SAFETY JURISDICTION OVER NATURAL GAS PIPELINES

*Jim Behnke**

I. INTRODUCTION

On July 5, 1994, Congress enacted a revision of Title 49 of the United States Code.[1] The expressed purpose of the bill was to restate in comprehensive form, but without substantive change, certain general and permanent laws relating to transportation and to enact those laws as subtitles II, III, and V-X of Title 49, United States Code, and to make other technical improvements in the Code.[2] "In a codification law, the courts uphold the following presumption: the law is intended to remain substantively unchanged [citations omitted]."[3] As to major pipeline facilities located within the United States, the enactment revised and recodified both the Natural Gas Pipeline Safety Act of 1968, as amended[4] (NGPSA), and the Hazardous Liquids Pipeline Safety Act of 1979, as amended[5] (HLPSA). The substantive provisions of the NGPSA and HLPSA were combined in the recodification and are now located in subtitle VIII of Title 49 - Pipelines comprising one Revised Pipeline Safety Act (RPSA).[6]

This article examines the claim that the RPSA effects no substantive change in the law as applied to natural gas pipeline safety. In doing so, this article reviews the allocation of jurisdiction over gas pipeline safety that exists among the Federal Energy Regulatory Commission (FERC), the United States Department of Transportation (DOT) and the several states, as well as areas of regulatory overlap, if any, among these entities. This is an important issue because at least one state has recently attempted to assert pipeline safety jurisdiction over pipelines that are exclusively within federal safety jurisdiction.[7] The article concludes that the RPSA has

---

* Jim Behnke is a stockholder at Rich, May, Bilodeau & Flaherty, P.C., Boston, Massachusetts. He received an A.B. from Dartmouth College in 1972 and a J.D. from Harvard University Law School in 1981. Mr. Behnke would like to thank his mentor Harold B. Dondis for his thoughtful comments and assistance in the preparation of this article.

1. Revision of Title 49 United States Code, Transportation, Pub. L. No. 103-272, 108 Stat. 745 (1994).

2. H.R. REP. No. 103-180 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822.

3. 1994 U.S.C.C.A.N. at 822.

4. The Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, 82 Stat. 720 (1968).

5. Hazardous Liquid Pipeline Safety Act, Pub. L. No. 96-129, 93 Stat. 1003 (1979).

6. 49 U.S.C.A. §§ 60,101-60,503 (West 1996).

7. *See State of New Hampshire, Site Evaluation Committee* (Docket No. 96-01) (Docket No. 96-03) Decision and Order dated July 16, 1997, Attachment D; letter from Roger Fletcher, Utility Systems Engineer, Florida Public Service Commission, to Merlin Moseman, Senior Project Engineer, Enron Gas Pipeline Group (Dec. 20, 1995) (on file with the *Energy Law Journal*, University of Tulsa College

created a technical ambiguity in the law that might mistakenly be interpreted to divest the several states of the jurisdiction that they possessed under the NGPSA[8] and the Natural Gas Act (NGA)[9] to impose additional or more stringent safety requirements with respect to so called "Hinshaw Pipelines."[10] On the other hand, the RPSA appears to clarify that states lack pipeline safety authority over lateral pipelines situated entirely within one state which are owned and used by interstate pipeline companies to transport gas in interstate commerce to an end-user purchasing natural gas for its own consumption. Such pipelines are not Hinshaw Pipelines because they are owned by interstate pipelines, rather than a separate entity or person, and ownership by a separate person is one of the legally distinctive characteristics of a Hinshaw Pipeline.

The RPSA benefits interstate natural gas pipelines transporting gas across state lines to large industrial and commercial consumers and delivering the gas so transported through such lateral pipelines by confirming the existence of exclusive federal safety jurisdiction over such lines,[11] and rendering such pipelines free from additional and more stringent state safety regulation even if those state standards are compatible with the DOT pipeline safety standards.[12] This is important to interstate pipelines whose business has become primarily that of "open-access" transporters of gas ever since the FERC promulgated Order No. 636.[13] Moreover, it is not clear that the states ever had regulatory authority to impose safety regulation on direct sales consumer lines in addition to and/or more stringent than those safety regulations promulgated by the DOT because the FERC has always retained complementary safety jurisdiction with the DOT of such lines under sections 1(b) and 7 of the NGA.[14]

In explaining the complementary scope of the DOT jurisdiction on the one hand, and the FERC and state jurisdiction in the area of natural gas pipeline safety on the other, as well as the potential ambiguity that the RPSA has generated with respect to Hinshaw Pipelines, the historical tension that has existed among the DOT, the FERC and the states is examined. Accordingly, this article is organized under five major headings: Jurisdictional Statements under the RPSA and the NGA; The Relationship

---

of Law).

8. *See* 49 U.S.C.A. app. § 1672(a) (West 1992).

9. 15 U.S.C.A. §§ 717-717z (West 1976).

10. Hinshaw pipelines are pipelines satisfying the requirements of section 1(c) of the NGA. Public Serv. Comm'n v. FERC, 900 F.2d 269, 275 n.4 (D.C. Cir. 1990).

11. *See* 49 U.S.C.A. § 60104(c) (West 1996).

12. 49 C.F.R. pts. 190-99 (1997) [hereinafter DOT Code].

13. Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation under Part 284 of the Commission's Regulations and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III F.E.R.C. STATS. & REGS. ¶ 30,939, *order on reh'g*, Order No. 636A, III F.E.R.C. STATS. & REGS. ¶ 30,950 (1992), *order on reh'g*, Order No. 636-B, 62 F.E.R.C. ¶ 61272 (1992), *reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993), *aff'd in part and vacated and remanded in part*, United Dist. Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1723 (1997) [hereinafter Order No. 636].

14. 15 U.S.C. § 717(b) (1976); 15 U.S.C. § 717f (1994).

of the FERC, the DOT and of the several states to Natural Gas Pipeline Safety Regulation; Evolution of the RPSA Choice of Regulation Rule; The Anomaly and Substantive Change in the Law Generated by the Revision of Title 49; and a Recommendation.

II. JURISDICTIONAL STATEMENTS UNDER THE RPSA AND THE NGA

Before undertaking an in-depth analysis, it may be helpful to preview the choice of regulation and jurisdictional rule by which the RPSA defines the safety powers of the DOT and other agencies over natural gas pipelines. That rule presently states:

> A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate [gas] pipeline facilities and intrastate [gas] pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate [gas] pipeline facilities or interstate [gas] pipeline transportation.[15]

The RPSA further defines "interstate gas pipeline facility" and "intrastate gas pipeline facility" as follows:

"Interstate gas pipeline facility" means:

> "... a gas pipeline facility ... used to transport gas; and ... subject to the jurisdiction of the [FERC] under the [NGA] ... but ... does not include a gas pipeline facility transporting gas from an interstate gas pipeline in a State to a direct sales customer in that State buying gas for its own consumption."[16]

"Intrastate gas pipeline facility" means:

> "...a gas pipeline facility and transportation of gas within a State not subject to the jurisdiction of [FERC] under the [NGA] ... and ... a gas pipeline facility transporting gas from an interstate gas pipeline in a State to a direct sales customer in that State buying gas for its own consumption."[17]

Thus, the RPSA defines "interstate [gas] pipeline facilities" and "intrastate [gas] pipeline facilities" in most part, in terms of the well-established jurisdiction of the FERC. However, the RPSA choice of regulation rule, first quoted above, uses two terms, "interstate [gas] pipeline transportation" and "intrastate [gas] pipeline transportation," which are not themselves defined in the RPSA. The balance of this article is devoted to examining just what the choice-of-regulation rule and these two undefined concepts might mean.

Because the DOT's natural gas pipeline safety jurisdiction under the RPSA is in large measure defined in terms of FERC jurisdiction under the NGA, the examination commences with the NGA.

A. FERC Jurisdiction under the NGA

Regulatory authority over gas pipeline facilities is granted by Con-

15. 49 U.S.C.A. § 60,104(c) (West 1996).
16. 49 U.S.C.A. § 60,101(6) (West 1996).
17. 49 U.S.C.A. § 60,101(9) (West 1996).

gress to the FERC under the first clause of the NGA section 1(b)[18] as limited by section 1(c).[19] Section 7(c)[20] deals with the construction and operation of facilities regulated by the FERC under the first clause of section 1(b). Section 1(b) grants the FERC general jurisdiction over certain activities involving interstate commerce in natural gas and reserves to the several states jurisdiction over other activities.

The relationship of section 1(b) and pipeline services and facilities regulated by the FERC is spelled out by section 7(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage *in the transportation or sale of natural gas, subject to the jurisdiction of the [Federal Energy Regulatory] Commission*, or undertake the construction . . . of any facilities therefor . . . or operate such facilities . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . (emphasis added).

Thus, the first clause of section 1(b) supplies subject matter jurisdiction over pipeline facilities used in:

1. "[T]he transportation of natural gas in interstate commerce."[21]

2. "[T]he sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use," or

3. Facilities described by or used to provide both 1 and 2.[22]

Facilities expressly excluded from FERC and NGA subject matter jurisdiction by the terms of the second clause of section 1(b),[23] include facilities used for:

---

18. 15 U.S.C.A. § 717(b) (West 1976). According to the committee reports explaining NGA section 1(b), the second clause of NGA section 1(b) does no more than state limitations that are implicit in the affirmative grant of the first clause of the section. Congress was urged to retain the limiting language of the second clause, because the language was present in previous drafts of such legislation and Congress believed that its removal might result in an overly expansive interpretation of the first clause. *See Resolution Adopted by the Executive Committee of the National Association of Railroad and Utilities Commissioners on March 26, 1937*, 75th Cong. (1937), *included in* H.R. REP. NO. 709, at 3-4 (1937); S. REP. NO. 1162, at 3 (1937).

19. 15 U.S.C.A. § 717(c) (West 1976).

20. 15 U.S.C.A. § 717f(c) (West Supp. 1997).

21. *See* FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972). For purposes of interpreting the first clause of section 1(b) of the NGA, "interstate commerce" means "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof . . . ." *See* 15 U.S.C.A. § 717a(7) (West 1976).

22. *See* Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498 (1942).

23. Jurisdiction over the facilities expressly excluded from FERC regulation under the NGA is reserved to the several states, except in those situations which create conflict with FERC jurisdiction. *See* Northwest Cent. Pipeline v. Kansas Corp. Comm'n, 489 U.S. 493, 511 (1989).

1. "any other transportation" (referred to herein as "Intrastate Transportation Facilities").[24]

2. "other . . . sale of natural gas" (referred to herein as "Retail Sale Facilities").[25]

3. the "local distribution of natural gas" (referred to herein as "Local Distribution Facilities").[26]

4. "to the production" of natural gas (referred to herein as "Production Facilities").[27]

5. "gathering of natural gas"[28] (referred to herein as "Gathering Facilities").[29]

Section 1(c) of the NGA, the Hinshaw Amendment, was enacted in 1954 and sets forth an important exclusion from the FERC's jurisdiction under the NGA for those section 1(b) Interstate Facilities that meet all *three* elements of the following test.

1. The facilities must be used by a person "to engage in the transportation in interstate commerce or the sale in interstate commerce for resale of natural gas," and receive gas "from another person," i.e. a person other than the person owning and operating the pipeline facility that receives the gas,

---

24. *See, e.g.*, Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412 (10th Cir. 1992); Public Util. Comm'n v. FERC, 900 F.2d 269, 274-276 (D.C. Cir. 1990).

25. *See* Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507 (1947).

26. *See Cascade*, 955 F.2d 1412, and *Public Util. Comm'n*, 900 F.2d 269. As *Public Utilities Commission* discusses, Local Distribution Facilities are essentially the same as Retail Sale Facilities. 900 F.2d at 276-7. By-pass transportation of natural gas in interstate commerce does not constitute state regulated local distribution of gas where the sale of gas being transported occurs outside the state in which the end user is located. *See* Michigan Consol. Gas Co. v. Panhandle Eastern Pipeline Co., 887 F.2d 1295 (6th Cir. 1989), *reh'g denied, cert. denied* 494 U.S. 1079 (1989).

27. *See Northwest Central Pipeline*, 489 U.S. 493.

28. Natural Gas Pipeline Co. v. R.R. Comm'n of Tex., 679 F.2d 51, 54 (5th Cir. 1982); Conoco, Inc. v. FERC, 90 F.3d 536 (D.C. Cir. 1996).

29. Thus, pursuant to sections 1(b) and 7 of the NGA, the FERC has jurisdiction over all facilities used in the transportation or sale of natural gas for resale or interstate commerce, *but not* Intrastate Transportation Facilities, Retail Sales Facilities, Local Distribution Facilities, Production Facilities or Gathering Facilities. All facilities used to perform the activities named in section 1(b), whether subject to regulation by the FERC or reserved to regulation by the several states under the NGA, are referred tc in this article as section 1(b) Facilities. Any reference to State-regulated section 1(b) Facilities would therefore include Intrastate Transportation Facilities, Retail Sale Facilities, Local Distribution Facilities, Gathering Facilities and Production Facilities. Facilities that would be subject to the FERC's jurisdiction under the first clause of section 1(b), even where eligible for section 1(c) Hinshaw Amendment exception, are referred to in this article as section 1(b) Interstate Facilities.

2. The facilities must receive the gas "within or at the boundary of a State," and the gas received by such facilities must be "ultimately consumed within such State" *and*

3. The rates and service of the facilities and the person using the facilities must be "subject to regulation by a State commission." [30]

Section 1(b) Interstate Facilities satisfying the above test are referred to as section 1(c) Hinshaw Facilities in this article.[31] Hinshaw pipelines are usually located in gas consuming states, but the FERC has asserted jurisdiction over intrastate lines in producing states where they are part of an interstate transmission system containing co-mingled interstate and intrastate gas and function as part of a "backhaul" system.[32]

Under section 1(c) and federal case law, if an interstate pipeline regulated by the FERC transports natural gas in a transmission pipeline to a state line or across a state line into a second state where the gas is delivered to a gas pipeline owned and operated by a "person" who is different than the person owning and operating the FERC-regulated interstate transmission pipeline, then the FERC has no jurisdiction to regulate the receiving facility if the state does so.[33] If, on the other hand, the person owning and operating the FERC-regulated interstate transmission pipeline is the *same person* that owns and operates the receiving lateral, the FERC will retain jurisdiction of the lateral,[34] even if the other elements of the section 1(c) Facilities test are satisfied.[35] The FERC and state jurisdictional relationships are summarized in Appendix A, infra.

B. NGA Sections 1(b) and (c) Codify the Evolution of Federal Jurisdiction over Facilities Used in Interstate Commerce and a

30. Louisiana Power & Light Co. v. F.P.C., 483 F.2d 623, *reh' g denied*, 483 F.2d 1404 (5th Cir. 1973), *cert. denied*, 416 U.S. 974, *reh' g denied*, 417 U.S. 978 (1974).

31. Thus, under the foregoing definitions, section 1(b) Interstate Facilities, excepting any section 1(c) Hinshaw Facilities, constitute facilities that are subject to the FERC's jurisdiction under the NGA. Such facilities are FERC-regulated section 1(b) Facilities. State-regulated section 1(b) Facilities and section 1(c) Hinshaw Facilities are referred to as State-regulated section 1 Facilities.

32. *See, e.g.*, Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281 (D.C. Cir. 1994) (although the gas in this case physically moved in a high pressure transmission line from a gathering system to an end user located within the same state, the FERC asserted jurisdiction over the matter as involving transportation in interstate commerce because the transportation was part of a "backhaul" transaction in which a downstream and out-of-state seller of natural gas arranged to transport and deliver its gas to the instate end-user in question).

33. *Louisiana Power & Light Co.*, 483 F.2d 623.

34. Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412 (10th Cir. 1992).

35. In cases where a potential Hinshaw pipeline facility is owned and operated by a corporate affiliate of a FERC regulated interstate transmission line the FERC is given considerable latitude in deciding whether the affiliate owning and operating the potential Hinshaw pipeline constitutes a different person than the affiliate owning and operating the interstate transmission pipeline. *See, e.g.*, Altamont Gas Transmission Co. v. FERC, 92 F.3d 1239 (D.C. Cir. 1996).

Corresponding Limitation on State Authority

Sections 1(b) and 1(c) of the NGA can be understood as the Congressional reaction to the case by case attempt by the United States Supreme Court to define "interstate commerce" in natural gas, first under the so-called "dormant" commerce clause of the United States Constitution, and then under the NGA, as states and then the Federal Power Commission (FPC) asserted jurisdiction over the transportation and/or sale of natural gas by pipeline during the first half of this century.[36]

Congress enacted the Natural Gas Act of 1938 on June 21, 1938, to fill the regulatory void created by the dormant commerce clause jurisprudence of the United States Supreme Court.[37] Although Congress initially adopted the constitutional limit of permissible state regulation as established by the Supreme Court as the corresponding limit of FPC jurisdiction under the NGA,[38] in the mid-1950's this limit was readjusted by enactment of the Hinshaw Amendment.

1. Interstate Pipeline Transportation and Sales as Characterized in the Supreme Court's Dormant Commerce Clause Cases

The United States Supreme Court characterized interstate commerce and transportation of gas or electricity during the period 1910-1938 as transmission of gas or electricity through a pipeline or wire, as the case might be, from one state to another up to the point that it was delivered to local distribution mains or retailing facilities. The Court decided that wholesale rate regulation of interstate commerce in natural gas and electricity were fields of activity that the states had no constitutional authority to regulate. Transportation of gas or electricity from one state to another was identified as interstate commerce. By contrast, sales by local or out-of-state companies at retail were determined to be within state jurisdiction to regulate. The Court thus declared a portion of commerce in natural gas beyond state regulatory authority, but carefully reserved state jurisdiction over intrastate rates.[39]

2. Interstate Pipeline Transportation and Sales under the NGA

Congress enacted the NGA to assure federal regulation of wholesale sales of natural gas and transportation of natural gas in interstate commerce, adopting the constitutional framework for defining the permissible extent of state regulation that had been previously outlined by the United States Supreme Court under the commerce clause.[40] Consequently, it

36. *See* General Motors Corp. v. Tracy, 117 S.Ct. 811, 820-22 (1997), and *infra* note 39.

37. Natural Gas Act 1938 ch. 556 §§ 1-24, 52 Stat. 821 (1938).

38. *See* 15 U.S.C.A. § 717(b) (West 1976).

39. The cases generally cited for this regulatory division are: Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 309 (1924); Public Util. Comm'n. for Kan. v. Landon, 249 U.S. 236 (1919); Pennsylvania Gas Company v. Public Serv. Comm'n of N.Y., 252 U.S. 23 (1920); Public Util. Comm'n of R.I. v. Attleboro Steam & Electric Co., 273 U.S. 83, 86 (1927).

40. The "bright-line" analysis of what constitutes an undue burden on interstate commerce un-

should not have been surprising when, in 1950, the Court carried over into its interpretation of the NGA roughly the same concepts of interstate gas pipeline transportation and intrastate gas pipeline transportation that it had developed in its previous constitutional cases.[41] In *Federal Power Commission v. East Ohio Gas Co.*,[42] the Court was specifically asked to construe the phrase "transportation of natural gas in interstate commerce" in section 1(b) of the NGA. The Court decided that a pipeline company receiving high pressure natural gas at a state line from a different pipeline company situated outside the state, which the receiving pipeline then *transported* and sold to a third person located within the state of receipt, was engaged in the transportation of natural gas in interstate commerce under section 1(b) and subject to the regulatory jurisdiction of the FPC for purposes of accounting and reporting.[43]

In terms of the analytic categories summarized in Appendix A, *East Ohio* established that section 1(b) Interstate Facilities located entirely within one state were subject to the FPC's jurisdiction.[44] The facilities downstream of the point of pressure reduction and introduction into local main gas pipeline facilities constituted state regulated section 1(b) Facilities, namely Intrastate Transportation Facilities, Retail Sales Facilities and Local Distribution Facilities.[45]

---

der the "dormant" commerce clause in the area of gas and electricity appears to have been abandoned by the Court, and most certainly in the case of rural electric cooperatives, in favor of a contemporary "balancing" test that identifies "legitimate state interests" and balances the putative benefit of state regulation against any burden on interstate commerce that such regulation imposes. *See*, Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983). *See also*, *General Motors Corp.*, 117 S.Ct. at 820 n.8. However, abolition of the "bright line" analysis does not overrule cases decided under the NGA or lessen the importance of the cases cited in note 39 in interpreting the NGA. Hence the cases forming the basis of that "bright line" analysis remain of paramount importance to the NGA and the NGPSA.

41. *Supra* note 39.

42. FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

43. Justice Black described the facts of the case and its holding as follows:

> East Ohio owns and operates a natural gas business solely in Ohio selling gas to... Ohio consumers through local distribution systems. Most of this natural gas is transported into Ohio from Kansas, Texas, Oklahoma and West Virginia through pipelines [of other companies]... Inside the Ohio Boundary these interstate lines connect with East Ohio's large high pressure lines in which the imported gas... flows continuously more than 100 miles to East Ohio's local distribution systems.... That this continuous flow of gas from other states to and through East Ohio's high pressure lines constitutes interstate transportation has been established by numerous previous decisions of this Court. The gas does not cease its interstate journey the instant it crosses the Ohio boundary or enters East Ohio's pipes, even though that Company operates completely within the state where the gas is finally consumed... the meaning of interstate commerce in [the NGA] is no more restricted than that which theretofore had been given it in opinions of this Court... We hold that the word 'transportation' like the phrase 'interstate commerce' aptly describes the movements of gas in East Ohio's high-pressure pipelines (citations omitted).

338 U.S. 464, 467-69 (1950). For discussions of the national commerce power, see 338 U.S. at 471-72.

44. *See* Appendix A, A.1 and A.2.

45. *See* Appendix A, B.1-B.3.

3. The Hinshaw Amendment and Transportation of Gas in Interstate Commerce

The *East Ohio* decision, although predictable and consistent with the Supreme Court's previous commerce clause decisions, created dissatisfaction among local distribution companies and others owning and operating transmission facilities within a single state because the decision specifically upheld the FPC's authority to require East Ohio Gas Company to keep accounts and submit reports to the FPC under sections 1(b), 5, 6, 8, 10 and 16 of the NGA,[46] potentially resulting in federal rate and operational regulation of these pipelines. In 1954, Congress enacted the Hinshaw Amendment, which added section 1(c) to the NGA[47] and eliminated the possibility of such regulation in those cases where a state subjected the rates and facilities of the pipeline in question to regulation.

Enactment of section 1(c) of the NGA was the first significant addition to state jurisdiction over the transportation and sale of gas in interstate commerce since the United States Supreme Court began to develop its dormant commerce clause jurisprudence with respect to natural gas.[48] Section 1(c) of the NGA expressly reserved to state public utility commissions and other state agencies authority to regulate interstate transportation and/or sale of gas satisfying the conditions of the test it specified. Section 1(c), however, did nothing to modify the interstate character of such transportation and, in fact, the language expressly applies to facilities used in transportation in interstate commerce and sale in interstate commerce for resale. Despite the Hinshaw Amendment, *East Ohio* continues to be cited for its definition of interstate transportation of natural gas by pipeline because, among other things, the FERC retains jurisdiction over these facilities unless the state affirmatively regulates the facilities in question.[49]

Under the analytic categories displayed in Appendix A, section 1(c) diminished the FPC's and FERC's regulatory authority over section 1(c)

---

46. 15 U.S.C.A. §§ 717(b), 717(d), 717(e), 717(g), 717(i) and 717(o) (West 1976).

47. Act of Mar. 27, 1954, ch. 115, 68 Stat. 36 (1954) (now codified at 15 U.S.C.A. § 717(c) (West 1976)).

48. A significant expansion of federal jurisdiction under the NGA by the Supreme Court at the expense of the States occurred during the year the Hinshaw Amendment was enacted, when the Court imposed federal regulation and price controls on natural gas producers selling gas for resale into the interstate market and to interstate pipelines. *See* Wisconsin v. Phillips Petroleum Co., 347 U.S. 672 (1954). This ruling did not subject to regulation intrastate sales in the state of production, but the consequences flowing from this decision and the long term gas contracting practices of gas pipelines ultimately helped to create the shortage of natural gas in the interstate market that motivated Congress to enact the Natural Gas Policy Act, 15 U.S.C.A. §§ 3301-3432. *See* United Distribution Cos. v. FERC, 88 F.3d 1105, 1123 (D.C. Cir 1996); Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 502 (1989).

49. *See* Public Util. Comm'n. of Cal. v. FERC, 900 F.2d 269, 275 (D.C. Cir. 1990) (interstate transportation continues to the point of pressure reduction and delivery to local mains). Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412, 1418 (10th Cir. 1992) (interstate transportation includes tap and meter facilities at point of local delivery). In *Cascade* the Court of Appeals applied the *East Ohio* pressure reduction test to the facts before it, but reserved the issue in other situations. 955 F.2d at 1420 n.9.

Interstate Facilities by adding section 1(c) Hinshaw Facilities to the State Regulated section 1(b) Facilities that were regulated by the several states.[50] As will be shown later, this transfer of regulatory authority has important consequences for the RPSA.

C. *FERC Jurisdiction under Section 1 of the NGA and its Application to Interstate Gas Pipeline Facilities and Intrastate Gas Pipeline Facilities under the RPSA*

FERC jurisdiction under the NGA and the relation of section 1(b) subject matter jurisdiction to its constitutional origin has been reviewed in order to explain in detail the RPSA definitions "interstate gas pipeline facility"[51] and "intrastate gas pipeline facility."[52] Because such gas pipeline facilities are defined, in part, in terms of whether or not a facility is "subject to the jurisdiction of [the FERC] under the [NGA]," the RPSA cannot be understood without first understanding FERC jurisdiction under the NGA. However, these terms are not alone decisive on the issue of whether a given facility may be regulated by the states. The concepts of interstate pipeline transportation and intrastate pipeline transportation also have an important part to play.

1. Common Elements and Distinguishing Features

The RPSA definitions for "interstate gas pipeline facilities" and "intrastate gas pipeline facilities" both involve "gas pipeline facilities" that are " . . . used in transporting gas."[53] "Transporting gas" means in relevant part "transmission or distribution of gas by pipeline . . . in interstate commerce."[54] "Interstate commerce" means, for these purposes, " . . . commerce . . . between a place in a State and a place outside that State."[55]

A third element which distinguishes interstate from intrastate pipeline facilities is the general relationship of the natural gas pipeline facility in question to the FERC jurisdiction under the NGA. "Interstate gas pipeline facilities" would generally include all facilities "subject to the jurisdiction of [the FERC] under the [NGA]."[56] By contrast, "intrastate gas pipeline facilities" generally includes all facilities "not subject to the jurisdiction of [the FERC] under [the NGA]."[57]

The definition of "interstate gas pipeline facilities" under the RPSA is, however, also subject to *an exception* for certain facilities that *are* subject at least in part to the FERC jurisdiction under the NGA. That exception is for "a gas pipeline facility transporting gas from an interstate gas

50. Compare the FERC and State Jurisdiction headings of Appendix A, A.2 and B.1-B.5.
51. 49 U.S.C.A. § 60,101(6)(A) (West 1996).
52. 49 U.S.C.A. § 60,101(9)(A) (West 1996).
53. 49 U.S.C.A. §§ 60,101(6)(A) and (9)(A) and 60101(3) (West 1996).
54. 49 U.S.C.A. § 60,101(21) (West 1996).
55. 49 U.S.C.A. § 60,101(8)(A)(i) (West 1996).
56. 49 U.S.C.A. § 60,101(6)(A) (West 1996).
57. 49 U.S.C.A. § 60,101(9) (West 1996).

pipeline in a State to a direct sales customer in that State buying gas for its own consumption."[58] At the time this exception was introduced under the NGPSA, the direct sales customer generally purchased gas directly from an interstate pipeline that owned the gas in question *and* transported it to the purchaser. In this article, a gas pipeline facility satisfying this additional and express exception from "interstate gas pipeline facility" will be referred to as a "Direct Sales Customer Line."[59]

While there is an exclusion of Direct Sales Customer Lines from the "interstate gas pipeline facility" definition in the RPSA, there is an express inclusion of Direct Sales Customer Lines in the definition of "intrastate gas pipeline facility."[60] Therefore, "interstate gas pipeline facilities" under RPSA are FERC regulated section 1(b) Facilities excluding any Direct Sale Customer Lines.[61]

2. Distinguishing Among NGA section 1(c) Hinshaw Facilities Direct Sales Customer Lines and Interstate Transportation Laterals

Direct Sales Customer Lines, NGA section 1(c) Hinshaw Facilities and what might be termed Interstate Transportation Laterals, necessarily constitute "intrastate gas pipeline facilities" under the RPSA. All three types of facilities are located entirely within one state, service a customer or customers located within that state, and all the gas delivered by these facilities is consumed in that state. The three types of facilities are also used in transportation of gas in interstate commerce by pipeline. However, under the RPSA these three types of facilities differ significantly in that a Direct Sales Customer Line, which is used by an interstate pipeline to make direct sales of gas to a consumer, is expressly excepted from the general rule defining "interstate gas pipeline facility" to be a pipeline facility used to transport natural gas subject to the jurisdiction of the FERC under the NGA. By contrast, an NGA section 1(c) Hinshaw Facility, is excluded from the RPSA definition of "interstate gas pipeline facility" because NGA section 1(c) necessarily excludes NGA section 1(c) Hinshaw Facilities from the FERC's jurisdiction under the NGA and thus an express definitional exclusion under the RPSA is not required. An Interstate Transportation Lateral, on the other hand, merely transports gas in interstate commerce directly to an end-user without that transportation being legally connected with the sale of the gas that is delivered.

NGA section 1(c) Hinshaw Facilities and Direct Sales Customer Lines constitute two similar but materially different types of "intrastate gas

58. 49 U.S.C.A. § 60,101(6)(B) (West 1996).

59. *See* FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972); FPC v. Transcontinental Pipeline Corp. 365 U.S. 1 (1961), Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507 (1947). Compare these cases to Michigan Consol. Gas Co. v. Panhandle Eastern Pipeline Co., 887 F.2d 1295 (6th Cir. 1989).

60. *See* 49 U.S.C.A. § 60,101(9)(B) (West 1996).

61. *See* Appendix A, A.1.

pipeline facilities" under the RPSA. Both types of facilities are involved in interstate gas pipeline transportation under NGA section 1, but NGA section 1(c) Hinshaw Facilities cannot be subject to the FERC's jurisdiction under the NGA whereas Direct Sales Customer Lines must be subject to FERC transportation jurisdiction. No pipeline facility can be in both legal categories at the same time. The material factual distinction between these two types of gas pipeline facilities under the RPSA is that a NGA section 1(c) Hinshaw Facility is owned and operated by a person or entity different from the person or entity that owns and operates the natural gas transmission line supplying natural gas to the owner and operator of that NGA section 1(c) Hinshaw Facility and is subject to state regulation in most respects. The owner and operator of a Direct Sales Customer Line, on the other hand, is the same person or entity as the owner and operator of the interstate natural gas transmission line that supplies natural gas to the Direct Sales Customer Line. The Interstate Transportation Lateral is owned and operated by the interstate pipeline transporting the gas in question but is not used to deliver gas that is transported and sold by the pipeline to the end-user in a single "bundled" transaction. In the case of the Interstate Transportation Lateral, both the transportation of gas and underlying pipeline that transports gas from the transmission line to the end-user is subject to the FERC's jurisdiction for transportation rate purposes and for purposes of requiring a certificate of public convenience and necessity pursuant to NGA section 7(c).

III. THE RELATIONSHIP OF THE FERC, THE DOT AND THE SEVERAL STATES TO NATURAL GAS PIPELINE SAFETY REGULATION

The complexity of the definitions of "interstate gas pipeline facilities" and "intrastate gas pipeline facilities" is a consequence of the history of the concepts of interstate gas pipeline facility, intrastate gas pipeline facility, interstate gas pipeline transportation, intrastate gas pipeline transportation and the precedent natural gas pipeline safety statutes that were ultimately revised and recodified as the RPSA.[62] That history is a tale of jurisdictional conflict and territoriality, with the FERC, the DOT and the several states at one time or another attempting to establish, expand or protect their respective authority to regulate the safety of natural gas pipelines relative to the other.

Upon a cursory reading, the relationship between the FERC under the NGA and the DOT under the RPSA would appear to be governed by the RPSA's choice of regulation rule,[63] with most, if not all, jurisdiction to establish natural gas pipeline safety standards having been transferred to the DOT. Moreover, the RPSA states:

> In a proceeding under section 3 or 7 of the Natural Gas Act (15 U.S.C. 717b or 717f), each applicant for authority to import natural gas or to establish, construct, operate, or extend a gas pipeline facility subject to an applicable

62. Subtitle VIII, 49 U.S.C.A. § 60,101 (West 1996).

63. 49 U.S.C.A. § 60,104(c) (West 1996).

> safety standard shall certify that it will design, install, inspect, test, construct, operate, replace, and maintain a gas pipeline facility under those standards and plans for inspection and maintenance under section 60108 of this title. The certification is binding on the Secretary of Energy and the Commission except when an appropriate enforcement agency has given timely written notice to the Commission that the applicant has violated a standard prescribed under this chapter.[64]

The meaning of this section of the RPSA, however, is more subtle than a cursory reading reveals. As discussed below, under the statutes that preceded the RPSA, the language quoted above was enacted to achieve two different and important Congressional goals: (a) preservation of the *concurrent* safety jurisdiction of the FERC and the DOT with respect to the FERC Regulated section 1(b) Facilities; and (b) limiting those situations in which it would be necessary for the FERC to examine pipeline safety issues in detail in a proceeding for a certificate of public convenience and necessity under sections 7(c)[65] and 1(b).[66]

Jurisdictionally, the FERC has authority over pipeline transportation of natural gas in interstate commerce pursuant to the first clause of section 1(b) of the NGA as modified by the Hinshaw Amendment.[67] Section 7(c) requires a company to obtain a certificate of public convenience and necessity from the FERC before constructing and operating FERC Regulated section 1(b) Facilities. Section 7(e) authorizes the FERC to place reasonable conditions on such certificates.[68] As part of its authority to issue certificates of public convenience and necessity, found in sections 1(b) and 7, the FERC is required to conduct a wide ranging review of all aspects of a proposed project including gas supply, demand for gas, cost of facilities, land use, environmental considerations, and, in appropriate cases, pipeline safety in determining whether a proposed project or pipeline facility is in the public interest and a certificate of public convenience and necessity under section 7(c) should issue to the pipeline project proponent.[69]

Pipeline safety, then, is one of the many issues that the FERC can and does address in a certificate proceeding under sections 1(b) and 7, and that can be the legitimate subject of a section 7(e) condition. This is confirmed by the history of federal pipeline safety regulation that preceded enactment of the RPSA.

---

64. 49 U.S.C.A. § 60,104(d)(2) (West 1996).

65. 15 U.S.C.A. § 717f (c) (West 1997).

66. 15 U.S.C.A. § 717(b) (West 1997).

67. 15 U.S.C.A. §§ 717(b)-(c) (West 1997).

68. 15 U.S.C.A. § 717f (e) (West 1997).

69. *See* Atlantic Refining Co. v. Public Serv. Comm'n. of N.Y., 360 U.S. 378 (1959); National Fuel Gas Supply Corp. v. Public Serv. Comm'n., 894 F.2d 571 (2d Cir. 1990).

A. *The Natural Gas Pipeline Safety Jurisdiction of the FERC under the NGA*

1. NGPSA and *Chattanooga Gas*

Under the authority of sections 1(b), 7(c) and (e), the FPC exercised authority to regulate the safety of interstate natural gas pipelines prior to the passage of the NGPSA (1968).[70] In 1974, the question whether the FPC retained any safety jurisdiction over interstate natural gas facilities under the NGA after the passage of the NGPSA (1968) was raised directly by the FPC when the FPC ordered Chattanooga Gas Company to cease operating a liquified natural gas (LNG) facility previously certificated by the FPC under section 7 of the NGA.[71] That certificate had been expressly conditioned on compliance with National Fire Prevention Association Standard No. 59-A-1972.[72] In *Chattanooga*, the FPC took emergency action because Chattanooga's operation of the LNG facility, as certificated by the FPC, violated safety conditions requiring compliance with the National Fire Protection Association Standard No. 59A. The FPC subsequently denied rehearing, stating:

> Chattanooga's contention that this Commission has no authority to impose safety standards on pipeline facilities certificated by it because the Secretary of Transportation has jurisdiction over such matters [under the NGPSA], is an interpretation of applicable statutes which entirely ignores our responsibilities under the [NGA]. While the Secretary indeed has certain jurisdiction over the establishment of specific safety standards such jurisdiction is not exclusive of [FERC's] powers in considering the "public convenience and necessity." We have in the past consistently exercised our authority over pipeline safety under Section 7 of the [NGA] as part of our jurisdictional responsibility to determine public convenience and necessity.[73]

The committee reports discussing the Natural Gas Pipeline Safety Act of 1968[74] support the FPC majority position in *Chattanooga. Chattanooga* ultimately settled with the FPC approval and a dissenting opinion, based on the rationale of a prior dissent[75] asserted that when the NGPSA (1968) was enacted, the Office of Pipeline Safety of the DOT was granted exclusive safety jurisdiction over interstate pipelines because of section 7 of the NGPSA.[76] These FPC orders brought to light a clear jurisdictional conflict

---

70. *See, e.g.*, Atlantic Seaboard Corp., 36 F.P.C. 635, 655 (1966); *compare* The Natural Gas Pipeline Safety Act of 1968, Pub. No. 90-481, 82 Stat. 720 (1968).

71. Chattanooga Gas Co., 51 F.P.C. 1022 (1974).

72. In 1974, 49 C.F.R. § 192.12 (1974) required owners and operators of LNG facilities, the construction of which commenced after January 1, 1973, to comply with the requirements of the NFPA 59A (1972). Section 192.12 identified the provisions of the DOT Code applicable to LNG facilities until February 11, 1980, when that section was repealed by the DOT and 49 C.F.R. pt. 193 became effective. 45 Fed. Reg. 9203 (1980).

73. Chattanooga Gas Co., 51 F.P.C. 1278, 1279 (1974).

74. *See* The Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, 82 Stat. 720 (1968); and H.R. REP. NO. 1390 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3223, 3251.

75. Chattanooga Gas Co., 51 F.P.C. 2371 (1974).

76. 49 U.S.C. § 1676 (1970).

between the DOT and the FPC which has been reflected in the committee reports of subsequent amendments to the NGPSA. Today, outside the area of LNG safety where agreement has been reached, that conflict remains largely dormant. Thus, until its amendment in 1976, FPC, DOT and state jurisdiction over gas pipeline safety was as summarized in Appendix B.

2. The Natural Gas Pipeline Safety Amendments of 1976

The FPC orders in *Chattanooga* appear to have been one of the reasons for the amendment of the NGPSA in 1976[77] (hereinafter the "1976 NGPSA Amendments"). *Federal Power Commission v. Louisiana Power & Light* (hereinafter *Louisiana Power & Light I*)[78] appears to have been another reason for the amendments, although the case did not directly relate to pipeline safety issues.

a. The Louisiana Power and Light/United Gas Pipeline Company Litigation

The factual background and procedural history of the litigation involving Louisiana Power and Light (LP&L), United Gas Pipeline Company (United) and the FPC are complex. That litigation resulted in two important decisions: the 1972 United States Supreme Court case noted above[79] and the decision by the United States Court of Appeals for the Fifth Circuit cited previously in connection with the explanation of the Hinshaw Amendment.[80]

The litigation involved two pipelines owned and operated by United and situated entirely in Louisiana.[81] United's so-called "Black System" carried natural gas originating in Louisiana to pipelines that ultimately transported and delivered the gas outside Louisiana. The gas carried in the "Black System" was considered gas transported or sold for resale in interstate commerce and subject to the jurisdiction of the FPC under the NGA along with the facilities that carried it. United's "Green System," although connected to the "Black System" through a series of valves and pipeline interconnections, was physically distinct from it. Prior to the events that provoked the LP&L litigation, the "Green System" transported gas originating in the state of Louisiana owned and sold in bundled intrastate transactions to direct sale customers, such as LP&L, also located and consuming the gas in Louisiana.[82] As such the "Green System" was used to transport and sell gas in intrastate commerce and was subject to

77. Natural Gas Pipeline Safety Act Amendments of 1976, Pub. L. No. 94-477, 90 Stat. 2073 (1976).

78. FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

79. *Id.*

80. Louisiana Power & Light Co. v. FPC, 483 F.2d 623 (5th Cir. 1973).

81. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 624 (1972).

82. *Id.*

regulation in all respects by the Louisiana Public Service Commission.[83] LP&L had a long-term contractual relationship with United that required United to make direct sales of natural gas to its power plants located on the "Green System" for their immediate consumption.[84]

In the late sixties and early seventies, a combination of federal regulation of producer prices and long term gas supply contracting practices resulted in a shortage of natural gas in interstate markets.[85] In response the FPC, issued a series of so-called "curtailment" orders and regulations,[86] in which the FPC established certain favored uses of gas (e.g. use by residential customers, hospitals, and schools) and disfavored uses of gas (e.g., power plant and boiler uses), and required natural gas companies subject to FPC jurisdiction under the NGA to modify their respective interstate natural gas sales and transportation tariffs to implement FPC curtailment policies.[87] Thus, subject to any applicable contractual liabilities between the parties, the FPC authorized natural gas companies to modify obligations to existing direct sales customers with industrial users and power plants not directly subject to FPC jurisdiction in order to comply with the FPC's curtailment policy.

After the issuance of FPC curtailment requirements, United decided to introduce relatively small amounts of interstate gas from its "Black System" into its "Green System" and petitioned the FPC for a certificate of public convenience and necessity to do so, as well as for a declaratory order that the "Green System" was subject to the FPC orders pertaining to curtailment.[88] At risk of unilateral modification of its long term direct sales gas supply contracts for plants located on the "Green System," LP&L filed suit against United in the United States District Court for the Western District of Louisiana.[89] United prevailed in the District Court, but that decision was reversed by the United States Court of Appeals for the Fifth Circuit. United appealed the decision to the United States Supreme Court. The Supreme Court decided in *Louisiana Power & Light I* that the FPC possessed sufficient authority over transportation of natural gas in interstate commerce under section 1(b) of the NGA to consider and decide, in the first instance, whether the FPC had jurisdiction over United's "Green System."[90] Thus, on primary jurisdiction grounds, the Supreme Court vacated the order of the Court of Appeals, noting that that Court would have jurisdiction to review the curtailment decision of the FPC in connection with United and LP&L under section 19 of the NGA,[91] if ap-

83. Louisiana Power & Light Co. v. FPC, 483 F.2d 623, 625 (5th Cir. 1973).
84. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 624 (1972).
85. *See* discussion *supra* note 48.
86. FPC Order 431, 36 Fed. Reg. 7505 (1971).
87. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 629 (1972).
88. *Id.* at 625.
89. *Id.*
90. *Id.* at 648.
91. 15 U.S.C. § 717r (1976).

pealed.[92]

Shortly after the Supreme Court's decision the FPC decided that it had jurisdiction over United's "Green System" due to the introduction of interstate gas (amounting to approximately 3.4% annually of aggregated deliveries).[93] LP&L appealed the FPC decision to the United States Circuit Court of Appeals for the Fifth Circuit. Deferring to the FPC's decision, the Court of Appeals upheld the FPC's determination as well as a determination that the Hinshaw Amendment was inapplicable to the "Green System."[94] Thereafter, the Court of Appeals denied rehearing and the United States Supreme Court denied certiorari and rehearing.[95] Thus, United succeeded in transforming its intrastate system into an interstate system, subjecting that system to FPC curtailment priorities.

The producing states and others feared that state safety jurisdiction over such historically intrastate direct sales pipelines such as the "Green System" could be defeated simply by commingling relatively minor amounts of gas dedicated to interstate commerce into such systems, thus converting intrastate to FPC regulated interstate transportation. Congress was petitioned to remedy the situation. Clearly, gas producing states that had historically regulated intrastate pipelines such as the United "Green System" were facing a challenge to their pipeline safety jurisdiction. In view of the NGA section 1(c), the Hinshaw Amendment, however, state regulators in non-producing states did not realistically face such a challenge.

b. Attempt to Divest FPC of Safety Jurisdiction Fails

It followed from the assertion of jurisdiction by the FPC over the curtailment decisions of United with respect to its "Green System" under NGA section 1(b), as well as from *Chattanooga*, that direct sales customer lines were subject to FPC jurisdiction under NGA sections 7(c) and (e), and that the FPC had safety jurisdiction with respect to direct sales customer lines under the NGA and FPC certificate authority. Because the NGPSA (1968) had defined DOT safety jurisdiction in terms of FPC jurisdiction under NGA section 1(b), it followed from the *Louisiana Power & Light I* and *Louisiana Power & Light Co. v. Federal Power Commission* (hereinafter *Louisiana Power & Light II*)[96] decisions that state safety regulation of direct sales customer lines was preempted by the NGPSA (1968), just as *Chattanooga* had clarified that the FPC actively asserted safety jurisdiction over FERC Regulated NGA section 1(b) Facilities.[97]

By 1976, bills to amend the NGPSA (1968) had been proposed to and

92. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 648 (1972).

93. Louisiana Power & Light Co. v. F.P.C., 483 F.2d 623, 630 (5th Cir. 1973).

94. *Id.* at 631-34.

95. Louisiana Power & Light Co. v. FPC, 483 F.2d 623 (5th Cir. 1973), *reh' g denied*, 483 F.2d 1404 (5th Cir. 1973), *cert. denied*, 416 U.S. 974, *reh' g denied*, 417 U.S. 978 (1974).

96. *Id.*

97. *See* Appendix B.

considered by Congress. The bills amounted to an assault on FPC pipeline safety jurisdiction that, for the most part, failed. A compromise between the House and Senate produced the 1976 NGPSA Amendments. Under the compromise, the House bill, H.R. 12168, was passed in lieu of the Senate bill, S. 2042, after the House bill was amended to include much of the Senate text.[98]

The Senate bill had proposed to overrule *Chattanooga* by expressly eliminating natural gas pipeline safety jurisdiction reserved to the FPC under the NGA as recognized in section 7 of the NGPSA (1968). The Senate Report issued in connection with this bill explained that S. 2042 would have prevented the FPC from attaching any safety conditions to a certificate of public convenience and necessity other than standards established by the DOT.[99]

Not surprisingly, the FPC opposed elimination of FPC safety jurisdiction under the NGA. The FPC emphasized that the NGPSA (1968) was not intended to diminish the safety jurisdiction of the FPC under the NGA and detailed the FPC's efforts with the DOT and the Coast Guard to enter into a jurisdictional Memorandum of Understanding (MOU) with respect to safety jurisdiction over liquefied natural gas (LNG) facilities, a matter that was concluded some years later.[100]

One of the principal purposes of S. 2042 was to eliminate FPC safety jurisdiction over interstate gas transmission facilities in its entirety. Consequently, the bill, if enacted, would have eliminated FPC pipeline safety jurisdiction over all natural gas pipeline facilities including Direct Sale Customer Lines. However, the 1976 NGPSA Amendments as enacted did not include S. 2042 language divesting the FPC of pipeline safety jurisdiction, but *did include* direct sales customer lines in its new definition of "intrastate pipeline transportation."[101]

Thus, the passage of the 1976 NGPSA Amendments failed, as a technical matter, to remove pipeline safety jurisdiction from the FPC under the NGA, and did not make exclusive the DOT's jurisdiction to establish federal safety standards over FERC Regulated NGA section 1(b) Facilities. At best, the FPC and the DOT were left by Congress to work out an allo-

---

98. *See* S. REP. NO. 94-852 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4673.

99.

> Jurisdictional disputes between the DOT and other federal agencies still continue to plague the Office of Pipeline Safety. One such dispute would be resolved statutorily by S. 2042. The dispute stems from the fact that the FPC regulates the interstate sale of natural gas for resale through a certification process. In so doing, it has from time to time imposed safety conditions on those natural gas facilities over which it has authority.

Id. at 4676.

100. *Id.* at 4694.

101. H.R. REP. NO. 94-1660, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4701, 4703. This House Report dealt with the issue of FPC safety jurisdiction and stated that although the Senate amendment would have forbade the FPC from attaching safety standards to certificates of convenience and necessity if such condition requested safety standards other than those imposed by the DOT, the Senate had receded to the House position, which did not include any diminution with respect to the authority of the FPC.

cation of jurisdictional responsibilities between themselves. The 1976 NGPSA Amendments did exclude Direct Sales Customer Lines from "interstate gas transmission facilities" and included such lines in the definition of "intrastate pipeline transportation."[102] This exclusion, to the extent that it did affect the jurisdictional relationships of the FPC and the several states with respect to the NGA section 1(b) Facilities, did so merely with respect to Direct Sales Customer Lines whose gas sales were otherwise regulated by state regulatory commissions. The exclusion was clearly a congressional reaction to the potential for application of preemptive federal safety jurisdiction by the DOT over State Regulated NGA section 1(b) Facilities like those involved the United/LP&L litigation, which were located entirely within a gas producing state and served industrial or commercial end-users.

From the perspective of applying the choice of regulation rule of the NGPSA (1976),[103] the 1976 NGPSA Amendments meant that Direct Sales Customer Lines constituted "intrastate pipeline transportation." Although the NGPSA[104] appeared to suggest that states might establish additional or more stringent standards as to Direct Sale Customer Lines than those established by the DOT, such regulation theoretically trespassed upon a field of regulation considered by the Supreme Court to belong to the transportation jurisdiction of the FPC under the NGA section 1(b). Congress *did not* revoke or expressly modify FPC jurisdiction under the 1976 NGPSA Amendments. Thus, safety regulation of these facilities by states remained theoretically subject to preemption under *Louisiana Power & Light I* and the NGA.

Jurisdictional relationships for pipeline safety purposes, upon enactment of the 1976 NGPSA Amendments, are summarized in Appendix C.

3. Pipeline Safety Act of 1979

The Pipeline Safety Act of 1979 (PSA)[105] provided Congress with another opportunity to eliminate or adjust the FERC's[106] safety jurisdiction under the NGA. By 1979, the safety regulation of LNG facilities and hazardous liquids pipeline transportation had become serious legislative concerns. Congress addressed these issues in the PSA, but again refused to eliminate safety jurisdiction from the FERC under the NGA. The FERC retained safety jurisdiction even though the legislative explanation set forth in Senate Report No. 96-182 for S. 411, the bill that was passed as the PSA in lieu of the competing House bill, continued to identify lack of co-

102. The 1976 NGPSA Amendment definition of "intrastate pipeline transportation" is the functional equivalent of the RPSA's definition of "intrastate gas pipeline facilities." *Compare* 49 U.S.C. § 1671 (1976) and 49 U.S.C.A. § 60,101(a) (West 1996).

103. 49 U.S.C. § 1672(b) (1976).

104. *Id.*

105. Pipeline Safety Act of 1979, Pub. L. No. 96-129, 93 Stat. 989 (1979).

106. The functions of the FPC were transferred to the Secretary of Energy, and with regard to natural gas matters subject to the NGA, to the FERC within the Department of Energy by The Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977).

operation and coordination between the FERC and the DOT with respect to pipeline safety as a problem. The committee noted, however, that the FERC and the DOT were working on a MOU with respect to their respective safety jurisdiction over LNG, and thus deferred legislation on the subject.[107]

A MOU regarding LNG facilities and the roles of the FERC and the DOT with respect to LNG safety was finally executed and published on May 9, 1985.[108] That MOU expressly recognized the FERC's authority to exact more stringent safety requirements than the DOT with respect to any LNG facility that is subject to the FERC's jurisdiction under the NGA sections 1(b) and 7. In any event, the MOU appears to have ended, as to LNG facilities, the jurisdictional controversies between the DOT and the FERC.[109]

4. The Pipeline Safety Amendments of 1992 and the Accountable Pipeline Safety and Partnership Act of 1996

Neither the Pipeline Safety Act of 1992 (PSA of 1992)[110] nor the Accountable Pipeline Safety and Partnership Act of 1996 (APSPA)[111] addressed FERC jurisdiction with respect to pipeline safety under the NGA. Consequently, neither the NGPSA (1968), the 1976 NGPSA Amendments, the PSA, the PSA of 1992, nor the APSPA have eliminated FERC safety jurisdiction under the NGA.

B. Arguments Arising Under the NGA Against Assertion of State Safety Jurisdiction

Because the FERC retains safety jurisdiction under NGA sections 1(b), 7(c) and (e) with respect to the FERC-regulated NGA section 1(b) Facilities, the same doctrines that militate against state regulation of matters falling within the purview of a FERC certificate of public convenience and necessity under the NGA sections 1(b) and 7 apply to state regulation of pipeline safety. For example, if a state attempted to impose natural gas pipeline safety standards in addition to or more stringent than those imposed by the DOT on a Direct Sales Customer Line or an Interstate Transportation Lateral transporting gas to an end-user, and such line is constructed and operated under a certificate of public convenience and necessity issued pursuant to NGA section 7, federal preemption under the NGA and other doctrines preserving FERC authority under the NGA theoretically apply.

---

107. S. REP. NO. 96-182 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1999.

108. *See Notice of Agreement Regarding Liquefied Natural Gas*, 31 F.E.R.C. ¶ 61,232 (1985).

109. The FERC continues to place safety conditions in excess of those required by the DOT Code in certificates of public convenience and necessity issued under the NGA section 7. *See, e.g., Columbia Gas Transmission Corp.*, 71 F.E.R.C. ¶ 61, 347 (1995).

110. Pipeline Safety Act of 1992, Pub. L. No. 102-508, 106 Stat. 3289 (1992).

111. Accountable Pipeline Safety and Partnership Act of 1996, Pub. L. No. 104-304, 110 Stat. 3793 (1996).

1. Federal Preemption under the NGA

Unlike DOT jurisdiction under the NGPSA or the RPSA, pipeline safety preemption under the NGA and the Supremacy clause of the Constitution[112] is not express.[113] Federal preemption under the NGA is a form of "implied preemption." There are, in turn, at least two types of implied preemption, "field" and "conflict."[114] Field preemption arises when an activity purportedly regulated by a state falls within a field of activity that is pervasively regulated by federal law and has been exclusively reserved by law to federal regulation. Conflict preemption arises when competing federal and state directives apply to the same action or regulated activities and state law interferes with or is an obstacle to the purposes of Congress.[115]

Field preemption would appear to be a more expansive case of conflict preemption because any state regulation occurring within a field exclusively reserved to federal regulation necessarily conflicts with that reserved authority, whether or not the federal agency in question has actually promulgated a rule or order regulating the issue at hand. Ordinarily, the issue in a field preemption case is which sovereign, federal or state, has paramount or pervasive authority to regulate in that field. The issue in a conflict preemption case is generally actual interference of conflicting regulations promulgated under the delegated authority of two different sovereigns, one federal, the other state.

In the natural gas industry, section 1(b) of the NGA[116] created a field of exclusive federal regulation and a field of regulation reserved to the states. As this paper has previously discussed, with the exception of section 1(c) of the NGA, the Hinshaw Amendment, the field of exclusive federal regulation under the NGA is roughly the same field the Supreme Court determined the states were forbidden to regulate under the "dormant" Commerce Clause during the first three decades of this century.

Thus, FERC authority and state authority to regulate commerce in natural gas are complementary. The FERC was granted exclusive authority to regulate "transportation of natural gas in interstate commerce" and/or "the sale in interstate commerce of the natural gas for resale for ultimate consumption for domestic, commercial, industrial, or any other

112. U.S. CONST. art. VI, cl. 2.

113. In cases where the several states or their respective municipalities have attempted to impose additional or more stringent natural gas pipeline safety standards than permitted under the NGPSA choice of regulation rule then applicable, federal courts have uniformly ruled that preemption by the DOT Code is express. *See, e.g.*, ANR Pipeline Co. v. Iowa State Commerce Comm'n, 828 F.2d 465 (8th Cir. 1987); Natural Gas Pipeline Co. v. Railroad Comm'n, 679 F.2d 51 (5th Cir. 1982); Northern Border Pipeline Co. v. Jackson County, 512 F.Supp. 1261 (D. Minn. 1981); United Gas Pipe Line Co. v. Terrebonne Parish Police Jury, 319 F. Supp. 1138 (D. La. 1970), *aff'd*, 445 F.2d 301 (5th Cir. 1971).

114. There is also a form of implied preemption that arises from frustration of congressional purposes. *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

115. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992).

116. 15 U.S.C. § 717(b) (1994).

use."[117] Additionally, under section 7(c) of the NGA, the FERC's exclusive authority under section 1(b) of the NGA expressly applies to the construction and operation of pipeline facilities engaged in "transportation or sale of natural gas subject to the jurisdiction of [the FERC]."[118] On the other hand, authority to regulate state-regulated section 1(b) Facilities and section 1(c) Hinshaw Facilities as shown in Appendix A, sections A.2 and B.1-5, was reserved to the states.[119]

As for the safety regulation of natural gas pipeline facilities used to transport or sell natural gas for resale in interstate commerce and requiring a certificate of public convenience and necessity under section 7 of the NGA, such safety regulation appears to fall squarely within the field of the FERC's authority over FERC-regulated section 1(b) Facilities and not within the reserved authority of states to regulate the Intrastate Transportation Facilities, Retail Sales Facilities, Local Distribution Facilities, Production Facilities, Gathering Facilities or section 1(c) Hinshaw Facilities.[120] Thus, the FERC-regulated section 1(b) Facilities, including Direct Sales Customer Lines,[121] are presumably subject to safety regulation by the FERC as well as by the DOT. State pipeline safety regulation of FERC-regulated section 1(b) Facilities[122] is thus theoretically subject to preemption under the NGA, as well as the NGPSA and its successor the RPSA.

2. Prohibition Against Collateral Attack of FERC Orders under Section 19 of the NGA

A doctrine of federal administrative law that may also apply to foreclose imposition of state pipeline safety requirements that are, in addition to or more stringent than those required by the DOT Code under the RPSA, is the doctrine that prohibits collateral attack of federal agency orders properly issued within the scope of the agency's jurisdiction.[123] In the event that a final certificate of public convenience and necessity is issued under section 7 of the NGA with respect to a FERC-regulated NGA section 1(b) Facility, the doctrine would apply, at a minimum, to foreclose state safety regulation in connection with any matters addressed in the certificate because section 19 of the NGA establishes exclusive administrative

117. 15 U.S.C. § 717(b) (1994).

118. Under NGA sections 1(b) and 7, the FERC reviews all matters pertinent to the public interest in deciding whether or not to issue a certificate of public convenience and necessity under the NGA. Atlantic Refining Co. v. Public Serv. Comm'n of N.Y., 360 U.S. 378, 391 (1959).

119. State regulation in these reserved areas which conflicts with the FERC's ability to regulate the FERC-regulated section 1(b) Facilities as shown in Appendix A, section A.1 may be preempted. Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 518 (1989).

120. *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); National Fuel Gas Supply Corp. v. Public Serv. Comm'n, 894 F.2d 571 (2d Cir. 1990).

121. Excluded from the FERC's jurisdiction and preemption, of course, is state regulation of intrastate sales of gas to the consuming end-user. When sales are made outside the state, however, the state has no jurisdiction over the sale. *See supra* note 26.

122. *See* section A.1 of Appendices A, B and C.

123. *See, e.g.*, Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

and judicial procedures for reviewing such FERC orders.[124]

The two doctrines of preemption and the prohibition against collateral attack apply to the FERC-regulated NGA section 1(b) Facilities as shown in Appendixes A-C, & E of this article. Such facilities include the Direct Sale Customer lines and Interstate Transportation Lateral lines which are regulated by the FERC under its NGA section 1(b) "transportation" authority, even though Direct Sale Customer Lines are excluded from the RPSA's definition of "interstate gas pipeline facilities" and are included in RPSA's definition of "intrastate gas pipeline facilities." Thus, federal preemption under the NGA and the doctrine prohibiting collateral attack of FERC orders, properly granted, appear to apply to prevent state safety regulation of Direct Sale Customer Lines subject to the FERC's certification authority, even though under the NGPSA Direct Sale Customer Lines are considered "intrastate pipeline transportation"[125] and under the RPSA such facilities are considered "intrastate gas pipeline facilities."[126]

Intrastate Transportation Facilities, Retail Sale Facilities, Local Distribution Facilities, Production Facilities, Gathering Facilities, and NGA section 1(c) Hinshaw Facilities, on the other hand, may be subject to more stringent or additional state safety regulation, as shown in Appendices B and C, because those facilities fall outside the field of exclusive regulatory authority granted to the FERC under NGA section 1(b) and within the complementary field of authority reserved to the several states under NGA section 1(b) and (c).

IV. THE EVOLUTION OF THE RPSA CHOICE OF REGULATION RULE

After enactment of the 1976 NGPSA Amendments, regulation of pipeline safety by the several states under the NGPSA was expressly preempted by the DOT's minimum pipeline safety, with respect to all FERC-regulated NGA section 1(b) Facilities except Direct Sales Customer Lines.[127] Contrary to the language of House Report No. 105-180, quoted at the beginning of this article, the RPSA choice of regulation rule[128] appears to have changed the prior law. The change appears to correspond, in part, to the change in the interstate natural gas pipeline industry wrought by FERC Order No. 636 series.[129]

---

124. *See, e.g.*, Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255 (10th Cir. 1989) and cases cited therein; Tennessee Gas Pipeline Co. v. 104 Acres, 749 F. Supp. 427 (D. R.I. 1990). The RPSA itself appears to have an exclusive appeal provision that may prevent subsequent collateral attack of a DOT regulation in certain instances. *See* 49 U.S.C.A. § 60,119 (West 1998); United Steelworkers of America, Local 12,431 v. Skinner, 768 F. Supp. 30 (D. R.I. 1991); Southern Pac. Pipe Lines, Inc. v. U. S. Dept. of Transp., 796 F.2d 539 (D.C. Cir. 1986).

125. *See* Appendix C.

126. *See* Appendix E.

127. Such express preemption occurred under choice of regulation rules found at 49 U.S.C. § 1672(b) (1970) (Supp. V 1981) and 49 U.S.C.A. app § 1672(a) (West Supp. 1992). *See* Appendices A, B and C.

128. The RPSA's choice of regulation rule is found at 49 U.S.C.A. § 60,104(c) (West 1996).

129. Order No. 636, *supra* note 13.

A. *NGPSA Choice of Regulation Rule*

The original NGPSA choice of regulation rule stated:

> Any State agency may adopt such additional or more stringent standards for pipeline facilities and the transportation of gas not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act as are not incompatible with the Federal minimum standards [i.e., the DOT Code], but may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standards applicable to interstate transmission facilities.[130]

Thus, determination of whether "additional or more stringent" natural gas pipeline safety standards of the several states were preempted by DOT standards and/or FPC regulatory authority under the NGA was straightforward. Regulation by the FPC under the NGA determined whether the pipeline facility could be subject to permissible state regulation under the NGPSA (1968).[131]

B. *The 1976 NGPSA Amendments*

The 1976 NGPSA Amendments changed the choice of regulation rule of the NGPSA (1968) to the following: "Any State agency may adopt additional or more stringent standards for intrastate pipeline transportation if such standards are compatible with the Federal minimum standards. No State agency may adopt or continue in force any such standards applicable to interstate transmission facilities, after the Federal minimum standards become effective."[132]

This amendment introduced a statutorily defined concept of "intrastate pipeline transportation" to complement the preexisting definition of "interstate transmission facility." In response to *Louisiana Power & Light I* and *II*, the 1976 NGPSA Amendments also modified the definition of "interstate transmission facilities" which had applied to all pipeline facilities regulated by the FPC under the NGA, by excluding from it any "pipeline facilities within a State which transport gas from an interstate pipeline to a direct sales customer within such State purchasing gas for its own consumption."[133] The complementary concept of "intrastate pipeline transportation," on the other hand, was defined as:

> [P]ipeline facilities and transportation of gas within a State which are not subject to the jurisdiction of the Federal Power Commission under the Natu-

130. 49 U.S.C. § 1672(b) (1970). The NGPSA (1968) defined "interstate transmission facilities" to mean "pipeline facilities used in the transportation of gas which are subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act," 49 U.S.C. § 1671(8) (1970), "pipeline facilities" to include "any equipment facility or building used in the transportation of gas or the treatment of gas during the course of transportation," 49 U.S.C. § 1671(4) (1970); and "transportation of gas" to mean "the gathering, transmission or distribution of gas by pipeline or its storage in or affecting interstate commerce . . . ." 49 U.S.C. § 1671(3) (1970).

131. *Compare* Appendices A and B.

132. 49 U.S.C. § 1672(b) (1976).

133. 49 U.S.C. § 1671(8) (1976). As discussed previously there is some reason to think that this language was only intended to apply to gas producing states.

> ral Gas Act, except that it shall include pipeline facilities within a State for which transport gas from an interstate gas pipeline to a direct sales customer within such State purchasing gas for its own consumption."[134]

Thus, the 1976 NGPSA Amendments retained a two category test for permissible state regulation. A pipeline facility's character as an "interstate transmission facility" or "intrastate pipeline transportation" determined whether it could be regulated by a state under the NGPSA (1976). Direct sales customer lines, however, were defined as intrastate pipeline transportation, even though such lines might be subject to FPC authority over natural gas transportation in interstate commerce.

In terms of the analytical categories summarized in Appendix C, the choice of regulation rule established by the 1976 NGPSA Amendments stipulated that the DOT pipeline safety standards would preempt all additional and more stringent state pipeline standards applicable to FERC-regulated NGA section 1(b) Facilities except Direct Sales Customer Lines. On the other hand, additional and more stringent pipeline safety regulation by the several states, subject to DOT Code compatibility was not to be preempted *by the DOT Code* with respect to Intrastate Transportation Facilities, Retail Sales Facilities, Local Distribution Facilities, Production Facilities, Gathering Facilities, NGA section 1(c) Hinshaw Facilities, *and* Direct Sales Customer Lines.[135] Thus, the 1976 NGPSA Amendment, for purposes of interpreting the NGPSA choice of regulation rule, transferred Direct Sales Customer Lines from the NGPSA category that prohibited all natural gas pipeline safety regulation by the several states in excess of the DOT Code requirements to the NGPSA category that permitted such regulation, provided those state standards were compatible with the DOT Code. As discussed previously however, the 1976 NGPSA Amendments failed to terminate or modify the FPC's authority under NGA sections 1(b) and 7 to impose more stringent and additional pipeline safety requirements with respect to the FERC-regulated NGA section 1(b) Facilities including Direct Sales Customer Lines.[136] Thus, state regulation of

---

134. 49 U.S.C. § 1671(9) (1976).

135. DOT counsel issued an internal policy memorandum that interpreted the 1976 through 1992 versions of the NGPSA choice of regulation rule to authorize additional or more stringent safety regulation of direct sale customer lines by the several states. In the memorandum, the DOT counsel did not consider any of the following: the history of the United/LP&L litigation; direct sales by interstate pipelines; FERC natural gas pipeline safety jurisdiction under the NGA; or the failure of Congress to deprive the FERC of such safety authority. The memorandum is not an official order or regulation of the DOT, and hence is not entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). However, even if the interpretation were a formal act of the DOT, *Chevron* deference would be questionable in view of the overlap of jurisdiction between the FERC and the DOT. *See* Appendix D.

136. Any argument that, by creating the definitions of "interstate transmission facilities" and "intrastate pipeline transportation" the 1976 NGPSA Amendments, in effect, amended the NGA to exclude direct sales customer lines from FERC jurisdiction under the first clause of NGA section 1(b), necessarily fails. A comparison of the definitions of these two types of pipeline facilities under the NGPSA (1976) indicates that direct sales customer lines are treated, for NGPSA purposes, as a definitional exception from pipeline facilities that were and remained subject to FPC jurisdiction under the NGA. The definitional exception under the NGPSA did not change the character of FPC regulation

natural gas pipeline safety of Direct Sales Customer Lines remained theoretically subject to FPC preemption under NGA sections 1(b) and 7, and the prohibition against collateral attack of FPC orders under NGA section 19, even though these issues appear never to have been litigated.

C. *Pipeline Safety Act of 1979*

The Pipeline Safety Act of 1979 (PSA) renumbered but did not materially affect the NGPSA (1976) choice of regulation rule, as applied to natural gas pipeline safety.[137] It did, however, make some significant modifications to other aspects of pipeline safety.

1. 1979 Additions to NGPSA (1976)

The PSA added extensive statutory provisions dealing with the safety of liquefied natural gas (LNG) facilities, including, but not limited to, complex provisions as to the application of location, design, engineering and construction standards to such LNG facilities.[138] It also clearly applied the choice of regulation rule for pipeline safety found under NGPSA (1979) to such LNG facilities and clearly demarcated the respective limits of DOT and Coast Guard safety authority over onshore LNG Facilities pursuant to the NGPSA (1979).[139]

2. Addition of HLPSA

Title II of the PSA also enacted the HLPSA, which included a choice of regulation rule with respect to hazardous liquids pipelines.[140] The concept of "intrastate pipeline facility"[141] and the four category approach to a choice of regulation rule, was later adopted by the RPSA, appears to have originated in Title II of PSA.

The HLPSA (1979) choice of regulation rule states:

> Any State agency may adopt additional or more stringent safety standards for intrastate pipeline facilities *and* the transportation of hazardous liquids associated with such facilities, if such standards are compatible with the Federal standards issued under this title. No State agency may adopt or continue in force any safety standards applicable to interstate pipeline facilities *or* the

---

over Direct Sales Customer Lines.

137. *Compare* 49 U.S.C. § 1672(a)(1) (Supp. V 1981) and 49 U.S.C. § 1672(b) (1976).

138. *See* 49 U.S.C. § 1674a (Supp. V 1981).

139. *See* 49 U.S.C. §§ 1671(12), (14) (Supp. V 1981); 49 U.S.C. §§ 1672(a)(1), 1674a(f) (Supp. V 1981).

140. *See* 49 U.S.C.A. §§ 2001-14 (West Supp. V 1981).

141. The DOT issued safety regulations interpreting such facilities to include all lateral lines within a single state that connect to an interstate transmission line. The regulations were upheld on appeal. *See* Southern Pac. Pipe Lines, Inc. v. U.S. Dept. of Transp., 796 F.2d 539 (1986). It is important to note, however, that the DOT's safety jurisdiction under the HLPSA does not overlap or compete with the safety jurisdiction of the FERC. Thus, under the HLPSA, the DOT could issue interpretations, rulings and orders that unilaterally define the relative bounds of state and federal safety jurisdiction over hazardous liquids pipeline transportation. Such was not the case under the NGPSA and the field of natural gas pipeline safety due to the FERC's retention of independent natural gas pipeline safety authority under section 7 of the NGA.

transportation of hazardous liquids associated with such facilities (emphasis added).[142]

Thus, the HLPSA (1979) is the origin of a four category federal choice of regulation rule with respect to facilities that are either: (1) "interstate pipeline facilities" *and/or* (2) transport substances associated with such facilities. This four category concept is different on its face than the two category preemption concept set forth in the NGPSA (1979),[143] even though the Senate Report which explains the HLPSA states that the analysis of the rule generally corresponds to the NGPSA (1979) choice of regulation rule and "therefore, need not be repeated."[144]

Neither the NGPSA (1979) nor the HLPSA (1979) defined "interstate pipeline transportation." This concept also remains undefined in the RPSA.

D. Pipeline Safety Act of 1992

The PSA of 1992 made a number of additions to the NGPSA (1979) in the field of gas regulation pertaining to environmental protection, pipelines in high density population areas, gathering lines and underwater abandoned facilities, none of which directly affected the choice of regulation provisions discussed in this article.

Section 116 of the PSA of 1992 did, however, add the requirement that state agencies be certified by the DOT as a condition of imposing additional or more stringent pipeline safety standards on intrastate pipeline transportation.[145]

E. The Accountable Pipeline Safety and Partnership Act of 1996

The APSPA, among other things, required a cost benefit analysis in connection with the promulgation of new safety standards, established a risk management demonstration project program, required the filing of pipeline maps in effected municipalities, required the DOT to establish standards for defining gathering lines and modified existing provisions pertaining to so-called "smart-pigs." The APSPA did not directly affect the RPSA choice of regulation rule.[146]

The APSPA also authorized the DOT to define "gathering line" and "regulated gathering line" without being restricted by the FERC's classifications with respect to gathering facilities under section 1(b) of the NGA.[147] This modification is an implicit Congressional recognition that the NGPSA and the RPSA are otherwise to be construed consistent with

---

142. 49 U.S.C. § 2002(d) (Supp. V 1981).

143. 49 U.S.C. § 1672(a) (Supp. V 1981).

144. S. REP. NO. 96-182 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1971, 1987.

145. Pipeline Safety Act of 1992, Pub. L. No. 102-508, 106 Stat. 3289 (1992). As of 1992, and prior to the passage of the RPSA, the respective pipeline safety jurisdictions of the FERC, the DOT and the several states are summarized in Appendix C.

146. *See* 49 U.S.C.A. § 60,104(c) (West 1996).

147. *Compare* 49 U.S.C.A. § 60,101(b) (West 1996).

the NGA, as discussed in *Natural Gas Pipeline.*[148] It also created the opportunity for more complexity in the application of the RPSA choice of regulation rule. As a result of the APSPA, there are now at least three jurisdictional possibilities for gathering lines. First, if a pipeline facility is defined by the DOT's regulations as a gathering line and is also an interstate transportation pipeline regulated by the FERC under the first clause of section 1(b) of the NGA,[149] then the DOT establishes minimum safety standards but the FERC may theoretically establish more stringent requirements for the facility under the FERC's certificate powers. Second, if a pipeline facility is defined by the DOT's regulations as a gathering line and is also a gathering facility under section 1(b) of the NGA, then the DOT establishes minimum pipeline safety standards for the facility, but the states are free to establish additional or more stringent safety standards provided the state authority is certified by the DOT and the state standards are compatible with DOT standards. Finally, if a pipeline facility used in gathering is expressly excluded from the DOT's definition of gathering line, and is also excluded from FERC jurisdiction under section 1(b) of the NGA, the facility will be subject to state safety jurisdiction.[150]

F. Applying RPSA's Choice of Regulation Rule

At long last, a detailed and meaningful analysis of the RPSA choice of regulation rule is possible.[151] That rule states:

> A State authority that has submitted a current certification under § 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities *and* intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities *or* interstate pipeline transportation (emphasis added).[152]

The rule is significantly different from the choice of regulation rule in the NGPSA, as its use of the conjunctive, "and," in the first sentence and the disjunctive, "or," in the second, creates a four category test (apparently inherited from the HLPSA) for identifying permissible state regulation in place of the previous two category test. Not surprisingly, this four-part test seems to take into account changes in the natural gas industry brought about by the FERC Order No. 636 series.[153]

The four categories created by the RPSA and their corresponding

148. Natural Gas Pipeline Co. of America v. Railroad Comm'n of Tex., 679 F.2d 51 (5th Cir. 1982).

149. The FERC distinguishes between pipelines used in transportation in interstate commerce and Gathering Facilities by applying a "primary function" test to the pipeline in question. *See* Conoco, Inc. v. FERC, 90 F.3d 536 (D.C. Cir. 1996).

150. *See* Appendix E.

151. This article considers in detail only application of the rule to natural gas pipeline facilities and transportation.

152. 49 U.S.C.A. § 60,104(c) (West 1996).

153. *See* Order No. 636, *supra* note 13.

preemption results are as follows: (a) intrastate gas pipeline facilities used in intrastate pipeline transportation may be regulated by a state; (b) intrastate gas pipeline facilities used in interstate pipeline transportation may not be regulated by a state;[154] (c) interstate gas pipeline facilities used in intrastate pipeline transportation may not be regulated by the state;[155] and (d) interstate gas pipeline facilities used in interstate pipeline transportation may not be regulated by the state.

Consequently, the RPSA choice of regulation rule[156] to be applied to these four categories is summarized as follows. First, if state standards apply to intrastate gas pipeline facilities *and* those facilities are used in intrastate pipeline transportation, a state may adopt additional or more stringent safety standards (provided the DOT certification and compatibility tests are met). Second, as to interstate gas pipeline facilities *or* interstate gas pipeline transportation, state authorities may not adopt or continue to enforce state safety standards. Applying the two preemption rules to the four categories of facilities and activities above, state authorities may only regulate facilities qualifying under category (a) above. In the other three categories either an "interstate gas pipeline facility" or an "interstate pipeline transportation" or both are involved. Hence, the states may not impose additional or more stringent pipeline safety standards than the DOT.

As discussed previously, the RPSA expressly defines "interstate gas pipeline facility" and "intrastate gas pipeline facility."[157] The critical question remains as to what constitutes "interstate pipeline transportation" and "intrastate pipeline transportation," terms that are not expressly defined in the RPSA. Existing case law, however, would seem to provide adequate guidance in construing these terms.

G. *RPSA's Undefined Choice of Regulation Concepts: Interstate Pipeline Transportation and Intrastate Pipeline Transportation*

Since the terms "interstate pipeline transportation" and "intrastate pipeline transportation" are not expressly defined under the RPSA, a review of related definitions under the RPSA, as well as judicial decisions under the NGA and the Commerce Clause is appropriate in determining

154. This result seems particularly appropriate given the FERC Order No. 636 series. As a practical matter the FERC regulated interstate pipelines are no longer involved in making direct sales of gas to end-users. Rather, such pipelines are now almost exclusively engaged in interstate transportation subject to the FERC's authority to regulate transportation under sections 1(b) and 7 of the NGA. Consequently, the justification for state regulation of pipelines owned by interstate companies that were formerly used to make direct sales of gas on grounds that the states regulated their rates has, as a practical matter, been eliminated by the FERC Order No. 636 series. Since such companies no longer use such high pressure lateral lines to make direct sales and the FERC certifies the facilities and regulates the transportation rates of such pipelines, it is appropriate that federal, not state, safety regulation apply. From a practical perspective there are few, if any, direct sale customer lines left. They have been replaced by what this article has termed "interstate transportation laterals."

155. There are no pipeline facilities that can satisfy this category. *See* FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

156. 49 U.S.C.A. § 60,104(c) (West 1996).

157. 49 U.S.C.A. §§ 60,101(6), (9) (West 1996).

what these undefined terms mean given the purposes of the RPSA. To the extent that FERC Order No. 636 series may influence the construction of these terms, its influence must also be taken into account.

1. Related RPSA Definitions Self-Contradictory

Review of related definitions under the RPSA makes it very clear that the meaning of the terms "interstate [gas] pipeline transportation" and "intrastate [gas] pipeline transportation" must be found outside the RPSA. The term "pipeline transportation" means "transporting gas" in relevant part,[158] and "transporting gas" means the "gathering, transmission or distribution of gas by pipeline ... in interstate or foreign commerce"[159] but does not include gathering activities in certain rural areas. "Interstate or foreign commerce," in turn, means commerce between "a place in a State and a place outside that State."[160] Thus, using the RPSA definition of "pipeline transportation" to interpret the RPSA term "intrastate pipeline transportation" involves a logical self-contradiction. Applying the definition of "pipeline transportation" to "intrastate pipeline transportation" necessarily characterizes such intrastate pipeline transportation as commerce between a place in a State and a place outside that State and that, in turn, constitutes *interstate* commerce in RPSA and *interstate* pipeline transportation as ordinarily understood. Given this logical inconsistency, an appeal to the previous treatment that these concepts have been afforded under NGA and the Commerce Clause of the United States Constitution is appropriate.

2. Interstate Pipeline Transportation and Intrastate Pipeline Transportation under the Constitution and the NGA

As the discussions of the U.S. Supreme Court's "dormant" Commerce Clause jurisprudence prior to 1938 and *East Ohio Co.*[161] have disclosed, the federal courts have evolved well developed concepts of pipeline transportation of natural gas in both interstate and intrastate commerce. At least one federal court has expressly held that case law interpreting the NGA may be used and is dispositive in interpreting the predecessor to the RPSA, the NGPSA.[162]

In order for natural gas to be transported by pipeline in interstate commerce under the NGA and the Commerce Clause, two elements must be satisfied: (a) the natural gas that is being transported must have physically (or in the case of "back-haul,"[163] constructively) crossed at least one

158. 49 U.S.C.A. § 60,101(19) (West 1996).

159. 49 U.S.C.A. § 60,101(21) (West 1996).

160. 49 U.S.C.A. § 60,101(8)(A)(i) (West 1996).

161. *See* FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

162. *See* Natural Gas Pipeline Co. v. Railroad Comm'n of Tex., 679 F.2d 51, 54 (5th Cir. 1982) (applying the terms "production" and "gathering" as construed by the courts under the NGA section 1(b) to define these terms under the NGPSA).

163. "Back-haul" is also referred to as "displacement." It arises when different natural gas trans-

state line and (b) the natural gas must be transported at high pressure up to the point that it is delivered to another legally distinct person for distribution or consumption. The point of delivery to another, when accompanied by pressure reduction, is the point at which interstate commerce ceases and intrastate commerce commences. The FERC regulates transportation and facilities upstream of the delivery point, while the states regulate downstream of the delivery point. The two concepts of interstate and intrastate gas pipeline transportation are mutually exclusive because the FERC and state regulatory authority is to be complementary. Thus it is contradictory from a regulatory standpoint to characterize high pressure transportation of natural gas through a single facility as both interstate and intrastate pipeline transportation.[164]

Applying these traditional, judicially created concepts of intrastate and interstate gas pipeline transportation to the analytical categories previously developed in this article would certainly appear to be appropriate given existing case law under the NGA and the NGPSA. This is true, particularly in view of the fact that the FERC has restructured the interstate gas pipeline industry to eliminate virtually all sales of gas by pipelines and to limit the role of the pipelines strictly to the FERC regulated interstate transportation. Given prior case law, the following classifications would appear to result.[165]

a. Interstate [Gas] Pipeline Transportation

This concept requires gas to have been transmitted across a state line at high pressure. Such transportation terminates upon pressure reduction and delivery to a customer. Interstate gas pipeline transportation has had at least four important manifestations for purposes of applying the RPSA choice of regulation rule.

(1) *FERC Regulated NGA section 1(b) Facilities.* These facilities are used in interstate transportation of natural gas or sale of natural gas for resale, as described in the first clause of the NGA section 1(b) and exclude the NGA section 1(c) Hinshaw Facilities. All such FERC Regulated NGA section 1(b) Facilities are necessarily involved in the transportation of natural gas in interstate commerce because the gas these facilities carry must have crossed, or be mixed with natural gas that has crossed a state line either physically or constructively (as "back-haul") and must be transported at high pressure in these facilities up to the point of delivery to a legally distinct person.

(2) *Direct Sales Customer Lines.* As discussed previously these facili-

---

mission systems are interconnected. It ordinarily involves an exchange of natural gas in interstate commerce between two pipelines allowing a pipeline interconnecting with another at a downstream point to make an upstream delivery off of the other pipeline system. The exchange occurs by having the other pipeline make the upstream delivery off of the other's system on behalf of the "back hauling" pipeline in return for the "back hauling" pipeline making an equivalent delivery of gas on behalf of the other pipe at a point downstream of the interconnection.

164. *See, e.g.*, California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965).

165. *See* Appendix E.

ties were FERC Regulated NGA section1(b) Facilities and thus were necessarily involved in interstate gas pipeline transportation. Since the promulgation of the FERC Order No. 636, series direct sales by pipelines through such facilities has virtually ceased. As a consequence, the Direct Sales Customer Line exception to Interstate [Gas] Pipeline Facilities under the RPSA currently appears to have little, if any, practical application.

(3) *Interstate Transportation Laterals* to end-users are pipelines owned and operated by interstate natural gas pipelines to transport gas from their respective interstate transmission systems to end-users. They may be, in all respects, the same as Direct Sale Customer Lines, except the pipeline in question does not sell a bundled gas and transportation service to the end-user.

(4) *NGA section 1(c) Hinshaw Facilities* are expressly excluded from the FERC's regulation by the NGA section 1(c). However, such facilities are otherwise involved in the interstate pipeline transportation of gas, because prior to its delivery to the NGA section 1(c) Hinshaw Facility, such natural gas has been transported to or across at least one state line, either actually or constructively, and after such delivery is transported by that NGA section 1(c) Hinshaw Facility at high pressure to a consumer located in the state of receipt.[166] Treatment of the NGA section 1(c) Hinshaw Facilities under the RPSA choice of regulation rule creates a technical anomaly in natural gas pipeline safety regulation relative to the NGPSA, because under the RPSA, NGA section 1(c) Hinshaw Facilities appear to be exempt from the FERC but not the DOT's safety jurisdiction, and are technically regulated by state authorities for all purposes except safety. This point is discussed more extensively in Section V below.

b. Intrastate [Gas] Pipeline Transportation

Intrastate gas pipeline transportation involves transmission of natural gas that is not interstate gas pipeline transportation. Intrastate gas pipeline transportation conforms to those facilities and activities properly within the scope of state regulation under the NGA section 1(b) and *East Ohio Co.* as follows:

(1) *Intrastate Transportation Facilities.* These are pipeline facilities that are not used in the transportation of gas by pipeline in interstate commerce. Such pipeline facilities are neither FERC Regulated NGA section 1(b) Facilities nor NGA section 1(c) Hinshaw Facilities both of which are used to transport natural gas in interstate commerce. Intrastate Transportation Facilities must transport natural gas that either (i) has not crossed a state line (either physically or as back-haul) or (ii) has been reduced in pressure after delivery by an interstate transporter.

(2) *Retail Sale Facilities.* Retail Sale Facilities are facilities used in making sales of natural gas that do not involve transportation of or sales of such gas for resale in interstate commerce. Such facilities may be used for

166. *See* 15 U.S.C. § 717 (c) (1994); FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

wholesale, retail or direct sale of natural gas that has not crossed a state line or for retail sales of natural gas that has been transported in interstate commerce after pressure reduction and delivery to a customer main.[167]

(3) *Local Distribution Facilities.* Such facilities are used in distributing gas on the retail level and are not used in transporting natural gas or selling natural gas for resale in interstate commerce. These facilities include Retail Sale Facilities.[168] Thus Local Distribution Facilities must be used to transport natural gas that has not crossed or been commingled with gas that will cross a state line (either actually or constructively), or must be situated downstream of the point of pressure reduction and delivery by an interstate transporter of natural gas.[169]

(4) *Production Facilities.* These pipeline facilities are used in the production of natural gas and are located upstream of any pipeline transmission system. Unless the input side of a natural gas Production Facility is situated in one state and the output side of that Production Facility is physically situated in a different state, these facilities are involved in intrastate gas pipeline transportation.[170]

(5) *Gathering Facilities.* These facilities are used in the gathering of natural gas from wells and collecting such natural gas for pipeline transmission in interstate or intrastate commerce. Gathering facilities are also located upstream of any transmission facilities. Unless a gathering facility is physically situated to cross a state line, these lines would necessarily appear to be involved solely in intrastate commerce.[171]

Thus, intrastate gas pipeline transportation as defined under the NGA and the commerce clause would appear to include natural gas transportation in Intrastate Transportation Facilities, Retail Sale Facilities, Local Distribution Facilities, Gathering Facilities and Production Facilities. Interstate gas pipeline transportation, on the other hand, would appear to include natural gas transportation in the FERC-regulated NGA section 1(b) Facilities (including Direct Sale Customer Facilities and Interstate Transportation Laterals) and the NGA's section 1(c) Hinshaw Facilities.

3. Application of Analytic Categories to RPSA's Choice of Regulation Rule

The foregoing discussion of the FERC, the DOT, and state pipeline safety authority under the RPSA, of the statutorily defined concepts of "interstate gas pipeline facilities" and "intrastate gas pipeline facilities," on the one hand, and the undefined concepts of "interstate [gas] pipeline transportation" and "intrastate [gas] pipeline transportation," on the other, is summarized in Appendix E.

---

167. *See* Cascade Natural Gas Co. v. FERC, 955 F.2d 1412 (10th Cir. 1992).

168. *Id.*

169. *See* California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965).

170. Northwest Central Pipeline v. Kansas Corp. Comm'n, 489 U.S. 493 (1989).

171. Natural Gas Pipeline Co. v. Railroad Comm'n of Tex., 679 F.2d 51 (5th Cir. 1982).

V. THE ANOMALY AND SUBSTANTIVE CHANGE IN THE LAW OF PIPELINE SAFETY GENERATED BY THE REVISION OF TITLE 49

Under the RPSA a state *may not* regulate natural gas pipeline safety in cases where an "interstate [gas] pipeline facility" *or* "interstate [gas] pipeline transportation" is involved. This rule shall be referred to as the RPSA's Federal Preemption Rule. Under the RPSA, a state *may* impose additional (or more stringent) pipeline safety requirements than the DOT Code only in those instances where an "intrastate pipeline facility" *and* "intrastate pipeline transportation" are involved, provided the state has been satisfactorily certified by the DOT[172] and the increased standards that it is to apply are consistent with the DOT Code. This rule shall be referred to as RPSA's State Regulation Rule.

The RPSA[173] choice of regulation rule appears to have created two problems. First, relative to the NGPSA,[174] the RPSA State Regulation Rule and the RPSA Federal Preemption Rule appear to have created a previously non-existent technical anomaly (discussed below) in the federal law of pipeline safety. Second, in creating the anomaly, the literal wording of the RPSA also appears to have substantively changed the federal law of pipeline safety jurisdiction over NGA section 1(c) Hinshaw Facilities. With respect to both these issues, understanding the status of NGA section 1(c) Hinshaw Facilities and Direct Sale Customer Lines under the NGPSA relative to their new status under the RPSA is crucial. As previously discussed, the material difference between these two types of facilities is in the ownership and operation of the interstate pipeline that transports natural gas to these facilities.

A. The Anomaly

Prior to the passage of the RPSA, natural gas pipeline safety jurisdiction had been divided into three jurisdictional spheres, namely that of the DOT, the FERC and the several states. Under the NGPSA, a natural gas pipeline facility of any type, whether a FERC-regulated NGA section 1(b) Facility, a State-regulated NGA section 1(b) Facility, or an NGA section 1(c) Hinshaw Facility, was always subject to the minimum pipeline safety standards imposed by the DOT Code. *In addition, each such natural gas pipeline facility* was subject either (i) to the safety jurisdiction of the FERC, in the case of FERC Regulated NGA section 1(b) Facilities; or (ii) to the jurisdiction of the several states, in the case of State Regulated NGA section 1(b) Facilities and NGA section 1(c) Hinshaw Facilities. In the later case, states had authority to impose additional or more stringent safety standards than the minimum safety standards imposed by the DOT Code.[175] Thus, prior to the passage of the RPSA, *every* natural gas pipeline

172. 49 U.S.C.A. § 60,105(a) (West 1996).
173. 49 U.S.C.A. § 60,104(c) (West 1996).
174. 49 U.S.C.A. app. § 1672(a) (West Supp. 1992).
175. *Compare* Appendices B and C.

facility was potentially subject to two jurisdictional authorities for pipeline safety purposes, either (i) the DOT and the FERC *or* (ii) the DOT and the several states. There were no exceptions to this rule.

With the enactment of the RPSA, this three-party jurisdictional scheme appears to have been disrupted so that in the case of NGA section 1(c) Hinshaw Facilities alone, as a technical matter, *neither the FERC nor the several states* can impose additional or more stringent pipeline safety standards than the DOT Code minimums. In the case of the FERC, additional or more stringent safety regulation is prohibited because the NGA section 1(c) Hinshaw Facilities are expressly excluded from the FERC's jurisdiction under the NGA. In the case of the several states, safety regulation is technically prohibited even if the state has received a DOT certification[176] and the proposed state standards are compatible with the DOT Code, because the NGA section 1(c) Hinshaw Facilities are necessarily involved in "interstate [gas] pipeline transportation." State safety regulation is preempted under the RPSA Federal Preemption Rule.[177] Such treatment is unique to the NGA section 1(c) Hinshaw Facilities under the RPSA, and is without precedent under all versions of the NGPSA regulation that preceded the RPSA. The RPSA's treatment of NGA section 1(c) Hinshaw Facilities is anomalous and appears to have been a drafting oversight introduced by the inherent complexities of attempting to create a single and uniform rule for hazardous liquids and natural gas under the two statutes that the RPSA recodified.[178]

B. Change in Substance of NGPSA

1. Hinshaw Facilities

A NGA section 1(c) Hinshaw Facility is not subject to safety regulation by the FERC under NGA sections 1(b) and 7 and thus the owner and operator of a NGA section 1(c) Hinshaw Facility can not possibly assert the existence of the FERC jurisdiction to claim federal preemption or prohibition against collateral attack of the FERC's orders with respect to state safety regulation otherwise allowed by the RPSA. Moreover, from and after the date of enactment of the 1976 NGPSA Amendments, an owner and operator of a NGA section 1(c) Hinshaw Facility could not assert express NGPSA preemption of additional or more stringent state standards compatible with the DOT standards, because a NGA section 1(c) Hinshaw Facility was not subject to the jurisdiction of the FERC under the NGA, and thus constituted "intrastate pipeline transportation" under the statutory definitions of the NGPSA (1976)-(1992) and the NGPSA federal preemp-

176. 49 U.S.C.A. § 60,105(a) (West 1996).

177. *Compare* Appendix E, section III.C, to Appendix C, section B.2, and Appendix B, section A.2.

178. The APSPA amendment to the RPSA may have also created an anomaly relative to the NGPSA treatment of gathering lines, in that there theoretically appears to be at least one type of gathering line that is not subject to the DOT Code. *See* Section III.E. of this article.

tion rule.[179] Thus, as to the NGA section 1(c) Hinshaw Facilities, the RPSA choice of regulation rule,[180] although generally asserted by its authors to be a recodification of prior law, actually appears to have created a technical change in the substantive federal law of natural gas pipeline safety preemption. Prior to the enactment of the RPSA, states could regulate pipeline safety of the NGA section 1(c) Hinshaw Facilities free of federal preemption under the NGPSA or the NGA subject only to the DOT's certification and compatibility with the DOT standards.[181] After the passage of the RPSA, if the literal wording and logic of the statute is to be taken seriously, DOT standards under the RPSA preempt all state safety regulation of NGA section 1(c) Hinshaw Facilities, because such facilities are involved in "interstate [gas] pipeline transportation."

2. Direct Sales Customer Lines and Interstate Transportation Laterals

As for Direct Sales Customer Lines, the RPSA choice of regulation rule[182] also theoretically created a formal and technical change in the preemptive effect of the DOT Code relative to state regulation. Like the NGA section 1(c) Hinshaw Facilities, prior to the passage of the RPSA, Direct Sales Customer Lines were included in the definition of "intrastate pipeline transportation" under the NGPSA (1992), and were thus subject to the DOT's certification and compatibility requirements. The NGPSA[183] "permitted" states to impose additional or more stringent pipeline safety standards than the DOT; such "permission" was, however, potentially a nullity because such state standards were theoretically preempted by the existence of the FERC's authority under NGA sections 1(b) and 7 to impose more stringent or additional pipeline standards than the DOT Code minimums. Consequently, although the RPSA effected a technical change in the federal preemption law of natural gas pipeline safety as to Direct Sales Customer Lines, its passage did not seem to have effected a practical or substantive change in the law with respect to state safety regulation of such Direct Sales Customer Lines. With the promulgation of the FERC Order No. 636 series and the practical elimination of direct sales by FERC regulated pipelines, this issue now appears to be moot. The express recognition of interstate gas pipeline transportation in the RPSA, on the other hand, as a separate preemption category also appears to make it clear that Interstate Transportation Laterals are not to be regulated for safety purposes by the states and this constitutes a new statement of, if not a change in, substantive law.

179. *See* 49 U.S.C.A. app. § 1672(a) (West Supp. 1992).
180. 49 U.S.C.A. § 60,104(c) (West 1996).
181. *See* 49 U.S.C.A. app. § 1672(a) (West Supp. 1992).
182. 49 U.S.C.A. § 60,104(c) (West 1996).
183. 49 U.S.C.A. app. § 1672(a) (West Supp. 1992).

C. *Dealing with the Anomaly*

There are at least three ways of dealing with the technical anomaly that has been created by the RPSA Federal Preemption Rule and the RPSA State Regulation Rule.

1. Clarifying State Safety Power over Hinshaw Facilities

First, one could argue that Congress, in drafting the RPSA choice of regulation rule, did not in the case of NGA section 1(c) Hinshaw Facilities intend to create a substantive change in the federal law of pipeline safety. Acceptance of this position means that judicial and administrative construction of the RPSA Federal Preemption Rule should allow application of the RPSA State Regulation Rule to NGA section 1(c) Hinshaw Facilities. The legal justification for that construction would be that Congress, in enacting the RPSA, did not *generally* intend to change the substantive law of natural pipeline safety regulation, and the inclusion of NGA section 1(c) Hinshaw Facilities under the RPSA Federal Preemption Rule was a technical and unintentional oversight.[184]

From the perspective of federal preemption of state law, this approach seems entirely sensible and returns the legal situation to that prevailing under the NGPSA (1992)[185] with one other formal and technical exception. With respect to NGPSA (1992), Direct Sales Customer Lines constituted "intrastate pipeline transportation." Even so, it appears from a theoretical standpoint that state safety regulation of Direct Sales Customer Lines by the several states was at least debatable (other than fact situations analogous to that which triggered the United/LP&L litigation) because such lines were subject to pipeline safety regulation in excess of DOT Code standards by the FERC under NGA sections 1(b) and 7. Theoretically, federal field preemption of any state safety regulation of Direct Sales Customer Lines applied under the NGA, but express preemption under the NGPSA did not. With the enactment of the RPSA, not only does FERC safety jurisdiction under the NGA section 1(b) and 7 arguably preempt state safety requirements in excess of the DOT Code, but as a theoretical matter Direct Sale Customer Lines also constitute "interstate pipeline transportation" under the RPSA Federal Preemption Rule. Therefore, the RPSA *as well as* the NGA may now be interpreted to prohibit pipeline safety regulation of Direct Sales Customer Lines by the states. However, in view of the changes in the interstate gas industry rendered by the FERC Order No. 636 series, this issue, from a practical perspective, now appears moot.

2. Treating the Transportation Terms of the RPSA as Surplusage for Natural Gas Purposes

Second, in applying the RPSA Federal Preemption Rule and the

184. *See* H.R. Rep. No. 105-180, *supra* note 2 and accompanying text, at 1.

185. 49 U.S.C.A. app. § 1672(a) (West Supp. 1992).

RPSA State Regulation Rule, one could recreate the NGPSA choice of regulation rule[186] by reading the terms "intrastate pipeline *transportation*" and "interstate pipeline *transportation*" out of the RPSA, either by ignoring them entirely for natural gas pipeline purposes, or by construing these terms as meaning the same as the contrasting terms "intrastate pipeline *facility*" and "interstate pipeline *facility*" respectively. Like the first approach, this approach requires rendering an administrative and judicial correction to the actual language used by Congress. Under the second approach, whether a state natural gas pipeline safety regulation is preempted by the RPSA would be determined solely on the basis of whether the pipeline facility constitutes an "interstate gas pipeline facility" rather than an "intrastate gas pipeline facility." Under the first approach, independent meaning for the concepts of "intrastate pipeline transportation" and "interstate pipeline transportation" would be reserved solely for application to hazardous liquids if at all.[187] Under the second approach, Direct Sales Customer Lines and the NGA section 1(c) Hinshaw Facilities would be subject to the RPSA State Regulation Rule, but pipeline safety regulation of Direct Sales Customer Lines by the several states would theoretically continue to be preempted by the FERC's authority to impose more stringent and additional safety requirements under the NGA sections 1(b) and 7, a matter that the FERC Order 636 series has rendered virtually irrelevant. Thus, from a practical standpoint, the federal preemption result under this approach is the same as the result under the first approach. The difference is that the second approach recreates the exact, but confused, legal situation that prevailed under the NGPSA (1992) for purposes of applying federal preemption doctrines under the RPSA and the NGA. Under this second approach, the RPSA Federal Preemption Rule does not prevent state safety regulation of Direct Sales Customer Lines; rather, federal preemption of state regulation is theoretically possible because the FERC retains the authority under the NGA sections 1(b) and 7 to impose safety requirements in excess of the DOT Code on Direct Sales Customer Lines.

This second approach conforms the RPSA[188] to the situation under the NGPSA (1992),[189] but the difference in the federal preemption result between this approach and the first approach seems highly formal and technical—in essence, a distinction without substance or practical effect. Under either approach, states may not regulate FERC Regulated NGA section 1(b) Facilities, including Direct Sales Customer Lines and Interstate Transportation Laterals, but may regulate State Regulated NGA section 1(b) Facilities and the NGA section 1(c) Hinshaw Facilities in appro-

186. 49 U.S.C.A. § 1672(a)(1) (West 1992).

187. As to hazardous liquids pipeline facilities, given the regulatory interpretations upheld in *Southern Pacific Pipelines*, it seems quite likely that the DOT, not having to deal with the FERC's authority, and a prior history of judicial interpretation under the NGA, will use this second approach in dealing with hazardous liquids pipelines.

188. 49 U.S.C.A. § 60,104(c) (West 1996).

189. 49 U.S.C.A. app. § 1672(a) (West Supp. 1992).

priate circumstances. The principal shortcoming of the second approach is its underlying assumption, namely, that the undefined concepts of "intrastate pipeline transportation" and "interstate pipeline transportation" were intended by Congress to be ignored in applying the RPSA Federal Preemption Rule and the RPSA State Regulation Rule to natural gas pipelines. The language actually used by Congress does not support the approach, and the approach necessarily requires two judicially or administratively created exceptions to the language of the RPSA to be generated rather than one.

3. Dealing Separately with Facilities and Transportation

A third approach might be to articulate a meaningful and intelligible distinction between pipeline facilities and regulation of pipeline transportation (as an activity). For example, in applying the RPSA Federal Preemption Rule to a Direct Sale Customer Line, the pipeline facility would be subject to more stringent or additional state regulation, but the activity of transporting the natural gas through the pipeline would be free of such state regulation. Although the third approach appears theoretically possible, it appears virtually impossible to separate pipeline facilities from pipeline transportation, thereby implementing the approach on a principled basis. Establishing standards for gas pipeline facilities necessarily establishes standards governing how those pipeline facilities may transport their contents. Conversely, establishing a standard for pipeline transportation necessarily sets a standard that applies to a pipeline facility. Moreover, this analytical difficulty is exacerbated by the practical difficulties and confusions that arise when two regulatory authorities, one state and the other federal, are to have authority to establish standards that may potentially apply to one and the same facility.

Given these three possibilities, the author's inclination is to favor option one. It is the simplest and most direct. The approach creates the least disruption to the multi-agency regulatory scheme that applies to natural gas pipeline safety. It also recognizes that Congress, in enacting the RPSA choice of regulation rule,[190] in a technical oversight unintentionally changed the NGPSA choice of regulation rule applicable to natural gas pipeline safety in the case of the NGA section 1(c) Hinshaw Facilities. Furthermore, it recognizes that if federal preemption of state pipeline safety regulation as it existed prior to the enactment of the RPSA is to remain a reality, an administrative or judicial construction may be required to validate application of the RPSA State Regulation Rule to the NGA section 1(c) Hinshaw Facilities. Alternatively, a technical amendment to the RPSA could be petitioned directly to Congress. This amendment would formally define "interstate [gas] pipeline transportation" for purposes of the RPSA as transportation of natural gas in interstate commerce through a pipeline subject to FERC jurisdiction under the NGA section 1(b), but expressly exclude transportation of natural gas by pipeline in NGA section

190. 49 U.S.C.A. § 60,104(c) (West 1996).

1(c) Hinshaw Facilities. Correspondingly, a technical amendment could define "intrastate [gas] pipeline transportation" for purposes of the RPSA as transportation of natural gas by pipeline that is not interstate gas pipeline transportation.

VI. RECOMMENDATION

Ever since the passage of the NGPSA (1968), federal regulation of natural gas pipeline safety has been a complex matter involving complementary allocations of safety jurisdiction among the DOT, the FERC, and the several states. In recodifying all the transportation laws of the United States in Title 49, including revision of the regulation of safety of natural gas and hazardous liquids, Congress undertook an ambitious task that appears to have been subject to certain technical shortcomings in the important area of natural gas pipeline safety due to the exceedingly complex jurisdictional rules that Congress and the courts have created in this area. In effect, the jurisdictional complexities of this area of the law may have exceeded the capacity of Congress to keep track of all the technical distinctions attendant to the law that it previously enacted. Although Congress did not generally intend its recodification to change preexisting law in any substantive manner, it is clear, given the complexity of the NGPSA and the NGA, their respective histories and the size of the task that Congress undertook, that the recodification of the pipeline safety laws resulted in an unintentional anomaly and a technical change to the substance of prior law. In the recodification, Congress inadvertently rescinded the states' safety power over Hinshaw Facilities. Moreover, if Congress ever intended to grant states safety jurisdiction over Direct Sales Customer Lines, the FERC Order No. 636 series now seems to have rendered the issue moot. States, of course, retain safety powers over what this article has described as Intrastate Transportation Facilities, Retail Sales Facilities, Local Distribution Facilities, Gathering Facilities, and Production Facilities. The FERC continues to assert safety powers over interstate facilities as defined under the NGA, although in a NGA section 7(c) proceeding, the FERC must accept certification of compliance with the DOT standards in absence of evidence to the contrary.

In the opinion of the author, the RPSA cannot be properly interpreted without a thorough consideration of the complex history of natural gas pipeline regulation. Consequently, the author recommends judicial and administrative recognition of the fact that the RPSA preserves state safety authority over NGA section 1(c) Hinshaw Facilities. In this manner, the preexisting natural gas pipeline safety jurisdiction of the DOT, the FERC and the several states may be preserved with minimum disruption to the integrity of the RPSA.

APPENDIX A
SUMMARY OF FERC AND STATE JURISDICTION OVER NATURAL GAS PIPELINE FACILITIES UNDER NGA SECTION 1

		FERC Jurisdiction	*State Jurisdiction*
A.	NGA § 1(b) Interstate Facilities		
1.	FERC Regulated NGA § 1(b) Facilities: facilities used for transportation[191] or sale of natural gas for resale in interstate commerce (includes transportation jurisdiction over Direct Sales Customer Lines)	Yes	No
2.	NGA § 1(c) Hinshaw Facilities	No	Yes
B.	State Regulated NGA § 1(b) Facilities:	No	Yes
1.	Intrastate Transportation Facilities	No	Yes
2.	Retail Sales Facilities	No	Yes
3.	Local Distribution Facilities	No	Yes
4.	Production Facilities	No	Yes
5.	Gathering Facilities	No	Yes

191. Transportation by a natural gas pipeline in interstate commerce of natural gas that has crossed a state line ends at the point of pressure reduction and delivery to a customer main. *See* FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

APPENDIX B
SUMMARY OF DOT, FPC AND STATE SAFETY JURISDICTION UNDER THE NGA AND NGPSA AS OF 1968

	NGA § 1(b) Facilities	*FPC*[192] *Safety Jurisdiction*	*DOT*[194] *Jurisdiction*	*State*[193] *Safety Jurisdiction*
A.	NGA § 1(b) Interstate Facilities[195]			
1.	FERC Regulated NGA § 1(b) Facilities: Facilities used for transportation of natural gas in interstate commerce and sales of natural gas for resale in interstate commerce (including Direct Sales Customer Lines)	Yes	Yes	No
2.	NGA § 1(c) Hinshaw Facilities	No	Yes	Yes
B.	State Regulated NGA § 1(b) Facilities			
1.	Intrastate Transportation Facilities	No	Yes	Yes
2.	Retail Sale Facilities	No	Yes	Yes
3.	Local Distribution Facilities	No	Yes	Yes
4.	Production Facilities	No	Yes	Yes
5.	Gathering Facilities	No	Yes	Yes

192. The FPC may impose pipeline safety requirements in excess of the DOT standards under section 7(e) of the NGA, but is bound in most instances by certification by an applicant under section 7 of the NGPSA that the DOT Code will be observed. State natural gas pipeline safety regulation is preempted by the NGPSA. 49 U.S.C. § 1672(b) (1970). It is also theoretically preempted under the NGA. 15 U.S.C. § 717f (1994). *See* Section III.B.1. of this article. The prohibition against collateral attack of federal licensing orders may also have been applicable. *See* Section III.B.2 .of this article.

193. State pipeline safety regulation is allowed by the NGPSA, 49 U.S.C. § 1672(b) (1970), if the state standards are in addition to or more stringent than DOT minimums, provided such standards are compatible with DOT minimum standards.

194. The DOT is to establish *minimum* natural gas pipeline safety standards for all natural gas pipeline facilities whether the FERC or the state regulates.

195. *See* FPC v. East Ohio Gas Co., 338 U.S. 464 (1950).

APPENDIX C
SUMMARY OF DOT, FERC (FPC) AND STATE SAFETY JURISDICTION UNDER THE NGA AND NGPSA AS OF 1992 (REFLECTING THE 1976, 1979 AND 1992 AMENDMENTS OF THE NGPSA)

	NGA § 1(b) Facilities	*FPC Safety Jurisdiction*	*DOT Jurisdiction*	*State*[196] *Safety Jurisdiction*
A.	NGPSA - Interstate Transmission Facilities			
1.	FERC Regulated NGA § 1(b) Facilities: Facilities used for transportation of natural gas or sale of natural gas for resale in interstate commerce (excluding Direct Sales Customer Lines).	Yes	Yes	No
B.	NGPSA - Intrastate Pipeline Transportation			
1.	Direct Sales Customer Line[197] (a FERC Regulated NGA § 1(b) Facility)	See Note 196	Yes	See Note 196
2.	NGA § 1(c) Hinshaw Facilities	No	Yes	Yes
3.	State Regulated NGA § 1(b) Facilities			
	(a) Intrastate Transportation Facilities	No	Yes	Yes
	(b) Retail Sales Facilities	No	Yes	Yes
	(c) Local Distribution Facilities	No	Yes	Yes
	(d) Production Facilities	No	Yes	Yes
	(e) Gathering Facilities	No	Yes	Yes

196. *See* Appendix B for an explanation of the prohibition against or preemption of state regulation. In cases like the United/LP&L litigation, involving as it did a wholly intrastate facility in a producing state and (except for application of DOT Code minimum safety standards) regulated entirely by that state, there is every reason to believe that Congress intended to preserve state authority to require additional and more stringent safety requirements.

197. 49 U.S.C.A. § 1672(b) (West Supp. 1981) and 49 U.S.C.A. app. § 1672(a) (West Supp. 1992) do not preempt states from the safety regulation of Direct Sales Customer Lines, but theoretically the FERC's regulation under the NGA, sections 1(b) and 7 could do so. *See* Sections III.B.1 and 2 of this article, which raise the theoretical ineffectiveness of the 1976 Amendment to the NGPSA in requiring Direct Sales Customers Lines to be considered as intrastate pipeline transportation. In situations where the FPC retained certificate authority over the line in question, it theoretically retained safety authority with arguable preemptive effect.

APPENDIX D

SUBJECT: Direct Sales Provision
FROM: Barbara Betsock
Deputy Chief Counsel
TO: William Gute
Assistant Director for Operations and Enforcement

As you requested, we have examined the question of what constitutes a direct sales customer for the purpose of determining what is included in intrastate pipeline transportation subject to State jurisdiction under the Natural Gas Pipeline Safety Act. Our analysis, which is attached, is intended to be applied on a case-by-case basis depending on the particular facts in a given situation. If you have any questions of need further assistance, please contact this office.

Direct Sales Provision

The question has arisen as to what is included in the definition of "intrastate pipeline transportation" in the Natural Gas Pipeline Safety Act of 1968 (NGPSA). "Intrastate pipeline transportation" is defined as:

> pipeline facilities and transportation of gas within a State which are not subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, except that it shall include pipeline facilities within a State which transport gas from an interstate gas pipeline to a direct sales customer within such State purchasing gas for its own consumption.

The definition was amended in 1976, in response to a 1972 U.S. Supreme Court decision to avoid inadvertent shift of safety regulator responsibility from a State to OPS. *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 621 (1972). In that decision, the Court held that facilities transporting gas within a State to a direct sales customer in that State (direct sales provision) are subject to the transportation (as opposed to the rate-setting) jurisdiction of the FPC, now the Federal Energy Regulatory Commission (FERC), under the Natural Gas Act (NGA).

The legislative history of the 1976 amendment to the NGPSA is sparse, but the Senate Report indicates that "(m) [sic] ant States had regulated direct sales lines prior to the Supreme Court's decision, and this amendment would clarify that they may continue to do so without Federal preemption under the Natural Gas Pipeline Safety Act." S. Rep. No. 94-852 (94th Cong., 2d Sess. at 6).

It should be noted at the onset that jurisdiction under the NGA differs from jurisdiction under the NGPSA. The NGA regulates only the transportation of natural gas in interstate commerce, whereas the NGPSA regulates both interstate and intrastate pipeline transportation. Both interstate and intrastate pipeline transportation are subject to the standards set under the NGPSA; the only difference is whether the regulatory authority is the Federal Government or a State.

Neither the NGA nor the NGPSA defines "direct sales customer" or "direct sales lines," but the Court in *FPC v. LPL* clearly indicated that the "direct sales" customers referred to were those purchasing gas for their own consumption as opposed to "resale" [sic] customers, purchasing gas for distribution to ultimate consumers." 406 U.S. 621, 623. The court variously contrasted direct sales and sales for resale id. at 631; direct sales customers and resale customers, id. at 632; and direct industrial sales customers and ultimate consumers, including schools, hospitals, and homes, id.

OPS has not defined the term "direct sales customer." It would appear reasonable for OPS to interpret the term as having the generally understood meaning of an end-user or consumer who receives gas directly from an interstate pipeline company, rather than from a distribution company. This allows recognition of the function of the line as essentially distribution, even though the line is part of an interstate transmission line subject to FERC jurisdiction.

An additional issue concerns the point at which a pipeline facility ceases to be an "interstate transmission facility" and becomes "intrastate pipeline transportation" under the NGPSA. The plain language of the statute states that a pipeline facility must: (1) be within a State, (2) transport gas from an interstate gas pipeline, and (3) transport the gas to a direct sales customer (purchasing for its own consumption) in the same State. Therefore, the pipeline, facility must be wholly located within a single State, connected to an interstate pipeline, and delivering gas to a direct sales customer (as we understand the term). The statute is silent as to the ownership of the various pipelines operator, the operator of the within-State pipeline, and the end user; or the point of sale, the ownership of the gas, or any other contract provisions. The lack of specificity in the statute indicates that the Secretary of Transportation has considerable latitude to define the jurisdictional boundaries. The logical point at which to draw the line between the interstate pipeline and the intrastate pipeline is the point where gas intended solely for the end user leaves the interstate transmission line. Normally, there will be a meter or value at this point. The point of sale, the ownership of the pipeline, and the relationship of the various entities are all irrelevant to this determination.

To illustrate this point, we use an actual example raised by a State. An ultimate consumer, a city electric department located in State A, plans to purchase gas from Company X located in State B. The gas would be transported from State B via an interstate pipeline operated by an interstate operator (Company Y). Company Y plans to build a 2.2 mile pipeline from an existing meter station on the interstate pipeline to terminate at a meter station to be constructed on a portion of the power plant owned by the city. The 2.2 mile pipeline would be located entirely within State A, the gas would be transported directly from an interstate transmission line, and the gas is intended for consumption by the city. Therefore, the 2.2 mile pipeline is an intrastate pipeline facility subject to the jurisdiction of State A.

APPENDIX E
SUMMARY OF DOT, FERC AND STATE SAFETY JURISDICTION UNDER THE NGA AND RPSA (1994) TO DATE

	NGA § 1(b) Facilities	*FERC*[198] *Safety Jurisdiction*	*DOT*[200] *Jurisdiction*	*State*[199] *Safety Jurisdiction*
I.	RPSA Interstate Gas Pipeline Facilities:			
A.	FERC Regulated NGA § 1(b) Facilities; Facilities used for transportation and sale for resale of natural gas in interstate commerce (excludes Direct Sales Customer Lines) but includes Interstate Transportation Laterals - i.e. lateral lines located entirely within a state used to transport gas from transmission lines to an end-user.	Yes	Yes	No
II.	RPSA - Intrastate Gas Pipeline Facilities:			
A.	Direct Sales Customer Lines[201] (FERC Regulated NGA § 1(b) Facility)	(See III.B below)	(See III.B below)	(See III.B below)
B.	NGA § 1(c) Hinshaw Facilities	No	Yes	See Note[202]

198. *See supra* note 192.

199. *See supra* note 194. The DOT must also certify the state.

200. *See supra* note 193.

201. Direct Sales Customer Lines are Intrastate Gas Pipeline Facilities but also constitute interstate [gas] pipeline transportation under the RPSA and thus theoretically should not be regulated by the several states under the second sentence of 49 U.S.C.A. § 60,104(c) (West 1996). This result, however, has been rendered moot for all practical purposes by the FERC Order 636 series, which has eliminated the use of these pipelines by the FERC regulated pipelines to make direct sales to end-users.

202. NGA section 1(c) Hinshaw Facilities are involved in Interstate [Gas] Pipeline Transportation. *See* FPC v. East Ohio Gas Co., 338 U.S. 464 (1950). As such, they constitute Intrastate [Gas] Pipeline Facilities involved in Interstate [Gas] Pipeline Transportation under the RPSA, and technically *neither the FERC* under the NGA *nor the several states* under the RPSA may impose standards in

C.	State Regulated NGA § 1(b) facilities			
1.	Intrastate Transportation Facilities	No	Yes	Yes
2.	Retail Sales Facilities	No	Yes	Yes
3.	Local Distribution Facilities	No	Yes	Yes
4.	Production Facilities	No	Yes	Yes
5.	Gathering Facilities	No	Yes	Yes
D.	Gathering Lines (as defined under 49 U.S.C.A. § 60,101 (b) and the DOT Code §§ 192.3 and 192.9)	No	Yes[203]	Yes
III.	RPSA Interstate Pipeline Transportation:			
A.	FERC Regulated NGA § 1(b) Facilities: Facilities used for transportation in interstate commerce under the NGA (excluding Direct Sales Customer Lines but including Interstate Transportation Laterals)	Yes	Yes	No
B.	Direct Sales Customer Lines (FERC Regulated NGA § 1(b) Facility)	Moot	Moot	Moot
C.	NGA § 1(c) Hinshaw Facilities	No	Yes	See Note 202
IV.	RPSA - Intrastate Pipeline Transportation:			
A.	State Regulated NGA § 1(b) Facilities:			
1.	Intrastate Transportation Facilities	No	Yes	Yes

addition to or more stringent than those imposed by the DOT Code. *Cf.* NGA section 1(c) and the second sentence of 49 U.S.C.A. § 60,104(c) (West 1996). This is the technical anomaly in the law of pipeline safety created by the RPSA. Despite this technical anomaly, it is the author's view the RPSA should not be construed to eliminate state pipeline safety authority over NGA section 1(c) Hinshaw Facilities.

203. A natural gas gathering pipeline facility that is expressly excluded from DOT Code regulation by 49 U.S.C.A. § 60,101(b) (West 1996) and 49 C.F.R. §§ 192.3 and 192.9 (1995) and is not considered a FERC Regulated NGA section 1(b) Facility is subject solely to state pipeline safety regulation.

2.	Retail Sales Facilities	No	Yes	Yes
3.	Local Distribution Facilities	No	Yes	Yes
4.	Production Facilities	No	Yes	Yes
5.	Gathering Facilities	No	Yes	Yes
B.	Gathering Lines (as defined under 49 U.S.C.A. § 60,101 (b) and the DOT Code §§ 192.3 and 192.9)	No	Yes[204]	Yes

204. *See* Section IV.E. of this Article.