



CONCESSION OF PIPELINE GAS SERVICE: LEGAL, REGULATORY AND ECONOMIC ASPECTS

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Summary

The concession of natural gas services in Brazil is governed by the Federal Constitution, the Concessions Law (Law No. 8,987/1995) and the Gas Law (Law No. 14,134/2021), which regulates the transportation and marketing of natural gas. With the approval of the New Gas Law (Law No. 14,134/2021), the sector has undergone significant changes, aiming to promote competition and attract new private investments. The legislation seeks to guarantee the economic and financial balance of contracts, free access to infrastructure and affordable tariffs. The gas distribution service is the responsibility of the States, and oversight is carried out by regulatory agencies. Recent case law from the Superior Court of Justice (STJ) has reaffirmed the need for efficiency and continuity in the service, in addition to ensuring respect for consumer rights and a balance between concessionaires and the granting authority. The evolution of the gas regulatory framework is an important step towards the country's sustainable and energy development.

Keywords:Concession. Natural gas. Regulation. Free access.

ABSTRACT

The concession of natural gas services in Brazil is regulated by the Federal Constitution, the Concessions Law (Law No. 8,987/1995) and the Gas Law (Law No. 14,134/2021), which regulates the transportation and commercialization of natural gas. With the approval of the New Gas Law (Law No. 14,134/2021), the sector has undergone significant changes, aiming to promote competition and attract new private investments. The legislation seeks to guarantee the economic-financial balance of contracts, free access to infrastructure and reasonable tariffs. The gas distribution service is the responsibility of the States, and supervision is carried out by regulatory agencies. Recent jurisprudence from the Superior Court of Justice (STJ) has reaffirmed the need for efficiency and continuity in service, in addition to ensuring respect for consumer rights and balance between concessionaires and the granting authority. The evolution of the gas regulatory framework is an important step towards the country's sustainable and energy development.

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1. INTRODUCTION

The concession of the provision of natural gas services in Brazil is an activity of great economic and social relevance, especially given the growing demand for cleaner energy sources and the need to expand the country's energy infrastructure. Regulated by the Federal Constitution of 1988 and by Laws No. 8,987/1995 and No. 14,134/2021 (New Gas Law), this concession involves a complex articulation between the public authorities and the private sector.

The Brazilian natural gas sector has shown strong growth in recent years. Proof of this is that in 2023, with 150 million m³/day, the country broke a record in natural gas production, 9% more than in 2022, in addition to having reduced imports by 20%.

This article analyzes the legal and regulatory framework for natural gas concessions, including the role of regulatory agencies, the challenges of infrastructure expansion, the impact of the New Gas Law (Law No. 14,134/2021), and the economic implications. The main legal issues involved in the concession regime are also addressed, with citation of updated doctrines and case law that address the topic.

1 2. The Legal Framework for Natural Gas Concessions

In Brazil, the concession of public services, including the natural gas distribution service, is regulated by the Federal Constitution and the Concessions Law (Law No. 8,987/1995). The Constitution establishes that the States are responsible for organizing and operating local piped gas distribution services (art. 25, § 2), while the Union regulates the activities of exploration, transportation and commercialization of gas.

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Maria Sylvia Zanella Di Pietro defines:

Public service concession is the administrative contract by which the Public Administration delegates to another party the execution of a public service, so that it can be executed in its own name, at its own risk and expense, ensuring remuneration through a fee paid by the user or another form of remuneration resulting from the exploitation of the service. (DI PIETRO, 2019, p. 621)

Law No. 8,987/1995 defines concession as “the delegation of its provision, made by the granting authority, through bidding, to a legal entity or consortium of companies that demonstrates the capacity to perform it, at its own risk and expense, and for a specified period” (art. 2, II). This delegation involves responsibilities of both the granting authority and the concessionaire, aiming to ensure the continuous, efficient and accessible provision of services.

3. Natural Gas Regulatory Framework: Law No. 11,909/2009 and Law No. 14,134/2021

The regulatory framework for natural gas was consolidated by Law No. 11,909/2009, known as the Gas Law, which regulated the transportation, marketing and distribution of natural gas. The Gas Law established guidelines for the organization of the market and defines the need to guarantee free access to gas pipelines and the promotion of competition, always under the supervision of the National Agency of Petroleum, Natural Gas and Biofuels (ANP).

With the approval of Law No. 14,134/2021 (New Gas Law), the sector has undergone a new phase of transformation. The law introduced measures to modernize the natural gas market and attract more private investment, promoting increased competitiveness and reducing dependence on state monopolies. The New Gas Law expands free access to transportation infrastructure, an essential measure for creating a more competitive and efficient environment.

The law brought significant advances in opening up the market and liberalizing the industry by more clearly defining the roles of each segment of the production chain, ensuring non-discriminatory access to essential infrastructure. Greater precision in the responsibilities of each sector and the division of powers between the Union and the states, considering the shared jurisdiction over the network, are crucial to the success of the ongoing restructuring. The new legislation reinforces the Union's jurisdiction in regulating commercialization, deepens the distinction between network and commercialization services, and more clearly defines the separation between local piped gas services and the transportation network, granting the ANP the express power to classify transportation gas pipelines based on technical criteria.

According to Maria Bernadete GP Sarmiento Gutierrez:

Attempts to liberalize the natural gas market in Brazil resulted in the New Gas Law in 2021, which was important for enabling the expansion of the sector, with the expected effect of increasing the share of this source in the Brazilian energy matrix induced by a drop in prices. In addition to the expansion of the natural gas market, other important potential benefits include greater physical flexibility of the gas system, allowing for new contracts, as well as facilitating the integration of a greater proportion of intermittent renewable sources into the Brazilian energy matrix. As a long-term result, a competitive and transparent gas market would be able to adapt to a flexible system for other forms of primary energy, including gases considered low-carbon, with important gains in sustainability, efficiency and energy security in Brazil, while at the same time approaching the regulatory standards in force in OECD countries. (GUTIERREZ, 2022)

4. The Structure of the Concession Agreement

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The concession of public services, such as natural gas, follows a specific contractual format, regulated by the Concessions Law (Law No. 8,987/1995) and Law No. 14,134/2021. Concession contracts establish the obligations and rights of the parties, the term of validity, the conditions for providing the service, as well as the rules for setting tariffs and monitoring.

THE **tariff moderation** is one of the fundamental principles of the concession of public services. Article 6 of Law No. 8,987/1995 establishes that “*Any concession or permission presupposes the provision of a service suitable for the full satisfaction of users, as established in this Law, in the relevant standards and in the*

respective contract". The moderate tariff seeks to ensure that the tariffs charged by concessionaires are affordable to consumers, without compromising the economic viability of the service.

Furthermore, contracts must provide for mechanisms for **periodic tariff review** and of **economic-financial balance**, in order to adapt the concession conditions to market variations and necessary investments.

Maria Sylvia Zanella Di Pietro explains:

Today, the idea that economic and financial balance constitutes a right of the concessionaire is peacefully accepted and this idea is so rooted in doctrine and jurisprudence that such a right would be recognized even if it were not provided for in law or in the contract. This is because the theory of economic balance is based on major principles, which are independent of any provision in positive law:

- a. the principle of equity, which prevents one of the parties from experiencing illicit enrichment to the detriment of the other;
- b. the principle of reasonableness, which requires a proportion between cost and benefit;
- c. the principle of continuity of the administrative contract, which determines the maintenance of the economic-financial balance essential to ensure the continuity of the contract;
- d. the principle of unavailability of the public interest, since, if the contract is necessary to meet some pressing need of the Administration, it is up to the latter to ensure its continuity, restoring the economic-financial balance of the contract. (DI PIETRO, 2015, p. 101)

In recent decisions, national courts have reinforced the need to maintain the economic and financial balance of concession contracts, as can be seen in the following excerpt:

The maintenance of the economic and financial balance of the administrative contract for the concession of public services is provided for by law in articles 65, item II, item "d", and §5, of Law No. 8,666/93, and in art. 9, §2, of Law No. 8,987/95, based on the theory of unpredictability, the need to maintain the objective bases of the contract, in accordance with the proposal accepted by the Public Administration, and the "rebus sic stantibus" clause. (TJSP; Appeal/Required Referral 1001081-25.2020.8.26.0629; Rapporteur: Carlos von Adamek; Judging Body: 2nd Chamber of Public Law; Judgment Date: 11/21/2022)

5. Regulation and Oversight: The Role of Agencies

The regulation and monitoring of natural gas transportation and marketing activities are the responsibility of the National Agency of Petroleum, Natural Gas and Biofuels (ANP), while monitoring of distribution is the responsibility of state regulatory agencies. These agencies are responsible for ensuring compliance with safety, efficiency and affordable tariff standards, in addition to mediating potential conflicts between concessionaires and consumers.

An example of relevant case law on the role of regulatory agencies occurred in ADI 2095/RS, where the STF recognized that: "*The autonomy of agencies to define tariff values is essential to sectoral regulation, observing the terms and legality of the underlying contract.*" (STF, ADI 2095/RS, Plenary, Rapporteur Min. CARMEN LÚCIA, DJE 11/26/2019)

Floriano de Azevedo Marques Neto defines the importance of regulatory agencies well:

The regulatory activity of the Public Administration plays an important role in the legal discipline of concessions. As seen in the historical overview, alongside contracts, regulations were essential to the historical development of the institute, and several regulatory frameworks were covered by the regulatory format. Today, notably after the reform of the State, with the creation of regulatory agencies, the normative acts issued by the administration are largely part of the regulatory framework of concessions and define sensitive points of their operational dynamics. (MARQUES NETO, 2015, p. 145)

The main goal of the New Gas Law (14,134/2021) is to foster competition in the natural gas market, encouraging competitiveness in energy prices. A central point in this process is the need to harmonize state laws and regulations in order to ensure a more accessible and competitive market. In this scenario, the interaction between state regulations, under the responsibility of the states, and the new federal legislation still presents great potential for the unification of rules.

According to the Monitoring of the Process of Opening the Natural Gas Industry produced by FGV CERI:

The regulation of the provisions of the New Gas Law by the ANP is essential because it makes it possible to take advantage of the potential of several mechanisms and provisions of this regulation to develop a thriving and competitive natural gas market. The indications of this potential lie especially in the fact that, despite not yet having been regulated by the agency, provisions for opening up are already producing practical results in advancing the transition process to a more competitive market. This is because agents have not waited for the regulation of the New Law to take risks and enter into business. As previously mentioned, contracts 86 have been signed in all links of the natural gas industry, indicating the confidence of agents in the new legal framework.

In addition to exploring the potential of the mechanisms of the New Gas Law to create a competitive national market, ANP regulations provide consistency and predictability of rules. These are important elements of legal certainty and, therefore, constitute fundamental incentives for the systematic and sustainable growth of the natural gas market in Brazil. (FGV, 2024, p. 85)

6. State Competence and the Distribution of Natural Gas

Despite granting the Union a monopoly on the exploration and extraction of deposits, the import and transportation of natural gas, the Magna Carta assigned the exploration of local piped gas services to the States, under the terms of § 2 of article 25, transcribed below:

Art. 25 – The States are organized and governed by the Constitutions and laws they adopt, observing the principles of this Constitution.

(...)

§ 2 - It is up to the States to directly explore, or through concession, local piped gas services, in accordance with the law, and the issuing of a provisional measure for their regulation is prohibited.

This means that each State has autonomy to define its policies for granting and regulating the piped gas distribution service.

Concession contracts vary from state to state, taking into account regional particularities and the demand of each local market. In states such as São Paulo and Rio de Janeiro, where there is significant industrial and residential consumption, piped gas distribution concessions are widely used and regulated by their respective state regulatory agencies.

7. Market Opening and Free Access

One of the central objectives of Law No. 14,134/2021 is to guarantee free access to natural gas transportation infrastructure, including pipelines. This principle is fundamental to creating a more competitive and open market, allowing different agents to use the existing infrastructure to transport natural gas efficiently and at lower prices.

Free access is considered an essential point for attracting new investments in the sector, as it eliminates market concentration and promotes the entry of new players.

The new Gas Law guarantees third-party access to essential gas industry infrastructure (production pipelines, natural gas treatment or processing facilities and LNG terminals), and the owner of the facility must ensure access to third parties, in a negotiated manner and observing their preference for use, as determined in article 28.

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8. Conclusion

The natural gas service concession regime in Brazil is one of the pillars for the expansion of in-energy infrastructure and the creation of a competitive market. The evolution of legislation, especially with the approval of the New Gas Law (Law No. 14,134/2021), represents an important step forward in opening up the market and attracting new investments, contributing to the country's sustainable economic development.

However, the success of this concession model depends on effective regulation that promotes



competition, guarantee the economic and financial balance of contracts and ensure the adequate and accessible provision of services to consumers.

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