, multiple gathering systems were available, it

176. See Collier, *supra* note 85.

177. Final Order, *supra* note 174, at 4.

178. See Original Petition for Judicial Review, *supra* note 84.

179. *Id.*

180. *Id.* at 2.

181. *Id.* at 3.

182. *Id.* at 7 (citing *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006)).

183. *Id.* at 6 (citing 16 TEX. ADMIN. CODE § 3.32(c) (2021) (R.R. Comm'n of Tex., Gas Well Gas and Casinghead Gas Shall be Utilized for Legal Purposes)).

184. *Id.* (citing 16 TEX. ADMIN. CODE § 3.32(f)(2) (2021) (R.R. Comm'n of Tex., Gas Well Gas and Casinghead Gas Shall be Utilized for Legal Purposes)).

185. *Id.*

186. *Id.* Ex. A at 20.

187. *Id.* at 7–8.

argued.¹⁸⁸ Williams also took aim at the gas economics metric adopted by the Commission in granting the exception.¹⁸⁹

The Commission had adopted EXCO's position that it would have been uneconomical to connect to the Mockingbird System, because the cost to gather the gas would far exceed the revenues that EXCO would recognize from the sale.¹⁹⁰ Williams quoted the *Flour Bluff* case, and noted that it "is only with 'negative gas economics' that operators request an exception. . . ."¹⁹¹

While the author would never question the environmental sensitivities of a giant pipeline company, the reader may wish to entertain the possibility that Williams's 18% rate of return weighed just as heavily on its conscious as did its concerns for flaring and the environment. Regardless, Williams faced an uphill battle. The Commission's order would have been reviewed under the substantial evidence rule, wherein significant deference would have been granted to the agency.¹⁹² Moreover, the Commission's order would have been presumed valid and its findings (including that there was no pipeline available) presumed supported by substantial evidence.¹⁹³ Williams would have the burden of overcoming those presumptions.¹⁹⁴ Moreover, courts typically defer to the Commission's interpretation of its own rules, "unless that interpretation is clearly erroneous or contrary to the plain language of the rule."¹⁹⁵

We will never know. By the summer of 2020, Williams and EXCO had entered into a gas gathering agreement and executed a settlement agreement.¹⁹⁶ EXCO's flaring ended and the parties jointly requested the court to order a dismissal.¹⁹⁷ What happened?

188. *Id.*

189. *Id.* at 5.

190. Tex. R.R. Comm'n, *supra* note 168, at 21–22.

191. Original Petition for Judicial Review, *supra* note 84, at 5.

192. See TEX. GOV'T CODE ANN. § 2001.174; see also *Anadarko E&P Co., L.P. v. R.R. Comm'n of Tex.*, No. 03-04-00027-CV, 2009 WL 47112, at *3 (Tex. App.—Austin Jan. 7, 2009, no pet.) (citing *R.R. Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995)); *Texas Health Facilities Comm'n of Tex. v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

193. *Anadarko*, 2009 WL 47112 at *9 (citing *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994)); *Charter Med.*, 665 S.W.2d at 452.

194. *Anadarko*, 2009 WL 47112 at *10 (citing *City of El Paso*, 883 S.W.2d at 185; *Hammack v. Public Util. Comm'n*, 131 S.W.3d 713, 725 (Tex. App.—Austin 2004, pet. denied)).

195. *SWEPI LP v. R.R. Comm'n of Tex.*, 314 S.W.3d 253, 260 (first citing Tex. App.—Austin 2010, pet. denied) (first citing *Public Util. Comm'n v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991)); and then citing *Cities of Dickinson v. Public Util. Comm'n*, 284 S.W.3d 449, 453 (Tex. App.—Austin 2009, no pet.).

196. Tex. R.R. Comm'n, *supra* note 93.

197. *Id.*

B. The Gas Utility Docket

The origins of the settlement lay with CNOOC, the Chinese National Offshore Oil Company, with the one-third non-operating interest in Chesapeake's wells (including the ones sold to EXCO).¹⁹⁸ In February of 2017, CNOOC had filed a formal complaint with the Commission over the rates Williams sought to charge it for accessing the Mockingbird System.¹⁹⁹

As previously discussed, Williams demanded that CNOOC and EXCO pay the same rates as Chesapeake was paying under the Mockingbird Agreement.²⁰⁰ These rates actually consisted of two distinct elements: the first, a recoupment of the ~\$1.6 billion Williams spent acquiring and building out the Mockingbird System (the cost-of-service model); the second, the cost of the actual ongoing gathering services.²⁰¹ That is, in quoting a rate to CNOOC and EXCO, Williams was insistent that they repay the approximately \$1.6 billion that Williams had spent acquiring and building out the Mockingbird System.²⁰²

Intrastate gas gathering systems like the Mockingbird System are subject to the Texas Utilities Code,²⁰³ and the Commission has regulatory jurisdiction over such systems.²⁰⁴ Among other requirements, a gas gathering utility may not “charge, demand, collect, or receive from anyone a greater or lesser compensation for a service provided . . . [that it does] from another [party] for a similar and contemporaneous service.”²⁰⁵ This, of course, was precisely what CNOOC and EXCO alleged Williams had done.²⁰⁶

In determining whether a gas gatherer is discriminating, the Commission looks to “similarly-situated shippers,” that is, “any shipper that seeks or receives transportation services under the same or substantially the same, physical, regulatory, and economic conditions of service.”²⁰⁷ This proved to be the crux of the dispute between CNOOC and EXCO against Williams on this docket—which shippers were “similarly-situated?”²⁰⁸

198. *Id.* at 2 (approving EXCO's request to leave the docket and dismiss its claims).

199. *Id.* at 9–11 (discussing whether Chesapeake is similarly situated to other shippers on the Mockingbird system).

200. Tex. R.R. Comm'n, *supra* note 168.

201. Proposal for Decision, *supra* note 129, at 21.

202. *Id.*

203. See TEX. UTIL. CODE ANN. § 121.001; John Morozuk, *Regulation of Midstream Gas Gathering Companies in Texas and Oklahoma*, OIL & GAS, NAT. RES., & ENERGY J., 251 (2015); Jesse Lotay & Yenmi Tang, *A Primer on Understanding Oil and Gas Transportation Agreements and Identifying Key Issues*, UNIV. OF TEX. CONTINUING LEGAL EDUC. (Mar. 26–27, 2020), <https://www.jw.com/wp-content/uploads/2020/04/Jesse-Lotay-Yenmi-Tang-UT-CLE-A-Primer-on-Understanding-Oil-and-Gas-Transportation-Agreements-Mar.-2020.pdf>.

204. Morozuk, *supra* note 203, at 14.

205. TEX. UTIL. CODE ANN. § 121.104(a)(2).

206. Proposal for Decision, *supra* note 129.

207. *Id.* (quoting 16 TEX. ADMIN. CODE § 7.115(32) (2021) (R.R. Comm'n of Tex., Definitions)).

208. *Id.* at 21.

CNOOC and EXCO pointed to various third-party shippers that were utilizing the same system and paying as low as \$0.99/MMBTU versus the “Chesapeake rate” of \$6.67/MMBTU.²⁰⁹ These parties, CNOOC and EXCO argued, were similarly situated, and Williams’ failure to extend CNOOC and EXCO the same or similar terms was unlawful discrimination under the Texas Utilities Code and the applicable rules of the Commission.²¹⁰

Williams, in contrast, insisted that Chesapeake was the appropriate benchmark for a similarly situated shipper.²¹¹ The Mockingbird System and its subsequent buildout were constructed primarily for the very wells that CNOOC and EXCO produced from, and therefore it only made sense to treat those two companies the same as Chesapeake.²¹²

The Commission’s Hearing Division and its Administrative Law Judge, John Dodson, sided with CNOOC.²¹³ In rejecting Williams’s argument, it noted that any upstream producer utilizing the Mockingbird system benefited from its existence, not just CNOOC and EXCO.²¹⁴ “[CNOOC] and EXCO being beneficiaries of the Mockingbird System . . . is not a permissible basis for shouldering them with repaying [the \$1.6 billion Williams spent on the system] if other shippers—also beneficiaries of the same gathering system—repay nothing.”²¹⁵ Indeed, for other “similarly situated” shippers, the Commission observed: “Williams did not require them to repay . . . the \$1.6 billion Instead, they only paid their own ‘connection costs’ to connect their facilities to the already-build Mockingbird System.”²¹⁶

Had the Commission sided with Williams, it is likely the pipeline company’s suit against the Commission would have proceeded with the goal being that EXCO (and CNOOC) would have been forced to cease flaring and therefore execute a gathering agreement at Williams’s demanded terms. The Commission, having found that Williams’ conduct was prohibited and unlawful discrimination, however, meant Williams no longer had any incentive to pursue the action as the company could not charge EXCO the “Chesapeake rate” in the event they prevailed over the Commission.²¹⁷

IV. AFTERMATH: THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

Meanwhile, the Commission was quick to downplay the controversy. At this time, the commissioners of the Commission were Wayne Christian

209. *Id.* at 13.

210. *Id.*

211. *Id.* at 23.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 21.

216. *Id.* at 19, 23.

217. *See id.* at 21.

(Chairman), Ryan Sitton, and Christi Craddick.²¹⁸ Commissioner Christian penned an op-ed in USA Today insisting that actually, flaring natural gas “is the safer environmental option.”²¹⁹ The only alternative in Commissioner Christian’s mind was “venting,” which is admittedly much worse than flaring.²²⁰ Shutting-in the offending wells, in order to wait for a pipeline warranted scant consideration in light of the fact that doing so “is expensive and time consuming . . . [and] reduces the supply of oil and raises production costs, which leads to higher prices at the gas pump and on the store shelf for products made from crude oil, such as tires, sunglasses and trash bags.”²²¹

Commissioner Sitton released a report seeking to “put the [flaring] data into context.”²²² The commissioners of the mid-1940s focused on the volumes of gas flared versus the volumes of gas produced, boasting that Texas was flaring less than 1% of the volume of gas it was producing.²²³ At the time of Commissioner Sitton’s report, Texas was flaring twice this ratio,²²⁴ so Mr. Sitton developed a new metric “that relates the amount of gas flared to the amount of oil produced,” a figure he refers to as “flaring intensity.”²²⁵ By that measurement, Texas was a conservationist ideal—only Saudi Arabia had less “flaring intensity.”²²⁶

Bill Murray was sadly unavailable for comment having passed away in 2004.²²⁷ Others, however, were quick to denounce the report. Gunnar Schade, a professor at Texas A&M University, insisted that the Commission underestimated flaring volumes.²²⁸ Indeed, research by the National Oceanic and Atmospheric Administration (NOAA), utilizing satellite analysis of flares, suggests a gross underestimation of flaring volumes.²²⁹

218. *See id.*

219. Wayne Christian, *Flaring Natural Gas is the Safer Environmental Option*, USA TODAY (July 30, 2019), <https://www.usatoday.com/story/opinion/2019/07/30/flaring-natural-gas-safer-environmental-option-editorials-debates/1872529001/>.

220. *Id.*

221. *Id.*

222. RYAN SITTON, TEXAS FLARING REPORT 13 (2020), <https://www.rrc.texas.gov/media/vhhj43cq/sitton-texas-flaring-report-q1-2020.pdf>.

223. *See id.* at 4.

224. For the period between November 2018 and October 2019 (the time period focused on in the report), Texas flared over 213 Bcf (casinghead flaring and gas well flaring) compared with a total of 10,278 Bcf of gas produced (casinghead gas and gas well gas), over 2%. Flaring and production figures provided by the Railroad Commission of Texas through an open records request by the author (on file with the author). *See id.*

225. *Id.*

226. SITTON, *supra* note 222.

227. TEX. STATE CEMETERY, *supra* note 25.

228. Mose Buchele, “It’s a Joke”: *Flaring Expert Find: Big Problems in Report from Texas Oil and Gas Regulator*, TEX. TRIBUNE (Feb. 25, 2020), <https://www.texastribune.org/2020/02/25/expert-finds-problems-report-texas-oil-and-gas-regulator/>.

229. U.S. DEP’T OF ENERGY, OFFICE OF OIL AND NATURAL GAS OFFICE OF FOSSIL ENERGY, NATURAL GAS FLARING AND VENTING: STATE AND FEDERAL REGULATORY OVERVIEW, TRENDS, AND IMPACTS 10–13 (2019) <https://www.energy.gov/sites/prod/files/2019/08/f65/Natural%20Gas%20Flaring%20and%20Venting%20Report.pdf>.

For example, the Commission reports that in 2012, 47.8 Bcf was flared statewide; in 2013, 76.5 Bcf; in 2014, 90.6 Bcf; and in 2015, 114.4 Bcf.²³⁰ The NOAA estimates for those same years are over 125 Bcf in 2012, over 130 Bcf in 2013, over 180 Bcf in 2014, and over 200 Bcf in 2015.²³¹ If the NOAA estimates are correct, this suggests an enormous under estimate of flaring and thus of waste.²³²

The Commission's flaring website notes that a total of 6,972 flaring exceptions were issued in 2019.²³³ As of the date of this writing, the Commission has not updated its website to indicate how many flaring exceptions were issued in 2020 or 2021.²³⁴ The Commission, however, continues to work "[t]o put these numbers in context," noting that Texas has 264,877 producing oil and gas wells, and these numbers make "just a small fraction of the state's oil wells."²³⁵ This context, however, is itself lacking context, as it implies that flaring exceptions are issued on a per-well basis.²³⁶ They are not; each flare permit can cover multiple wells.²³⁷

The Commission likewise issued a bulletin in July of 2021, highlighting "a positive long-term trend in Texas as the rate of flaring in the state continues to fall."²³⁸ This is accompanied by a colorful graph which notes that monthly flaring volumes in Texas had fallen from 19.53 Bcf in June of 2019 to a mere 5.30 Bcf in May of 2021.²³⁹ This also is missing a crucial bit of context in that before 2013, monthly flare volumes above 5 Bcf were virtually unheard of.²⁴⁰

V. CONCLUSION

In recent months, the Commission has continued to highlight the ongoing decline in flaring.²⁴¹ In the absence of any rule changes or issuing fieldwide orders shutting in flaring wells, one cannot help but wonder if the

230. *Historical Natural Gas Production and Well Counts*, R.R. COMM'N OF TEX., <https://www.rrc.texas.gov/oil-and-gas/research-and-statistics/production-data/historical-production-data/natural-gas-production-and-well-counts-since-1935/> (last visited Feb. 8, 2022).

231. U.S. DEPT. OF ENERGY, *supra* note 229.

232. *Compare id.* at 12, with R.R. COMM'N OF TEX., *supra* note 230 (Texas Railroad Commission Estimates).

233. *Flaring Regulation*, R. R. COMM'N OF TEX., <https://www.rrc.texas.gov/about-us/faqs/oil-gas-faqs/flaring-regulation/> (last visited Feb. 8, 2022).

234. *See id.*

235. *Id.*

236. *See id.*

237. *See, e.g.*, Final Order, *supra* note 174 (listing 138 wells on EXCO's request to flare, covered by 69 permits).

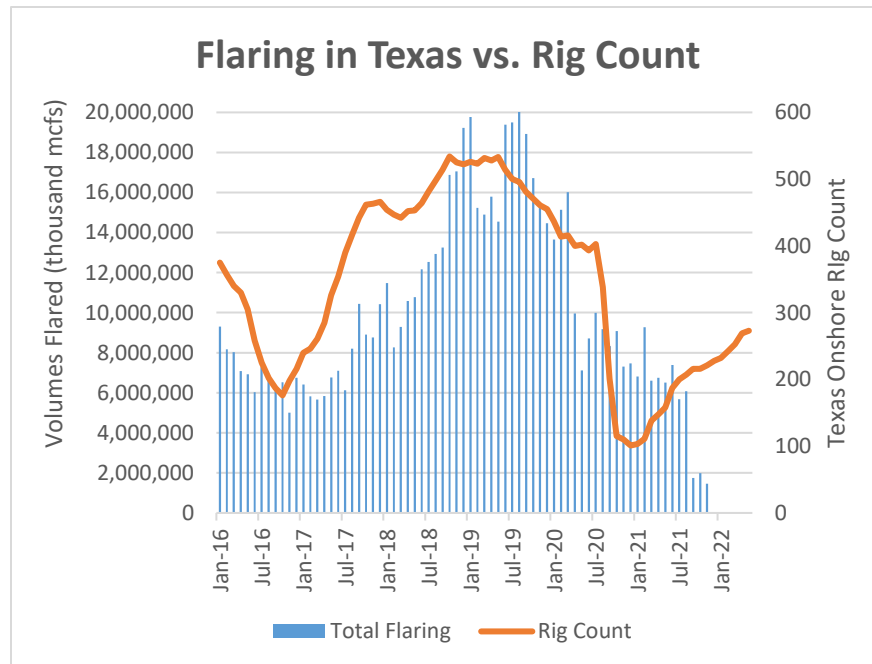
238. *Flaring Intensity in Texas Continues Downward Trend*, R. R. COMM'N OF TEX., <https://rrc.texas.gov/news/072821-flaring-trends/> (last visited Feb. 8, 2022).

239. *Id.*

240. U.S. ENERGY INFO. ADMIN., TEXAS NATURAL GAS VENTED AND FLARED (2022), <https://www.eia.gov/dnav/ng/hist/n9040tx2M.htm>.

241. Christian, *supra* note 219.

reduction in flaring is not simply a product of declining oil and gas activity in the state. The table above illustrates the correlation between flaring volumes and rig count since 2016.²⁴²



Also relevant to the analysis is the price of natural gas. For instance, 2021 witnessed appreciably higher average monthly prices at Henry Hub than 2019 or 2020.²⁴³ It remains to be seen whether (relatively) lower flaring volumes can survive a ramp-up in drilling activity or whether a return of high oil prices coupled with low natural gas prices will once again generate the kind of economic expediencies that drive producers so often to flare.

242. Flaring volumes provided via open records request with Texas Railroad Commission (on file with the author). See BAKER HUGHES, NORTH AMERICA RIG COUNT (2021), <https://rigcount.bakerhughes.com/na-rig-count>. Rig count timing is delayed four months to reflect the lag between spud and completion. See Laura Zachary, *The Estimated Effects of a Fed. Leasing Pause: A Review of the Modeling Consensus and Why a 2020 Study by Timothy J. Considine Fails to Compute*, (June 15, 2021), https://www.wilderness.org/sites/default/files/media/file/Considine%202020%20L%20Zachary%20review_15%20June%202021.pdf (noting that “[o]nce a well is spud (drilling begins), an average of 4 months passes before first production begins”).

243. See U.S. ENERGY INFO. ADMIN., HENRY HUB NATURAL GAS SPOT PRICE (2022), <https://www.eia.gov/dnav/ng/hist/rngwhhd.htm>.