

# COMMENT

## A CONFLICT IN THE CIRCUITS: THE FERC'S JURISDICTION OVER GATHERING RATES

### I. INTRODUCTION

There is a ripe debate about the extent of the Federal Energy Regulatory Commission's (FERC or Commission) jurisdiction over certain gas gathering rates. This issue will be examined by considering two recent cases and their differing analyses of section 1(b) of the Natural Gas Act (NGA),<sup>1</sup> which defines the scope of authority granted by Congress to the Federal Power Commission. Section 1(b) of the NGA states:

The provisions of this chapter *shall apply* to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, **BUT SHALL NOT APPLY** to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas (emphasis added).<sup>2</sup>

Gathering is the act of transporting gas as it is collected from the wells, whether or not the movement is interstate.<sup>3</sup> Gathering systems consist of pipeline and pumping units used to bring oil or gas from production leases by separate lines to a central point.<sup>4</sup> Gathering can be performed by a producer, by a pipeline, or by an independent gathering company.

In the recent cases of *Northwest Pipeline Corp. v. FERC*<sup>5</sup> and *Northern Natural Gas Co. v. FERC*<sup>6</sup>, the Tenth and Eighth Circuit Courts of Appeals, respectively, have issued what appears to be conflicting decisions as to the FERC's jurisdiction over gathering and gathering rates. The Tenth Circuit held that the FERC misapplied its own primary function test in characterizing Northwest's facilities as jurisdictional.<sup>7</sup> The Court then remanded the case to the Commission "for a determination as to whether the facilities at issue are properly exempted from the FERC's jurisdiction on the ground that they perform gathering functions as defined in section 1(b) [of the NGA]."<sup>8</sup> In essence, the Court's opinion supported the theory that the FERC did not have

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1. Natural Gas Act § 1(b), 15 U.S.C. § 717(b) (1988).

2. *Id.*

3. *In re Phillips Petroleum Co.*, 10 F.P.C. 246, 277 (1951). This case was overturned in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), on other grounds.

4. Joe Caggiano, *THE NATURAL GAS TRAINING AND EDUCATION ASSOCIATION NATURAL GAS CONTRACTS ADMINISTRATION COURSE HANDBOOK*, P. 7 (1990).

5. 905 F.2d 1403 (10th Cir. 1990).

6. 929 F.2d 1261 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 169 (1991).

7. *Northwest*, 905 F.2d at 1412.

8. *Id.* at 1412-13.

jurisdictional authority over any aspect of gathering, gathering facilities, or gathering rates.<sup>9</sup> Also, according to *Northwest*, the fact that facilities are owned by an interstate pipeline should be one of many factors in determining if a facility is primarily used for transportation or gathering. Thereafter, that jurisdiction plays a key role in the Commission's analysis of whether it could assert sections 4 and 5 jurisdiction over the gathering rates of Northwest.

In contrast, the Eighth Circuit in *Northern* "held that the FERC may, in implementing its open access order, regulate rates that natural gas pipelines charge third-party interstate transportation shippers for moving gas on their own gathering facilities."<sup>10</sup>

In 1991, the U.S. Supreme Court had the opportunity to resolve the conflict, but refused to consider an appeal from *Northern*.<sup>11</sup> In both cases, the pipelines asserted that section 1(b)'s gathering exemption exempts from federal regulation all aspects of gathering. In reply, the FERC argued that sections 4 and 5 of the NGA allow the Commission discretion on gathering rates charged if it is "in connection with"<sup>12</sup> the transportation of interstate gas, and that Congress did not intend any aspect of the interstate business of transporting or selling natural gas for resale be left unregulated by the Commission.

#### A. *The Northwest Case*

Northwest Pipeline Corporation (Northwest) initially filed for a general rate increase for gathering and transportation services to serve Natural Gas Corporation of California.<sup>13</sup> Both parties agreed to a proposed settlement, which was approved by the Commission, except for the gathering rate of Northwest's services in the Piceance Basin of Colorado, which are comprised of six gathering systems, three of which are connected to Northwest's own mainline transmission system. Northwest moves its gas from the wellhead through a tentacular network which feeds into its interstate pipeline for ultimate delivery to Natural Gas Corporation of California.

The administrative law judge (ALJ) found the gathering services performed by Northwest to be subject to the FERC's jurisdiction. Northwest then challenged the Commission's jurisdictional authority over these gathering facilities. The Commission affirmed the ALJ's holding that the FERC had jurisdiction over the facilities<sup>14</sup> by applying its current preference for a "primary function" test instead of the previous, more mechanical tests which distinguish jurisdictional transportation from nonjurisdictional gathering.

The facilities here were judged as a whole, not by their individual parts, and divided into jurisdictional and nonjurisdictional segments. According to the Commission's application of the primary function test, even if the Piceance area had true gathering lines in terms of the configuration, the service Northwest performed was transportation in interstate commerce. Thus, since the

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9. *Id.* at 1406.

10. *Northern*, 929 F.2d at 1261.

11. *Id.*

12. 15 U.S.C. § 717c(a) (1988).

13. *Northwest Pipeline Corp.*, 19 F.E.R.C. ¶ 61,082 (1982).

14. *Opinion and Order Affirming Initial Decision*, Opinion No. 270, 38 F.E.R.C. ¶ 61,302 (1987).

acts of interstate commerce override gathering, Northwest would not be allowed an exemption from the FERC's jurisdiction. The Commission argued that Congress did not intend this area be left unregulated and that sections 4 and 5 of the NGA gave them jurisdiction to regulate.

The Commission denied Northwest's request for a rehearing.<sup>15</sup> Northwest argued that the Commission exceeded its statutory authority when it deviated from precedent and discriminated against interstate pipelines under the gathering exemption, with no substantial evidence to support its decision. On appeal, the Tenth Circuit reversed and remanded the case for a determination of whether Northwest's gathering facilities were properly exempted from the FERC's jurisdiction since they are used to perform gathering functions as defined under section 1(b).<sup>16</sup> Also, the Court stated that the Commission deviated from precedent by subsuming the primary function test within one factor, Northwest's status as an interstate pipeline.

Northwest has proposed to convey its facilities to a newly created affiliate company, Williams Gas Processing Company (Williams). The Commission issued an Order Approving Abandonment and Disclaiming Jurisdiction, although it explained it would still continue to exert jurisdiction over the rates of Williams under sections 4 and 5. Requests for rehearing were promptly made and the rehearing was again denied on August 28, 1992.<sup>17</sup> The Commission explained that jurisdiction would extend over the rates of Williams the same as to an interstate pipeline itself. Therefore, in the Commission's point of view, jurisdiction was proper in accordance with sections 4 and 5 of the NGA even though the subject facilities were gathering facilities.

Recently, Northwest and two of its customers have filed appeals in two separate circuits contesting the order and denial of rehearing. These appeals have been consolidated in the Tenth Circuit.

### *B. The Northern Case*

Northern Natural Gas Company (Northern) filed with the FERC a general rate decrease for services subject to regulation in accordance with section 4(d) of the NGA.<sup>18</sup> A settlement on rates and terms was reached, but several policy questions were certified to the Commission for resolution. The Commission approved the settlement, but included a modification requiring Northern to state rates for gathering service in its FERC tariff.<sup>19</sup>

Northern challenged the FERC's jurisdiction and its inclination to include the gathering rate in the filing.<sup>20</sup> The FERC asserted that rates for open access transportation separately identify costs attributable to transportation, storage and gathering so that shippers can be apprised of the total cost of services that they purchase. According to the FERC, this gathering rate information was essential to effectuate its open-access transportation policies

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15. Opinion and Order Denying Rehearing, Opinion No. 270-A, 43 F.E.R.C. ¶ 61,491 (1988).

16. *Northwest*, 905 F.2d at 1412-13.

17. Order Denying Requests for Rehearing, 60 F.E.R.C. ¶ 61,213 (1992).

18. Order Approving Contested Offer of Settlement as Modified, 37 F.E.R.C. ¶ 61,272 (1986).

19. *Id.*

20. Order Denying Appeal of Staff Action and Denying Rehearing, 43 F.E.R.C. ¶ 61,473 (1988).

under Order No. 436,<sup>21</sup> and to regulate rates charged to third-party interstate transportation shippers for moving natural gas on gathering facilities owned by an interstate pipeline. Also, the "Commission decided that '[e]ven assuming that Northern's service is gathering, the Commission has the jurisdiction to determine the justness and reasonableness of the [charges] under which the gathering service is performed' under [sections] 4 and 5 of the NGA."<sup>22</sup>

Northern complied with the request, but sought review by the Eighth Circuit to address the issue of the FERC jurisdiction of gathering under NGA sections 4 and 5. The Eighth Circuit stated the Commission's orders were valid.<sup>23</sup> In *Northern*, the Court interpreted the gathering exemption in section 1(b) to apply to the physical gathering or processing facilities used in gathering, but not to rates for gathering charged by interstate pipelines.<sup>24</sup> The Court further reasoned that the order required a statement of gathering rates. This statement would help prevent interstate pipelines from discriminating "in favor of their own gas. . .at the expense of procompetitive purposes of the NGA, the NGPA, and Order No. 436 to the ultimate disadvantage of the ultimate consumers of gas, and in violation of. . .section 4 of the NGA."<sup>25</sup>

21. Order No. 436, *Regulations of Natural Gas Pipelines after Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408 (Oct. 18, 1985), F.E.R.C. Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,665 (1985), (codified as amended in scattered sections of 18 C.F.R. pts. 2, 157, 282, 375 and 381) (final rule and statement of policy), *reh'g granted in part and denied in part*, Order No. 436-A, 50 Fed. Reg. 52,217 (1985), F.E.R.C. Stats. & Regs., Regulations Preambles 1982-1985 ¶ 30,675; *reh'g granted in part*, Order No. 436-B, 51 Fed. Reg. 6,398 (1986), F.E.R.C. Stats. & Regs. ¶ 30,688; *reh'g denied*, Order No. 436-C, 51 Fed. Reg. 11,566 (1986), 34 F.E.R.C. ¶ 61,404, *reh'g denied*, Order No. 436-D, 51 Fed. Reg. 11,569 (1986), 34 F.E.R.C. ¶ 61,405; *reconsideration denied*, Order No. 436-E, 51 Fed. Reg. 1,156 (1986), 34 F.E.R.C. ¶ 61,403; *vacated and remanded*, *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 485 U.S. 1006, 108 S.Ct. 1468, 99 L.Ed.2d 698 (1988); *readopted on an interim basis on remand*, Order No. 500, 52 Fed. Reg. 30,334 (Aug. 14, 1987), F.E.R.C. Stats. & Regs., Regulations Preambles ¶ 30,761, *extension granted*, Order No. 500-A, 52 Fed. Reg. 39,507 (Oct. 22, 1987), F.E.R.C. Stats. & Regs., Regulations Preambles ¶ 30,770, *modified*, Order No. 500-B, 52 Fed. Reg. 39,630 (Oct. 23, 1987), F.E.R.C. Stats. & Regs., Regulations Preambles ¶ 30,772, *modified further*, Order No. 500-C, 52 Fed. Reg. 48,986 (Dec. 29, 1987), F.E.R.C. Stats. & Regs., Regulations Preambles ¶ 30,786 (1987), *modified further*, Order No. 500-D, 53 Fed. Reg. 8,439 (Mar. 15, 1988), F.E.R.C. Stats. & Regs., Regulations Preambles ¶ 30,800, *reh'g denied*, Order No. 500-E, 53 Fed. Reg. 16,859 (May 12, 1988), 43 F.E.R.C. ¶ 61,234, *modified further*, Order No. 500-F, 53 Fed. Reg. 50,924 (Dec. 19, 1988), F.E.R.C. Stats. & Regs., Regulations Preambles ¶ 30,841 (1988), *reh'g denied*, Order No. 500-G, 54 Fed. Reg. 7,400 (Feb. 21, 1989), 46 F.E.R.C. ¶ 61,148 (1989), *remanded*, *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, 54 Fed. Reg. 52,344 (Dec. 21, 1989), F.E.R.C. Stats. & Regs., Regulation Preambles ¶ 30,867 (1989)(Final Rule), *modified*, Order No. 500-I, 55 Fed. Reg. 6,605 (Feb. 26, 1990), F.E.R.C. Stats. & Regs. ¶ 30,880 (1990), *aff'd in part and reversed in part*, *American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied sub nom. Willcox v. FERC*, — U.S. —, 111 S.Ct. 957, 112 L.Ed.2d 1044 (1991); (codified at 18 C.F.R. § 284.8(b)); [hereinafter Order No. 436].

22. *Northern*, 929 F.2d at 1268.

23. *Id.* at 1274.

24. *Id.* at 1271.

25. *Id.* at 1274.

## II. REGULATORY, JUDICIAL AND LEGISLATIVE BACKGROUND

### A. Regulatory Background

The NGA<sup>26</sup> was spurred by a 1935 Federal Trade Commission Report, which found that the interstate pipelines had monopoly power and used it to the detriment of consumers.<sup>27</sup> To bring interstate pipelines under regulation, federal legislation was needed because federal courts had declared state regulatory efforts violative of the Commerce Clause.<sup>28</sup> In response, Congress enacted the NGA to control the interstate pipelines and abusive practices.<sup>29</sup>

The NGA implanted government supervision over the transportation and direct resale of natural gas in interstate commerce. Section 1(b) sets forth the scope of the NGA. Under the enactment of the NGA, Congress conveyed to the FPC jurisdiction over the transportation of natural gas in interstate commerce, its sale in interstate commerce for resale, and the natural gas companies engaged in such transportation or sale.<sup>30</sup>

The Supreme Court has upheld the constitutionality of the NGA and noted that the Commerce Clause, through the NGA, gave the FPC wide regulatory authority.<sup>31</sup> However, Congress has categorically excluded the FPC jurisdiction over "any other transportation or sale of natural gas. . .to the facilities used for such distribution or to the production or gathering of natural gas."<sup>32</sup>

The role of Order No. 436<sup>33</sup> is also a significant piece of regulatory background in this debate. Order No. 436 is a voluntary self-implementing transportation program that is intended to encourage competition in the gas industry. Through this program, consumers may obtain economically priced gas with better and more efficient access to transportation services.<sup>34</sup> The pipelines that participate must provide open-access to transportation without undue discrimination or preference. This order is one of the major justifications of the FERC's jurisdiction over gathering rates.

26. 15 U.S.C. §§ 717-717z (1988).

27. This Federal Trade Commission Report was made pursuant to S. Res. 83, 70th Cong., 1st Sess. (1928-1936).

28. See *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). The Federal Trade Commission advocated:

A federal regulatory law should be enacted applicable to interstate pipelines which transport gas for ultimate sale to and use by the public, regulating contracts for purchase of gas to be transported interstate, or regulating rates for carriage or city gate rate at the end of such transportation, or all of these . . .

See *supra* note 27.

29. 15 U.S.C. §§ 717-717z (1988).

30. *Id.* § 717(b) (1988).

31. Rob Tyson, *Natural Gas Regulation and Its Effect on Natural Gas Supply*, 1992 A.B.A. NATURAL RESOURCES & ENVIRONMENT Vol. 6, No. 4, P. 11. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

32. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947); *Natural Gas Act § 1(b)*, 15 U.S.C. § 717(b) (1988).

33. Order No. 436, *supra* note 21.

34. Caggiano, *supra* note 4, in Definition Section.

### B. *Important Historic Case Law*

For general background, several Supreme Court decisions deserve some attention that have been referenced by all sides to this debate for general background purposes. *Colorado Interstate Gas Co. v. FPC*<sup>35</sup> acknowledged the legislative history of the NGA and stated it supports the view that Congress did not intend to vest the Commission with authority over production or gathering, whether in rate proceedings or otherwise.<sup>36</sup> In *Colorado Interstate*, the Supreme Court stated that the Commission could include nonjurisdictional costs, such as gathering rates and production properties in the rate base of an interstate pipeline company, but may not regulate these nonjurisdictional costs. The Court in *Colorado Interstate* said the Commission may consider production and gathering costs "for the purposes of determining the reasonableness of rates subject to its jurisdiction."<sup>37</sup> The Court also stated that required reports by the Commission from the natural gas companies, containing maintenance and operation of the facilities, are for "mere information requirements quite consistent with the [Commission's] absence of power to regulate the production and gathering of natural gas."<sup>38</sup>

The Supreme Court in *Interstate Natural Gas Co. v. FPC*<sup>39</sup> upheld the FPC action that required an interstate pipeline company to reduce its rates. The FPC claimed jurisdiction to regulate sales in the field made by petitioner to three pipelines which eventually sold the gas in interstate commerce. One hundred and ten wells, owned and operated by petitioner, flowed through petitioner's system of field pipe lines moving first into branch lines, then trunk lines and eventually into main trunk lines where delivery is made to the three pipelines, one of which was an affiliate. Along petitioner's system, more gas was bought from producers in the field and entered at well pressure, and later pressure was increased by the three purchasing pipelines' compressors. The Commission reasoned that by the time sales were consummated, nothing remained to be done in the gathering process. Therefore, it held that the sale was in interstate commerce. The Court mentioned it was unnecessary to resolve the subsidiary issue of whether the gathering process continued to the point of sale, or, as the Commission found, at some point prior to the surrender of custody and title. However, footnoted in the case, the Court stated an inquiry of reasonableness for cost items may be possible when the Buyer and Seller are affiliated corporations and there is evidence that the sales were not made at arm's length.

*Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*<sup>40</sup> was another popular case. The issue was whether Indiana had the power to regulate sales of natural gas made by an interstate pipeline carrier direct to industrial consumers in Indiana. The Court stated that the NGA covered sales for resale by interstate carriers. Congress has permitted and supported

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35. 324 U.S. 581 (1945).

36. *Id.* at 583.

37. *Id.* at 603.

38. *Id.* at 599.

39. 331 U.S. 682 (1945).

40. 332 U.S. 507 (1947).

state regulation. States may regulate direct sales to customers though made by an interstate pipeline. Furthermore, if abuses in regulation appear and need correcting, this is within the power of Congress.

In *Phillips Petroleum Co. v. Wisconsin*,<sup>41</sup> the Supreme Court held that Phillips, a producer, was "a natural gas company" within the meaning of the NGA and subject to its jurisdiction as it engaged in the sale of natural gas for resale in interstate commerce. Additionally, Congress gave the Commission jurisdiction over all wholesales of natural gas in interstate commerce, regardless of whether the status was an independent producer or pipeline. However, the Court found jurisdiction over a certain aspect of natural gas transactions that are physically removed from the facilities over which the FERC has jurisdiction. Jurisdiction has never been an issue with respect to production facilities as exempted in section 1(b) of the NGA, but *Phillips* reached back to the wellhead to attach certain rate jurisdiction. After *Phillips*,<sup>42</sup> the FPC began setting wellhead price controls that failed to keep up with the rising cost of production.<sup>43</sup> This led to drastic shortages in the interstate market in the mid-1970's while the supply of gas in unregulated intrastate markets remained in balance with demand.<sup>44</sup> Following the Arab oil embargo and other competing complexities, Congress enacted the Department of Energy Organization Act of 1977,<sup>45</sup> which created the Department of Energy and replaced the FPC with the FERC.<sup>46</sup> In 1978, Congress responded to the shortages of gas by passing the Natural Gas Policy Act of 1978 (NGPA).<sup>47</sup> When originated, the NGPA's purpose was to de-control the prices paid at the wellhead,<sup>48</sup> thereby increasing the natural gas supply and encouraging competition throughout the market.<sup>49</sup>

### C. Legislative History

Section 1(b) may appear straightforward, but there has been conflict between regulators and pipelines concerning its scope. Therefore, it is important to look at the legislative history to clarify Congress' intent as to the extent of the gathering exemption. The Supreme Court has stated that House Bill 11662 is "substantially similar to the NGA" when addressing a case regarding the gathering and production exemption.<sup>50</sup> In the hearings of the Subcommittee of the House Committee on Interstate and Foreign Commerce,<sup>51</sup> Mr. Dozier A. DeVane<sup>52</sup> addressed the constitutionality of this house bill<sup>53</sup> and

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41. 347 U.S. 672 (1954).

42. *Id.*

43. Tyson, *supra* note 26, at 12.

44. *Id.*

45. Department of Energy Organization Act of 1977, 42 U.S.C. §§ 7101-7375 (1988).

46. Tyson, *supra* note 26, at 11, 12.

47. Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1988).

48. Caggiano, *supra* note 4, at 2.

49. *Id.*

50. *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505, n.7 (1949).

51. Hearings on H.R. 11662 Before the Subcomm. of the House Comm. on Interstate and Foreign Commerce, 74th Cong., 2nd Sess. (1936) 80 CONG. REC. H3407 (daily ed. March 6, 1936).

52. Dozier A. DeVane was the Solicitor of the FPC.

said, "this bill makes no attempt to regulate the production or gathering facilities of a natural gas company, this function being purely local in character, nor is any attempt made to exercise control over distribution facilities."<sup>54</sup>

In the same continuing discussion, Mr. DeVane specifically addressed gathering rates with Congressman Cooper<sup>55</sup> and stated that in Section 1(b) the Commission will not have jurisdiction over "gathering or gathering rates" for natural gas.<sup>56</sup> Mr. Cooper then asked Mr. DeVane for a clarification of gathering rates in which Mr. DeVane specified "the rates that are paid in the gathering field."<sup>57</sup>

The Report of the House Commerce Committee<sup>58</sup> stated that the provisions specifying what the act shall not apply to is unnecessary, due to the language stating the jurisdiction of the Commission. The report explained, "rather than invite the contention, however unfounded, that the elimination of the negative language would *broaden* the scope of the act, the Committee has included it in this bill (emphasis added)."<sup>59</sup>

#### D. FERC Development of Gathering Tests

Three different tests have been applied by the Commission to determine whether a company's gathering facilities are within the scope of the Commission's claimed authority. They are the behind-the-plant test,<sup>60</sup> the central-point test,<sup>61</sup> and the primary function test.<sup>62</sup>

The behind-the-plant test is a mechanical application that treats the subject facility as a gathering facility if it is located behind the gas processing plant which services the product coming from that area.<sup>63</sup> The central-point test determines where the separate and various lateral lines bring gas to a central point for delivery into a single line.<sup>64</sup> The primary function test attempts to encompass all the facts and circumstances in determining whether facilities are used for gathering or for transportation.<sup>65</sup>

53. Hearings on H.R. 11662, *supra* note 41.

54. *Supra* note 51, at 17. (Statement of Dozier A. DeVane).

55. *Id.*

56. *Id.* at 28.

57. *Id.*

58. REP. OF THE HOUSE COMMERCE COMM., H.R. REP. NO. 709, 75th Cong., 1st Sess. (1937). REP. NO. 709 accompanied H.R. 6586, which was the final bill approved by the House Commerce Committee. H.R. 6586 can be found at 83 CONG. REC., S8347, S9130, S9146, H9502-9503, 75th Cong., 3rd Sess. (1937).

59. S. REP. NO. 1162, 75th Cong., 1st Sess. (1937). H.R. 6585 was passed by the House. The Senate Comm. on Interstate Commerce adopted H.R. 6585 and House Rep. 709 and reported it without hearing. S. REP. NO. 1162, 75th Cong., 1st Sess. (1937). The Senate did not have floor debates on the issue of gathering and gathering rates. The Senate and House passed H.R. 6586. 83 CONG. REC., S8347, S9130, S9146, H9502-9503, 75th Cong., 3rd Sess. (1937).

60. *Phillips Petroleum Co.*, 10 F.P.C. at 277.

61. *Barnes Transportation Co., Inc.*, 18 F.P.C. 369 (1957). *Northern Natural Gas Co.*, 50 F.P.C. 177 (1973).

62. *Ben Bolt Gathering Co.*, 26 F.P.C. 825 (1961), *aff'd* 323 F.2d 610 (5th Cir. 1963).

63. *Phillips Petroleum Co.*, 10 F.P.C. at 277.

64. *Barnes Transportation Co., Inc.*, 18 F.P.C. 369; *Northern Natural Gas Co.*, 50 F.P.C. 177.

65. *Ben Bolt Gathering Co.*, 26 F.P.C. 825 (1961), *aff'd* 323 F.2d 610 (5th Cir. 1963).



The primary function test, also referred to as the "Farmland" test,<sup>66</sup> takes the following criteria into consideration when classifying a facility as transportation or gathering:

1. the diameter and length of the facility,
2. the location of compressors and processing plants,
3. the extension of the facility beyond the central point in the field,
4. the location of wells along all or part of the facility, and
5. the geographical configuration of the system.<sup>67</sup>

There is also a modification to the primary function test in which the Commission allows a sliding scale for the length of offshore pipelines and also onshore facilities. The size and length of a line is not the major determining factor where other factors lead the Commission to the conclusion that the primary function of a system is gathering.<sup>68</sup>

### III. ANALYSIS

*Northern* emphasized there was no conflict between its own theory and the *Northwest* opinion. *Northern* stated that the *Northwest* opinion determined that the facilities were subject to its rate regulatory jurisdiction under section 1(b). *Northern* distinguished its opinion and said it was not necessary to determine whether the facilities were gathering or interstate transportation. It claimed the right to regulate rates even if the facilities were gathering under section 1(b).<sup>69</sup> Both pipelines emphasized the structural layout of the NGA, primarily section 1(b) which sets forth the scope of the NGA. According to the index of Chapter 15B - Natural Gas, the "chapter," as referred to above consists of sections 717a.-717z., which is inclusive of 717c., (Rates and charges, schedules, suspension of new rates); 717d., (Fixing rates and charges, determination of cost of production or transportation); and 717f. (Construction, extension or abandonment of facilities, certificate of convenience and necessity, condemnation proceedings). This structural analysis of the NGA, in addition to the previous analysis of congressional intent, provides the support that infers Congress did not want Commission jurisdiction over any aspect of gathering.

#### A. Gathering Tests

In *Northwest*, the Commission has asserted its preference for the primary function test because it allows more flexibility than the other more mechanical tests in judging the facility.<sup>70</sup> The Commission went on to suggest that facilities should be judged as a whole so that given lines are not separated into jurisdictional and non-jurisdictional parts.<sup>71</sup> *Northwest* countered by arguing

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66. See *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063 (1985).

67. *Id.*; *Dorchester Gas*, 19 F.E.R.C. ¶ 61,058 (1982). The primary function test consisting of these factors had been recently relied on in *Louisiana Intrastate Gas Corp. v. FERC*, 962 F.2d 37 (D.C. Cir. 1992).

68. *Amerada Hess Corporation*, 52 F.E.R.C. ¶ 61,268 at 61,987-88 (1990).

69. *Northern*, 929 F.2d at 1273.

70. *Northwest*, 905 F.2d 1403.

71. *Id.*

the Commission misapplied the primary function test, by focusing on the primary function of the interstate pipeline instead of the primary function of the facilities in question.<sup>72</sup>

The Tenth Circuit agreed with Northwest that the FERC misapplied the primary function test and combined nonjurisdictional with jurisdictional factors. For example, the Court cited the Commission's agreement with the ALJ that gathering networks "would still be considered jurisdictional because of their primary transportation function."<sup>73</sup> However, the Court stated that "Northwest's status in interstate transportation cannot, alone, transform the character of these particular facilities."<sup>74</sup> It further emphasized that the result of the primary function must be based on the calculation of factors in the adjudication and that the gathering exemption was to attach to facilities, rather than certain owners or operators.<sup>75</sup>

### B. *Pro-Competitive and Consumer Policies*

The FERC's brief submitted to the Court in *Northwest* acknowledged the Supreme Court's view that "a reviewing court should defer to an agency's interpretation of its enabling statutes, unless the legislative history on the purpose and structure of the statute clearly reveals a contrary intent on the part of Congress."<sup>76</sup> The Commission, therefore, claimed in *Northwest* and *Northern* that it had proper jurisdiction over gathering through the pro-competitive and consumer protection policies promoted by the NGA and NGPA, and the Commission stated that regulation was necessary because of the changing nature of interstate pipeline transportation and implementation of Order No. 436.<sup>77</sup> Regulatory supervision over all transportation services must be required, according to the Commission, in a way that would allow the commodity market for natural gas "to develop in a competitive fashion."<sup>78</sup> Also, the Commission claimed that "permitting pipelines to discriminate unduly or to exclude certain consumers from transportation services is inconsistent with the fundamental goals of consumer protection and competition in the NGA and NGPA."<sup>79</sup> The Commission in *Northwest* and *Northern* relied heavily on the textual provisions in section 4(a) and (b) of the NGA.<sup>80</sup> Out of concern to

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72. *Id.* Under this analysis, the Commission would routinely find that gathering facilities owned by an interstate pipeline are always found jurisdictional. Northwest Pipeline's Initial Brief at p. 19.

73. Northwest Pipeline Corp., 38 F.E.R.C. ¶ 61,302, at 61,982.

74. Northwest, 905 F.2d at 1410.

75. *Id.*

76. *See, e.g.,* Chemical Manufacturer's Ass'n. v. Natural Resources Defense Counsel, 470 U.S. 116, 123, 125, 126 (1985).

77. *See* Order No. 436, *supra* note 21. Order No. 436 enacted for the purpose of providing transportation without discrimination against customers whose gas would compete with a pipeline's gas in the market.

78. 50 Fed. Reg. 42,408, at 42,413 (1985).

79. 50 Fed. Reg. 42,421, at 42,424.

80. Sec. 4(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Sec. 4(b) No natural-gas company shall, with respect to any transportation or sale of natural gas

aid the purposes of the NGA and NGPA, the Commission enacted the order to allow customers to buy gas at the wellhead and alleviate the interstate pipeline's refusal to move gas that would compete for their own sales.<sup>81</sup>

It has been stated that the flow of gas is continuous from the wellhead to the ultimate consumer.<sup>82</sup> This statement is heavily relied upon by the Commission to justify its assertion of jurisdiction over gathering performed "in connection with"<sup>83</sup> interstate transportation. Thus, the FERC claims power to regulate when gathering is performed by an interstate pipeline over its own facilities in connection with continuing interstate transportation by the same pipeline. This is in accordance with the FERC's assertion that supervision is needed over interstate pipelines, as opposed to independent gathering companies or producers, to control the interstate pipelines monopolistic tendencies. Both pipelines claim that treatment should be no different for interstate pipelines than other classifications. Transportation of natural gas in interstate commerce is subject to the Commission's jurisdiction under the NGA, but the gathering of natural gas is specifically exempted.

The FERC applied a textual analysis and found the practice of pipelines' rates "unduly discriminatory" under section 5 of the NGA.<sup>84</sup> Order No. 436 was issued by the Commission in 1985.<sup>85</sup> It obligates pipelines to transport without undue discrimination or preference,<sup>86</sup> even if it involves third-party gas and reducing its role of selling system supply. In the Commission's view, to assure fair rates and conditions for the movement of gas through an interstate pipeline's facilities from wellhead to the pipeline's mainline, the oversight and regulation is necessary in carrying out the purposes of the NGA and NGPA.<sup>87</sup> Similarly, broad responsibilities of the FERC demand generous

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subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

81. *Associated Gas Distributors*, 824 F.2d at 996.

82. H. Williams & C. Meyers, OIL AND GAS LAW 406-07 (1987).

83. 15 U.S.C. § 717(c) (1988).

84. *Associated Gas Distributors*, 824 F.2d at 993-94 (D. C. Cir. 1987), *cert. denied, sub nom* Intrastate Natural Gas Assn. v. FERC, 485 U.S. 1006 (1988). 15 U.S.C. § 717d(a) Sec. 5.

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, that the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

85. See Order No. 436, *supra* note 21; 18 C.F.R. § 284.8(b) (1987).

86. See Order No. 436, *supra* note 21.

87. *Northwest*, 905 F.2d at 1406.

construction of its statutory authority.<sup>88</sup>

The *Northern* Court also set out what it calls the Commission's most potent argument which states, "since *Colorado Interstate* permits the regulation of rates for gathering performed in connection with interstate sales, it would be inconsistent to hold that the Commission may not regulate rates for transportation over a pipeline's own gathering facilities performed in connection with admittedly jurisdictional interstate transportation."<sup>89</sup> However, as a result of Order No. 436, many interstate pipelines now primarily engage in transportation of competitive third-party gas. They have encouragement to maximize volumes, and therefore not to discriminate against third-party shippers.<sup>90</sup>

### C. Regulation by the States

In *Northern*,<sup>91</sup> the Court also stated that the basis of its analysis was the phrase "exceptions to the primary grant of jurisdiction in the section [1(b)] are to be strictly construed."<sup>92</sup> However, the Court's analysis should be looked at in the context of the material surrounding that specific phrase of the *Interstate*<sup>93</sup> case in which *Phillips*<sup>94</sup> cites in dicta. The *Phillips* Court stated:

It was the intention of Congress to give the States full freedom in these matters. Thus where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.<sup>95</sup> . . . It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests *may in some degree* be affected.<sup>96</sup>

Applying this strict construction theory to the gathering exemption, the *Northern* Court said rate regulation was consistent with the states' exercise of its regulatory functions. On the other hand, the *Northwest* Court mentions that it does not consider the FERC's alternative reasoning of sections 4 and 5 to cover its own justification for assertion of jurisdiction to review the rates. The *Northwest* Court then goes on further to state "although FERC may construct sound policy in this case, we don't believe it satisfies its own precedent or the intent of Congress."<sup>97</sup>

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88. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 642 (1972) *citing to Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) and *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 89-90 (1966).

89. *Northern*, 929 F.2d at 1269.

90. This argument is set forth on P. 26 in *Northern Natural's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*.

91. *Northern*, 929 F.2d at 1269.

92. *Id.*

93. *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690 (1947), *reh'g denied*, 332 U.S. 785 (1947).

94. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. at 679, *quoting Interstate Natural Gas Co. v. FPC*, 331 U.S. at 690-691.

95. *Interstate Natural Gas Co.*, 331 U.S. at 690.

96. *Id.* at 651.

97. *Northwest*, 905 F.2d at 1411.

Rate regulation by the FERC would be inconsistent and a substantial interference with a state's regulatory functions because the Commission does not have statutory authority to regulate in the production and gathering area under section 1(b). The Commission cannot override Congress and create jurisdiction expressly withheld by statute.<sup>98</sup>

Accordingly, the *Interstate*<sup>99</sup> Court frequently refers to *Colorado Interstate*,<sup>100</sup> where the Court acknowledged that the Commission could review costs included in sales for resale rates over which it had authority. However, the Commission had no authority establishing rates for nonjurisdictional services because "the authority of the Commission to suspend rates is restricted to rates over which it has jurisdiction."<sup>101</sup>

Notwithstanding the former argument, a facet of a state's regulatory function is also to assure compliance with its own constitution. Equal treatment is desired to eliminate invidious discrimination against interstate pipelines as opposed to gatherers and producers within a state's own jurisdiction. This justifies a powerful state argument which constitutes a substantial interference by the Commission.<sup>102</sup> With due respect to the Supremacy Clause, when the Tenth Amendment reserves to the states those powers which are not delegated to the federal government, the exercise by the state of its regulatory function can raise fundamental constitutional concerns which should be addressed by the court.

It should also be noted that the Department of Energy has recently issued a Request for Comments Concerning State Policies Affecting Natural Gas Consumption,<sup>103</sup> as part of a study for the National Energy Strategy. The request solicited comments to help understand how state policies and regulations in a wide variety of topics impact the gas industry and will aid policy makers at both the state and federal levels to develop strategies to improve efficiency in the natural gas industry.

#### D. Equal Protection

Northern and Northwest assert that the Commission's regulation of gathering rates for interstate pipelines, as distinguished from non-pipeline gather-

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98. See *Sebring Utilities Comm'n v. FERC*, 591 F.2d 1003 (5th Cir. 1979). The Commission cannot override Congress and create jurisdiction expressly withheld by statute. See also *N.L.R.B. v. Brown*, 380 U.S. 278 (1985) stating when administrative decisions are inconsistent with statutory mandate or frustrate Congressional policy underlying a statute, the reviewing courts should not affirm these decisions.

99. *Interstate Natural Gas Co.*, 331 U.S. at 690.

100. *Colorado Interstate Gas Co. v. FPC*, 142 F.2d 943 (10th Cir. 1944), *aff'd*, 324 U.S. 581 (1945).

101. *Colorado Interstate Gas Co.*, 324 U.S. at 596.

102. This substantial interference by the Commission could result in a regulatory taking according to *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), which automatically entitles compensation under either of two distinct categories of regulatory action. These two categories are regulations that compel the property owner to suffer a physical "invasion" of his property, and regulations that deny all economically beneficial and productive use of land. Interference with reasonable investment-backed expectations is another factor considered in the analysis. When the FERC attempted regulation over Northwest Pipeline's gathering facilities, evidence of economic non-viability or non-productive use of the land was present by Northwest assigning the gathering facilities to Williams.

103. Request for Comments Concerning State Policies Affecting Natural Gas Consumption, 57 Fed. Reg. 38,182 (1992).

ers, constitutes a violation of the Equal Protection Clause. Northern claimed the Commission asserted selective jurisdiction over gathering without lawful authority for that discriminatory treatment.<sup>104</sup> While the *Northern* Court stated Northern came close but avoided an explicit charge of denial of the Equal Protection Clause, it avoided addressing this question and stated the Commission's argument why it did not violate the equal protection standard. In *Northwest*, the Court stated that its reversal of the FERC's Order 270 and 270-A would eliminate the need to address Northwest's claim of denial of equal protection of the laws to it and other interstate pipelines.<sup>105</sup> The Equal Protection Clause protects corporations, like citizens, through the Due Process Clause of the Fifth Amendment.<sup>106</sup> In *Richardson v. Belcher*,<sup>107</sup> the Supreme Court stated:

While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* [rationally based and free from invidious discrimination] is perforce consistent with the due process requirement of the Fifth Amendment.

Interstate pipelines do not fit a suspect classification that permits application of a strict or intermediate scrutiny test for an equal protection claim.<sup>108</sup> Therefore, a rational basis test would be used, to ask if the disparate treatment is rationally related to a legitimate governmental purpose.<sup>109</sup>

The express language of section 1(b) does not distinguish pipelines from non-pipeline companies. Yet, the Commission's assertion over gathering relies on sections 4 and 5 which specifies rates charged by a "natural gas company."<sup>110</sup> "Natural gas company" is defined in the NGA as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."<sup>111</sup> Similarly, under the NGPA, a person selling natural gas not under the Commission's jurisdiction by the NGPA is not a "natural-gas company" subject to regulation under the NGA.<sup>112</sup> Therefore, in the Commission's assertion of jurisdiction over the gathering area, only the interstate pipelines are affected in submission to the Commission's extension of authority.

The Commission reaffirmed its explanation of an evolved nature of the interstate pipeline industry that required it to focus on and regulate the rates Northwest charges its customers for moving gas through its Piceance Area facilities.<sup>113</sup> The Commission further stated that it must be allowed flexibility

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104. *Northwest*, 905 F.2d at 1412.

105. *Northwest*, 905 F.2d at 1412.

106. *Marshall v. Kleppe*, 637 F.2d 1217, 1221 (9th Cir. 1981).

107. *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).

108. *New Orleans v. Dukes*, 427 U.S. 297 (1976). A suspect classification would be race, religion, gender, and age.

109. *Id.*

110. 15 U.S.C. § 717a(6) (1988).

111. *Id.*

112. 15 U.S.C. § 3431(a)(1) (1988). This is noted in Northern Natural's Initial Brief at p.37.

113. 43 F.E.R.C. at 62,217. This is reasserted in FERC's initial brief in the Northwest Pipeline case, pp. 40-41, stating:

in responding to changing industry conditions and structures, rather than be bound by a static approach to regulation.<sup>114</sup> This self-granted flexibility, however, should be taken into consideration and weighed against possible violation of equal protection rights guaranteed by the Constitution. This conflict between interstate pipelines and the FERC will undoubtedly surface again, probably resulting in additional litigation over this issue. Therefore, the court at that time, will need to weigh these factors involved.

### *E. Regulatory Gap*

The Commission asserted that when the NGA was enacted, Congress did not want any important aspect of this field left unregulated.<sup>115</sup> The Commission declared in *Northwest* that a "very attractive regulatory gap" would emerge if the Court should bar an exercise of the Commission's jurisdiction over federal regulation of the rates and conditions for service of the movement of natural gas in interstate commerce through Northwest's Piceance Area facilities. The Commission also argued that the states, if constitutionally empowered to regulate the Northwest facilities, would regulate in their state interests, rather than the national interests.<sup>116</sup> Furthermore, the Commission desires to carry out the purpose of the NGA and NGPA to promote competition through a unified national gas transportation network. Instrumental in the Commission's assertion of authority was *FPC v. Transcontinental Gas Corp.*,<sup>117</sup> which stated that Congress desired a comprehensive regulatory scheme not an "attractive gap." Also, when a federal agency attempts to control a problem that the state regulatory commissions can not be expected to deal with, "the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation."<sup>118</sup>

Supported by the same rationale with regard to the overriding concern of state interest in state matters and not the national interest, the Commission emphasized only one Sixth Circuit case.<sup>119</sup> This Court decided the Commission's jurisdiction over transportation covered movement from the wellhead through the interstate's gathering lines and also held the Commission's jurisdiction over such service was exclusive.<sup>120</sup>

On the other hand, both pipelines disagreed with the Commission's that

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In the past, an interstate pipeline's transportation of gas for hire was a minor aspect of its business as opposed to its sale for resale business. Moreover, in the past, the cost of gathering was rolled into the interstate pipeline's sales for resale and transportation rates. An interstate pipeline's unbundling of the costs of the field or production area movements was not an issue. Now, however, the interstate pipeline industry's focus has changed so that the transportation of gas for hire is an important element thereof and, therefore, the Commission's focus and responsibilities under the Act have changed.

114. FERC's Initial Brief in the Northwest Pipeline case, p. 41.

115. *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1, 19 (1960).

116. *Cf. FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 633 (1972); *Public Service Comm'n of Kentucky v. FERC*, 610 F.2d 439, 443 (6th Cir. 1979).

117. 365 U.S. at 28.

118. *Id.*

119. *Public Service Comm'n*, 610 F.2d at 444.

120. *Id.*

assertion of sections 4 and 5 provided jurisdiction to close this assumed regulatory gap in the regulation of transportation and sale of natural gas.<sup>121</sup> Could the Commission call this a gap and misconstrue the statutory exemption and legislative history concerning the Commission's lack of jurisdiction over gathering and gathering rates because the state may not regulate its own interest to the same extent the Commission would apply the national interest?<sup>122</sup> In 1972, the Supreme Court defined the jurisdictional scope of the Commission by stating, "a need for federal regulation does not establish [Commission] jurisdiction that Congress has not granted."<sup>123</sup>

The interpretation of section 1(b) has been discussed by many courts addressing the questions of the Commission's jurisdiction.<sup>124</sup> A very important concept emphasized by both sides in this debate is the review of legislative history leading to the NGA's enactment which assesses the Congressional intent.

The regulatory gap argument made by the Commission in *Northwest* was specifically rejected by the *Northern* Court.<sup>125</sup> Contrary to the Commission's current declaration that this gap gives the Commission jurisdiction under sections 4 and 5 of the NGA, the Commission had previously approved indirect regulation of gathering facilities.<sup>126</sup> In *Northwest*, the Court noted this fact and went on to say that the Commission's assumption is speculative in that states have no interest in this regulation.<sup>127</sup> Upon initial application of the primary function test, the FERC either has jurisdiction over facilities or it does not, and if a gap results, it was intended by Congress.<sup>128</sup> *Northern* has argued<sup>129</sup> that the Commission cannot justify extending its regulation into an area that Congress has specifically exempted and reserved to the states under the Tenth Amendment of the Constitution.<sup>130</sup>

In that regard, it should be noted that Congress did not require the states to regulate gathering. Congress excluded gathering from the Commission's jurisdiction, but in doing so simply *reserved* such area to the states.<sup>131</sup> After 50 years with only a few states enacting regulation in this area, it is self-evident that competition has enforced fair play in the market.

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121. *Northern Natural Gas Co.*, 44 F.E.R.C. ¶ 61,384, at 62,251.

122. *Supra* Article II, Legislative History and notes 40-51.

123. *Louisiana Power & Light Co.*, 406 U.S. at 635-36.

124. *See, e.g.*, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954); *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Panhandle Eastern Pipe Line Co. v. Indiana*, 332 U.S. 507 (1947); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947); and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

125. *Northwest*, 905 F.2d at 1411-12.

126. *See Galaxy Energies, Inc.*, 21 F.E.R.C. ¶ 61,208 (1982).

127. *Northwest*, 905 F.2d 1403.

128. *Id.* at 1412.

129. *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir. 1991), *cert. denied*, *Northern Natural Gas Co. v. FERC*, 112 S. Ct. 169 (1991). This argument is in *Northern's* Petition for a Writ of Certiorari.

130. *See Interstate Natural Gas Assoc. of America's* Brief in Support of Petitioner (*Northern*) to the United States Supreme Court, p. 2.

131. *Transcontinental Gas Corp.*, 365 U.S. at 8; *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 508-509 (1989); *Panhandle Eastern Pipe Line Co.*, 337 U.S. at 502, 503.



In *Phillips*,<sup>132</sup> the Court addressed the Commission's concerns about the unreasonableness of rates not under the Commission's jurisdictional status and said, "if it be assumed they are or will become unreasonable, we can only say to those who would have us find jurisdiction, what has often been said by the courts, that we think the remedy lies with Congress."<sup>133</sup> However, as pointed out earlier in the *Northwest* summary, the Commission felt differently in the August 28, 1992 Order Denying Requests for Rehearing, and explained that it could exert authority over the rates of Williams by sections 4 and 5 even though the Commission granted Williams' request of a petition for a declaration order stating that the subject facilities were gathering facilities. The Commission stated in that order it would extend authority over a pipeline affiliate the same as to an interstate pipeline itself.

#### IV. CONCLUSION

*Northwest* and *Northern* have the same common thread in the beginning of each suit, a challenge that a gathering charge was excessive. As each case unravelled, each Circuit went in different directions in assessing the FERC's jurisdiction. While the Tenth Circuit looked toward the gathering tests, the Eighth Circuit looked toward its responsibilities in implementing Order No. 436. However, it appears the backbone theories the Courts were using were in direct conflict, such as the affiliate status of gatherers owned by interstate pipelines and the existence and application of a regulatory gap in section 1(b). Due to the Supreme Court denying *Northern's* appeal, it is unknown how this conflict between the Circuits may be resolved.

According to the statutory construction and legislative history analysis of section 1(b) of the NGA as it pertains to the scope of authority for the gathering exemption, both pipelines have a strong argument that the Commission had exceeded its authority in regulating gathering and gathering rates. But at the same time, the Commission has been empowered by Congress to carry out the purposes of the NGA and NGPA. The court in future cases will have an interesting task ahead, balancing the interests of two powerful entities, large interstate pipelines that have expanded their roles in a free market economy to make ends meet in a challenging gas industry, and an administrative agency whose duty it is to manage and regulate a constantly changing industry.

To address the Commission's concerns of excessive rate charges for gathering, the *Northwest* Court has held that the remedy should lie with Congress, but the Commission and the *Northern* Court have expressed no reservations of overseeing gathering rates of interstate affiliates.

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132. *Phillips*, 347 U.S. 672.

133. *Phillips*, 10 F.P.C. at 280 (1951); See, e.g., *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 515-516 (1949); *Price v. Gurney*, 324 U.S. 100, 107 (1945); *AFL v. NLRB*, 308 U.S. 401, 411-412 (1940).