

# How FERC Confuses the Role of State and Local Authorities in Regulating Certified Natural Gas Pipelines

by Russell Kooistra\*

## I. Introduction

In 2012, natural gas flaring in North Dakota wasted \$1 billion in fuel and released greenhouse gas (“GHG”) emissions equivalent to one million cars on the road.<sup>1</sup> While gas producers would prefer to sell this gas, 30% of North Dakota’s gas is burned off primarily due to a lack of pipeline infrastructure.<sup>2</sup> The \$1 billion wasted and GHG emitted from flaring off natural gas in North Dakota evidences a strong example of how America needs to improve and expand its natural gas infrastructure.

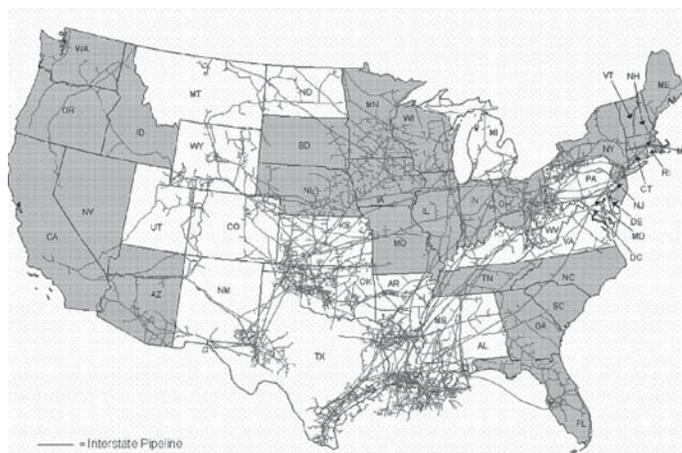
In addition, more natural gas infrastructure is required to meet increasing energy demand. Natural gas consumption by the electricity sector has increased steadily throughout the last few decades.<sup>3</sup> The natural gas industry faces major infrastructure concerns, however, including having inadequate infrastructure to connect supply to this growing demand.<sup>4</sup> Because the electric power sector increasingly relies on natural gas, having a strong natural gas infrastructure becomes crucial as many states rely on interstate pipelines for their natural gas supply.<sup>5</sup> Figure 1 depicts the network of interstate pipelines in 2007, with states in grey being at least 85% dependent on the interstate pipeline network.

Because interstate pipelines can have significant environmental, economic, and safety impacts, Congress enacted

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1. RYAN SALMON & ANDREW LOGAN, CERES, *FLARING UP: NORTH DAKOTA NATURAL GAS FLARING MORE THAN DOUBLES IN TWO YEARS 2–3* (2013), available at <http://www.ceres.org/resources/reports/flaring-up-north-dakota-natural-gas-flaring-more-than-doubles-in-two-years>.  
 2. *Id.*  
 3. U.S. ENERGY INFO. ADMIN., *ANNUAL ENERGY REVIEW 2011 186* (2012), available at <http://www.eia.gov/totalenergy/data/annual/pdf/aer.pdf>.  
 4. William B. Tye & Jose Antonio Garcia, *Who Pays, Who Benefits, and Adequate Investment in Natural Gas Infrastructure*, 28 *ENERGY L.J.* 1, 3 (2007).  
 5. *About U.S. Natural Gas Pipelines—Interstate Natural Gas Pipeline Segment*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngpipeline/interstate.html](http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/interstate.html) (last visited July 30, 2014).

Figure 1



Source: *About U.S. Natural Gas Pipelines—Interstate Natural Gas Pipeline Segment*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngpipeline/interstate.html](http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/interstate.html) (last visited July 30, 2014).

various laws that require pipeline companies to obtain approval from regulatory agencies.<sup>6</sup> For example, Congress enacted the Natural Gas Act (“NGA”)<sup>7</sup> to preempt the field of interstate transportation of natural gas, providing the Federal Energy Regulatory Commission (“FERC”) with comprehensive and exclusive power to regulate interstate natural gas facilities.<sup>8</sup> Under section 7(c) of the NGA, an interstate pipeline company must acquire a certificate of public convenience and necessity (“CPCN”) from FERC prior to constructing or extending such a facility.<sup>9</sup> Therefore, based on the NGA’s requirements, an interstate pipeline company may only receive a CPCN if the facility can show that construction of the facility is in the public convenience and necessity.

6. Joan M. Darby et al., *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities in LNG Terminals After the Energy Policy Act of 2005*, 6 *TEX. J. OIL GAS & ENERGY L.* 335, 337 (2011).  
 7. The Natural Gas Act of 1938, 15 U.S.C. §§ 717–717w (2012).  
 8. *See id.* § 717(d)–(f).  
 9. *Id.* § 717f(c)(1)(A).

While section 7(c) confers FERC the exclusive jurisdiction over the siting, construction, operation, or expansion of interstate natural gas facilities, pipeline companies additionally face obstacles from state and local governments.<sup>10</sup> Some of these state and local authorities use lawful regulatory power delegated by parallel federal programs. For example, states exercise delegated power from the Clean Water Act (“CWA”)<sup>11</sup>, the Coastal Zone Management Act (“CZMA”),<sup>12</sup> and the Clean Air Act (“CAA”)<sup>13</sup> that provide additional requirements with which pipeline companies must comply. States can also attempt to block or delay projects by using purely state and local laws, such as zoning requirements.<sup>14</sup>

Even though the NGA confers exclusive regulatory power to FERC,<sup>15</sup> FERC has issued contradictory rulings regarding the role of state and local authorities once a pipeline company receives a CPCN. At times, FERC has invoked its preemptive authority and issued decisions overturning a state or local law or regulation.<sup>16</sup> In other instances, FERC has suggested that pipeline companies must comply with state and local laws and regulations, even after issuing a CPCN.<sup>17</sup> Furthermore, FERC has conditioned the requirement that pipeline companies comply with state and local laws and regulations depending on their reasonableness.<sup>18</sup> Thus, FERC adjudications regarding the applicability of state and local laws and regulations, in light of differing federal requirements, have been inconsistent. These various rulings can confuse pipeline companies, which are often unsure of the regulations with which they must comply.

Federal courts have added to the confusion regarding FERC’s preemptive authority. The U.S. Supreme Court originally held that the NGA preempts state and local provisions regarding the siting, construction, extension, and operation of natural gas facilities in *Schneidewind v. ANR Pipeline Co.*<sup>19</sup> Since that ruling, the federal courts have consistently held that purely state and local regulations falling within those categories are preempted by the NGA.<sup>20</sup> The federal courts note that requiring pipeline companies to comply with these state and local regulations collides with the NGA and poses significant obstacles to natural gas pipeline projects.<sup>21</sup> The U.S. Court of Appeals for the Eighth Circuit (“Eighth Circuit”) even declared that FERC’s policy of requiring companies to cooperate with both federal and state and local law is confusing.<sup>22</sup> Whereas FERC has often required pipeline companies to comply with state and local authorities, federal

courts have consistently held that the NGA preempts state and local regulations when a project has already received a CPCN.<sup>23</sup>

FERC’s inconsistent holdings regarding state and local requirements means that pipeline companies must sort through these regulations, which may pose an obstacle to the construction of much-needed natural gas infrastructure. Pipeline companies and state and local authorities are unsure which regulations apply, especially after comparing FERC’s holdings with contradictory federal court holdings. This confusion leads to local regulation and litigation that often delay natural gas projects.<sup>24</sup>

To clarify the roles between state and local authorities and FERC, thus permitting a more streamlined construction process for certified natural gas pipelines, this Note proposes a two-part solution. First, Congress should amend section 7(c) of the NGA to declare that FERC-issued CPCNs preempt the field of siting, construction, expansion, and operation of interstate natural gas pipelines, thus preempting state and local laws within that field. Second, FERC should implement Congress’s intent through an order, implementing rule, or adjudication, explaining that it has such exclusive jurisdiction and that compliance with preempted state and local laws and regulations is not mandatory; however, FERC may wish to encourage pipelines to comply with appropriate regulations. Once these federal authorities clarify that the NGA preempts state and local authorities, interstate pipeline companies would know that compliance with state and local programs is not required, eliminating the confusion that leads to unnecessary delays in the development of natural gas pipeline infrastructure.

In making this argument, Part II of this Note will focus on the structure and necessity of natural gas infrastructure. Part III will discuss the federal grant of exclusive regulatory authority over interstate natural gas facilities to FERC. Part IV will explain concurrent authority and cooperative federalism—state laws implementing federal programs which the NGA does not preempt. Part V will describe (1) FERC’s inconsistent decisions on state and local authority over certified natural gas pipeline projects, (2) federal courts’ consistent decisions regarding this authority, and (3) the resulting confusion pipeline owners face when seeking to site a new facility. In response to these problems, Part VI will propose that Congress amend the NGA and that FERC implement Congress’s clarified intent through an order, implementing rule, or adjudication. Part VII briefly concludes.

## II. Natural Gas Supply and Infrastructure

From 2009 to 2012, overall consumption of natural gas in the United States rose from 22.91 trillion cubic feet to 25.53 trillion cubic feet, accounting for about a quarter of

10. Darby et al., *supra* note 6, at 336.

11. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251 et seq. (2012)).

12. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451 et seq. (2012)).

13. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401 et seq. (2012)).

14. See *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238 (D.C. Cir. 2013).

15. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988).

16. *Iroquois Gas Transmission Sys., L.P.*, 59 FERC ¶ 61,094, at 61,360 (1992).

17. See *Tex. E. Transmission, LP*, 121 FERC ¶ 61,003, at P 1 (2007).

18. *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at P 21 n.20 (2013).

19. *Schneidewind*, 485 U.S. at 300–01.

20. *E.g.*, *Islander E. Pipeline Co., L.L.C. v. Blumenthal*, 478 F. Supp. 2d 289, 295 (D. Conn. 2007).

21. See, *e.g.*, *id.*

22. *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 823 (8th Cir. 2004).

23. See *id.* at 821; *Schneidewind*, 485 U.S. at 300–01; *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244 (D.C. Cir. 2013); *Nat’l Fuel Gas Supply Corp. v. Pub. Serv. Comm’n of N.Y.*, 894 F.2d 571, 573 (2d Cir. 1990); *Islander E. Pipeline Co., L.L.C.*, 478 F. Supp. 2d at 295.

24. Darby et al., *supra* note 6, at 339.

electricity generation in the United States.<sup>25</sup> The primary consumer of natural gas in the United States is the electric power sector.<sup>26</sup> The electric sector is becoming progressively more reliant on natural gas supply: from 2010 to 2013, the amount of electricity generated from natural gas combustion appreciated by number of megawatt-hours (“MWh”) generated from natural gas appreciated by about 126 million MWh.<sup>27</sup> By comparison, wind generation, the fuel sector that experienced the second greatest rise in MWh generation during this time, grew by about 73 million MWh.<sup>28</sup>

Because natural gas supplies are located in relatively distinct geographical areas, connecting supply to most of the demand requires a comprehensive pipeline infrastructure.<sup>29</sup> As depicted by Figure 1, thirty-two of the lower forty-eight states are almost entirely dependent on interstate pipelines for their supply of natural gas.<sup>30</sup> In addition to transmission pipelines, natural gas pipeline infrastructure also includes compressor stations<sup>31</sup> and market centers.<sup>32</sup> Natural gas not being transported can be stored in underground storage sites, usually located in between the beginning and end terminals of the pipeline.<sup>33</sup> These facilities comprise the basic components of the much-needed interstate pipeline systems that distribute gas to the electric power sector and other consumers.<sup>34</sup>

The natural gas industry faces a lack of adequate infrastructure connecting supply to demand.<sup>35</sup> Rising demand for natural gas puts a strain on existing natural gas infrastructure.<sup>36</sup> The availability, reliability, and price of natural gas are directly linked to its infrastructure.<sup>37</sup> In 2003, inadequate natural gas infrastructure caused natural gas shortages and price spikes in the midwestern and northeastern United States.<sup>38</sup> Due to supply constraints, including inadequate pipeline infrastructure, gas prices in New England for the winter of 2013–2014 reached an average high of \$14.52 per million British thermal units (“MMBtu”),

whereas the January 2014 forward basis at Transco Zone 6 in New York City<sup>39</sup> settled around \$4.89 per MMBtu.<sup>40</sup> Therefore, natural gas infrastructure additions are necessary to meet rising demands in the electric power sector.<sup>41</sup>

### III. FERC Regulatory Authority Under the NGA

Because of the economic, environmental, and social effects of interstate natural gas pipeline facilities, Congress enacted federal regulations to cover these pipelines.<sup>42</sup> Section 7(c) of the NGA requires interstate pipeline companies to receive a CPCN from FERC before constructing an interstate pipeline facility.<sup>43</sup> FERC will only issue a CPCN if the pipeline company is willing to comply with FERC and the NGA’s regulatory scheme,<sup>44</sup> including any reasonable terms and conditions that FERC deems necessary.<sup>45</sup> In *Schneidewind v. ANR Pipeline Co.*, the U.S. Supreme Court held that “the NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale” through a comprehensive scheme of regulatory powers.<sup>46</sup> With respect to FERC’s authority over the transportation of natural gas in interstate commerce, the Court held that the NGA preempts the field of siting, construction, operation, and expansion of interstate natural gas facilities.<sup>47</sup> In such a scheme, state and local laws and regulations are trumped by federal laws and regulations governing that field. Field preemption exists when Congress has unmistakably ordained its laws to regulate exclusively a part of commerce.<sup>48</sup> Whether this intention is explicit or implicit, state laws also regulating that part of commerce must fall.<sup>49</sup>

The Energy Policy Act of 2005 (“EPAc ‘05”)<sup>50</sup> addressed the roles of states in the FERC review process when issuing a license pursuant to section 7(c) of the NGA.<sup>51</sup> EPAc ‘05 retained FERC’s lead role as the agency that prepares

25. U.S. ENERGY INFO. ADMIN., NATURAL GAS ANNUAL 2012 1 (2012), available at <http://www.eia.gov/naturalgas/annual/pdf/nga12.pdf>.

26. *Id.*

27. See *Electricity Data Browser*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/electricity/data/browser/> (last visited Dec. 22, 2014).

28. See *id.*

29. See *Overview of Natural Gas—Resources*, NATURALGAS.ORG, <http://naturalgas.org/overview/resources/> (last visited July 30, 2014).

30. *About U.S. Natural Gas Pipelines—Interstate Natural Gas Pipeline Segment*, *supra* note 5.

31. Compressor stations receive the natural gas at an intake and increase its pressure and flow rate so that the gas can continue to travel through the pipeline. *About U.S. Natural Gas Pipelines—Transportation Process and Flow*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngpipeline/process.html](http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/process.html) (last visited July 30, 2014).

32. Market centers are locations where pipelines intersect and flows are transferred. *Id.*

33. *Id.*

34. Liquefied natural gas (“LNG”) terminals were excluded from this discussion because they have an additional set of requirements. For provisions specific to LNG requirements, see 15 U.S.C. §§ 717b–717b-1 (2012).

35. Tye & Garcia, *supra* note 4, at 3.

36. Sarah McQuillen Tran, *Rebuilding Our Power Without Procedural Safeguards*, 32 HARV. ENVTL. L. REV. 217, 222 (2008).

37. MIT ENERGY INITIATIVE, THE FUTURE OF NATURAL GAS 131 (2011), available at [http://mitei.mit.edu/system/files/NaturalGas\\_Report.pdf](http://mitei.mit.edu/system/files/NaturalGas_Report.pdf).

38. FED. ENERGY REGULATORY COMM’N, STAFF INVESTIGATING TEAM, REPORT ON THE NATURAL GAS PRICE SPIKE OF 2003 5 (2003), available at <http://www.ferc.gov/legal/maj-ord-reg/land-docs/The-Price-Spike-Report-07-23-03.pdf>.

39. Transco Zone 6 in New York City is a physical natural gas trading hub on the Transcontinental Gas Pipeline that includes delivery points serving New York City. *Natural Gas Glossary*, SPRAGUEENERGY.COM, <http://www.spragueenergy.com/natgas/additional-resources> (last visited Dec. 22, 2014). Prices at this point reflect the trading of natural gas at this hub.

40. Press Release, U.S. Energy Info. Admin., High Prices Show Stresses in New England Natural Gas Delivery System (Feb. 7, 2014), available at [http://www.eia.gov/naturalgas/review/deliverysystem/2013/pdf/newengland\\_natgas.pdf](http://www.eia.gov/naturalgas/review/deliverysystem/2013/pdf/newengland_natgas.pdf). Natural gas price spikes in New York City were less frequent than in Boston during the winter of 2013–2014; however, on certain days, New York City had higher spot prices. *Id.*

41. This is especially true for the Marcellus shale, which needs substantial infrastructure additions. MIT ENERGY INITIATIVE, *supra* note 37, at 145. As of early 2010, less than one-half of the 1,100 wells in the Pennsylvania Marcellus had connecting pipeline access. *Id.* More pipelines are needed to move this gas to the market.

42. Darby et al., *supra* note 6, at 337.

43. 15 U.S.C. § 717f(c)(1)(A) (2012).

44. Darby et al., *supra* note 6, at 339–40.

45. 15 U.S.C. § 717f(e).

46. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988).

47. *Id.*

48. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

49. *Id.*

50. Energy Policy Act of 2005, Pub. L. No. 109-58, 100 Stat. 567 (2005) (codified at 15 U.S.C. § 717b (2012)).

51. 15 U.S.C. § 717n(b)(1)–(2), (c)(1) (2012).

an environmental impact statement (“EIS”) pursuant to the National Environmental Policy Act before issuing a CPCN to a pipeline company.<sup>52</sup> When a pipeline company files an application for a CPCN, states may intervene and participate in FERC proceedings or file protests and comments on environmental, safety, planning, and zoning issues.<sup>53</sup> During review of a pipeline application, FERC considers these comments, protests, and evidence filed by agencies and private parties; visits the project site; meets with both federal and state and local agencies to discuss the project impacts; and conducts public meetings with the affected localities.<sup>54</sup> Moreover, state agencies may comment on FERC’s draft and final EIS.<sup>55</sup>

In addition to overseeing the intervention of states in the CPCN process, FERC retains the sole ability to set a schedule for all federal authorizations.<sup>56</sup> In doing so, FERC must “ensure expeditious completion of all such proceedings”<sup>57</sup> and “comply with applicable schedules established by Federal law.”<sup>58</sup> Accordingly, FERC has a duty to ensure that state and federal interventions do not interfere with the prompt processing of an application or construction schedule that FERC establishes.

#### IV. State Intervention Under Parallel Federal Programs

As part of its lead role in licensing and regulating interstate pipeline facilities, FERC must coordinate “all applicable Federal authorizations” required before a pipeline company receives a CPCN.<sup>59</sup> Such authorizations usually include authorizations under the CWA, the CZMA, and the CAA. Under these laws, Congress delegated power to the states to implement federal programs, giving states the opportunity to regulate projects.<sup>60</sup> Incidentally, however, delegation of power to the states under these statutes has created the potential for delay and regulatory obstruction.<sup>61</sup> While other state and local regulations that fall under FERC’s preemptive field are invalid, FERC regulations complement these federal programs and thus do not preempt them.<sup>62</sup> This provides states with a valid avenue to block or delay the timely construction of interstate pipeline facilities.<sup>63</sup>

52. *Id.* See also National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified as amended at 42 U.S.C. §§ 4321 et seq. (2012)).

53. 18 C.F.R. §§ 157.10(a), 380.10(a), 385.214 (2014); WHATCOM CNTY., WASH., NATURAL GAS AND HAZARDOUS LIQUID PIPELINE REPORT 7 (2011), available at <http://www.mrsc.org/govdocs/w47/pipelinerpt.pdf>.

54. Darby et al., *supra* note 6, at 342–43.

55. *Id.*

56. 15 U.S.C. § 717n(c)(1).

57. *Id.* § 717n(c)(1)(A).

58. *Id.* § 717n(c)(1)(B).

59. *Id.* § 717n(b).

60. See, e.g., 33 U.S.C. § 1341(a)–(b) (2012) (vesting states with the authority to issue water discharge permits under the CWA’s National Pollutant Discharge Elimination System).

61. Jacob Dweck et al., *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473, 481–82 (2006).

62. *Id.* at 482.

63. See *id.* at 482–87.

#### A. The CWA

The CWA enables states to develop and enforce water quality standards under supervision from the Environmental Protection Agency (“EPA”) pursuant to CWA section 401.<sup>64</sup> EPA can decide to accept the state’s program or take control over the CWA program in the state.<sup>65</sup> If EPA accepts the state’s program, permitted facilities must be certified by the state as compliant with the state’s water quality program.<sup>66</sup> Because pipeline companies must comply with state regulatory requirements under federal programs, FERC must withhold a CPCN or issue the CPCN conditionally until the pipeline company receives a CWA section 401 water quality certificate.<sup>67</sup> Accordingly, the state can legally delay or block a project if the pipeline company has not received a permit under its CWA program or if the pipeline company does not comply with the state’s water quality program.<sup>68</sup>

#### B. The CZMA

States also have delegated authority under the CZMA.<sup>69</sup> The CZMA provides a state’s Secretary of Commerce with the power to veto federal permitting activities affecting the state’s coastal zones.<sup>70</sup> Under the CZMA, any federal agency that approves or develops a project in the coastal zone of a state must ensure that the project is consistent with the state’s approved coastal zone management programs.<sup>71</sup> If a state objects to a project within six months of receiving the information required to conduct its review, FERC may not certify the pipeline unless the state’s Secretary of Commerce overrules the objection.<sup>72</sup>

#### C. The CAA

The CAA is a federal law, with some authority delegated to the states, designed to improve the nation’s air quality. A key provision of the CAA directs the EPA to promulgate national ambient air quality standards (“NAAQS”) for air pollutants.<sup>73</sup> States must develop state implementation plans (“SIPs”) to implement, maintain, and enforce the NAAQS and submit these SIPs to the EPA for approval.<sup>74</sup> If the EPA finds that a SIP is inadequate or if a state does not develop a SIP, then the EPA can require the state to adhere to a federal implementation plan.<sup>75</sup> One of the requirements for a SIP to win approval is that the SIP must include an air quality permit program for the “construction of any stationary source within the areas covered by the plan [in order] to assure that

64. 33 U.S.C. § 1341(a)–(b).

65. *Id.* § 1341(a)(1).

66. *Id.*

67. *Id.* § 1341(a).

68. Darby et al., *supra* note 6, at 339.

69. Dweck et al., *supra* note 61, at 485.

70. 16 U.S.C. § 1456 (2012).

71. *Id.* § 1456(c)(2).

72. *Id.* § 1456(c)(3)(A).

73. 42 U.S.C. § 7410(a)(1) (2012).

74. *Id.* § 7410(a)(2).

75. *Id.* § 7410(c).

[NAAQS] are achieved.”<sup>76</sup> If a developer wishes to construct a compressor facility in an area covered by a state’s SIP, then he or she must receive a permit from the state to assure that any additional emissions from the compressor facility will not violate the NAAQS.

## V. FERC and Federal Court Rulings on NGA Preemption

State and local authorities also attempt to delay or block the construction of interstate natural gas pipelines using purely local laws, even if the pipelines have already received a CPCN.<sup>77</sup> Both FERC and federal courts have issued rulings determining whether state and local authorities may require certified pipeline companies to abide by these laws. Pipeline companies struggle with the confusion resulting from these conflicting rulings.

### A. FERC Adjudications on NGA Preemption

Where state and local authorities attempt to enforce non-federal regulations, FERC adjudications have established divergent precedents regarding the activities of state and local permitting authorities.<sup>78</sup> FERC has recognized its preemptive authority, then encouraged companies to comply with state and local laws, and then seemingly required companies to comply with these laws.

### I. FERC Recognizes Its Preemptive Authority

FERC has issued rulings in which it invokes its preemptive authority under the NGA over the siting, construction, expansion, or operation of natural gas pipelines. In *Gulf Crossing Pipeline Co. LLC*, FERC approved Gulf Crossing’s request for an extension of time for the in-service date for a compressor station.<sup>79</sup> In response to concerns from a state agency, FERC reminded the state of the NGA’s preemption by declaring, “[A]ny state or local permits issued . . . must be consistent with the conditions of this certificate.”<sup>80</sup> Furthermore, in *Iroquois Gas Transmission System, L.P.*, a pipeline company asked FERC to clarify that the pipeline need not comply with certain authorizations required by the Town of Mansfield prior to construction.<sup>81</sup> FERC responded that it encourages applicants to cooperate with state and local authorities with respect to state-issued stream crossing permits, but that this “does not mean that those agencies may undermine through their regulatory requirements, the force and effect of a certificate issued by the Commission.”<sup>82</sup>

## 2. FERC Issues Confusing and Contradictory Rulings

Whereas FERC has recognized the preemptive power of its CPCNs, FERC has also issued rulings encouraging pipeline companies to cooperate with state and local authorities and has gone so far as to seemingly require compliance with state and local laws. In *Transcontinental Gas Pipe Line Co., LLC*, New Jersey sought an explanation as to why FERC’s CPCN preempted state regulations governing eminent domain takings by public utilities.<sup>83</sup> Although FERC initially acknowledged that the NGA and Commission regulations “generally” preempt state and local law, FERC emphasized that “applicants [ ] cooperate with state and local agencies with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures.”<sup>84</sup> This holding encourages future pipeline companies to cooperate with state and local authorities, but as described below, FERC has used other language that runs the gamut on whether pipelines need to comply.

FERC has also issued rulings *suggesting* that pipeline companies must comply with state and local regulations. In *Pacific Connector Gas Pipeline, LP*, Oregon petitioned FERC for a declaratory order asking FERC to declare that Pacific Connector failed to make bona fide attempts to obtain landowner authorization for the state removal-fill permit application.<sup>85</sup> FERC dismissed the petition on other grounds but concluded that “interstate pipelines are *expected* to acquire all necessary permits, easements, and licenses prior to construction . . . .”<sup>86</sup> FERC clarified that “a rule of reason must govern both the State and local authorities’ exercise of their power and an applicant’s bona fide attempts to comply with State and local requirements.”<sup>87</sup>

FERC has issued rulings with stronger language indicating pipeline companies *must* comply with state and local rules. In *Texas Eastern Transmission, LP*, local authorities sought to intervene and requested a hearing and stay of the authorization granting the CPCN for the pipeline, arguing that a compressor station’s location required zoning approval and permits under the Pennsylvania Sewage Facility Act and the Pennsylvania Uniform Construction Code.<sup>88</sup> FERC denied the intervention on other grounds but concluded that, while the NGA preempts state and local authorities that “conflict” with federal regulations or would delay construction, “applicants may be required to comply with appropriate state and local regulations where no conflict exists.”<sup>89</sup>

FERC sometimes conditions the requirement that pipeline companies comply with state and local rules on the type and effect of regulations. In *Dominion Transmission, Inc.*, a town requested rehearing on a CPCN on the grounds that

76. *Id.* § 7410(a)(2)(C).

77. *See, e.g., Gulf Crossing Pipeline Co. LLC*, 127 FERC ¶ 61,299, at P 20 (2009).

78. *See id.*

79. *Id.* at P 21.

80. *Id.* at P 20 (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301–02 (1988)).

81. *Iroquois Gas Transmission Sys., L.P.*, 59 FERC ¶ 61,094, at 61,345 (1992).

82. *Id.* at 61,346–47.

83. *Transcon. Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091, at P 144 (2012).

84. *Id.* at P 107.

85. *Pac. Connector Gas Pipeline, LP*, 134 FERC ¶ 61,102, at PP 1, 4 (2011).

86. *Id.* at P 12.

87. *Id.* at P 11.

88. *Tex. E. Transmission, LP*, 121 FERC ¶ 61,003, at PP 1, 3 (2007).

89. *Id.* at P 12.

the pipeline company's compressor facility failed to comply with local zoning approval necessary for a CAA permit.<sup>90</sup> Although FERC held that the CPCN preempted the zoning requirements, FERC further stated that "state and local regulations are preempted by the NGA to the extent they conflict with federal regulation, impose conditions above the federal requirements, or would delay the construction and operation of facilities."<sup>91</sup>

Alternatively, in *Islander East Pipeline Co.*, FERC used the equivalent of a "reasonableness" standard to overrule a local agency assertion that another pipeline route was superior to the Commission-approved route.<sup>92</sup> FERC maintained that, while pipeline companies should disregard unreasonable state or local rules, the mere fact that "a state or local authority requires something more or different than the Commission, however, does not make it unreasonable" for an applicant to comply with both FERC's and other agencies' rules.<sup>93</sup> FERC further stated that additional state and local requirements may impose additional costs or delays in pipeline construction, but not all costs and delays are unreasonable in light of FERC's goal to include state and local authorities.<sup>94</sup> FERC refrained from explaining how much additional cost or delay was unreasonable.<sup>95</sup> FERC simply did not want to referee disputes between certified pipeline companies and state and local agencies.<sup>96</sup> Finally, FERC stated that, to the extent a state causes unreasonable delays in issuance of an approval, the applicant could proceed without such approval or could bring the matter before a federal court.<sup>97</sup>

FERC had the opportunity to clarify the reasonableness of delay standard in *Maritimes & Northeast Pipeline, LLC*. There, two certified pipeline companies challenged additional conditions that New Hampshire was imposing on the construction of the applicants' pipeline.<sup>98</sup> FERC ruled that a number of additional conditions would not unreasonably delay the project, including a state review and approval requirement with respect to pipeline route surveys, even to the extent the anticipated turnaround for such approval might exceed ten days, and additional endangered species survey requirements, even though those requirements could threaten the proposed in-service date of the pipeline.<sup>99</sup>

Putting the holdings together, FERC's policy regarding its preemptive power appears to be that states must respect the federal authority behind a CPCN by not unreasonably delaying a project or conflicting with federal regulations.<sup>100</sup> A state requiring something more or different, however, or some delays and additional costs, does not necessarily mean the

state and local regulations are unreasonable.<sup>101</sup> If FERC finds that the state and local regulations are reasonable and do not conflict with FERC's regulations, pipeline companies may be required to comply with the state and local regulations.<sup>102</sup>

## B. Federal Court Rulings on FERC Preemption

Federal courts, on the other hand, have been consistent with their rulings on FERC preemptive authority over state and local authorities. The U.S. Supreme Court held in *Schneidewind* that FERC has preemptive authority over the field of transportation of interstate natural gas.<sup>103</sup> In *Schneidewind*, the U.S. Supreme Court struck down a state law because it was "a regulation of the rates and facilities of natural gas companies used in transportation and sale for resale of natural gas in interstate commerce," thus establishing that FERC has exclusive jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce.<sup>104</sup> With respect to the transportation of natural gas in interstate commerce, federal courts have consistently followed the holding in *Schneidewind*, ruling that FERC-issued CPCNs preempt state and local authorities that impose conditions within the field of siting, construction, operation, and expansion of interstate natural gas facilities.

For example, in *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, a pipeline company filed at court in anticipation of state commission attempts to enforce a state certification requirement, which included environmental review, for its FERC-certified pipeline construction.<sup>105</sup> The U.S. Court of Appeals for the Second Circuit ("Second Circuit") held for the pipeline company, finding that FERC has authority to consider environmental issues, such that states may not engage in concurrent site-specific environmental review, and that FERC has exclusive jurisdiction over the siting, construction, operation, or expansion of interstate natural gas facilities.<sup>106</sup> The Second Circuit reasoned that allowing agencies with only local constituencies to regulate the facilities would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need.<sup>107</sup> Thus, the Second Circuit held that the FERC-issued CPCN preempted the state law because the NGA confers FERC exclusive authority over the field of interstate natural gas transportation and because FERC already conducted a federal environmental review.

Likewise, in *Northern Natural Gas Co. v. Iowa Utilities Board*, the pipeline company sought relief from the requirements imposed by the state regarding soil conservation and restoration of agricultural lands following pipeline maintenance.<sup>108</sup> The Eighth Circuit held that the NGA preempts

90. *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at PP 16–17 (2013).

91. *Id.* at P 21 n.20.

92. *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at P 113 (2003).

93. *Id.*

94. *Id.*

95. *See id.*

96. *Id.* at P 114.

97. *Id.*

98. *Maritimes & Ne. Pipeline, LLC*, 81 FERC ¶ 61,166, at 61,723 (1997).

99. *Id.* at 61,730–31.

100. *Report of the Committee on Natural Gas Regulation*, 19 ENERGY L.J. 431, 442–43 (1998).

101. *Id.* at 443.

102. *Tex. E. Transmission, LP*, 121 FERC ¶ 61,003, at P 12 (2007).

103. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988).

104. *Id.* at 306.

105. *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 571, 572 (2d Cir. 1990).

106. *Id.* at 576–77.

107. *Id.* at 579.

108. *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 818–19 (8th Cir. 2004).

the field of siting, construction, operation, or expansion of interstate natural gas facilities.<sup>109</sup> The Eighth Circuit determined that, although FERC's rulings could be read to mean that pipeline companies must comply with state and local law, only Congress can determine preemption issues.<sup>110</sup> Furthermore, the Court stated that FERC's "confusing" policy of requiring companies to cooperate with both federal and state and local law "does not change the preemptive effect of the NGA as enacted by Congress."<sup>111</sup>

In *Islander East Pipeline Co., L.L.C. v. Blumenthal*, the U.S. District Court for the District of Connecticut ("District of Connecticut") continued the trend of holding that the NGA preempts state and local laws. In that case, the pipeline owner petitioned for a declaratory judgment that the NGA preempted Connecticut's drilling and dredging regulatory program.<sup>112</sup> The District of Connecticut held that the state program was preempted and that allowing the state to follow its program and possibly deny the permit "would pose a significant obstacle to the project, presenting the 'imminent possibility of collision . . . [with] the NGA.'"<sup>113</sup>

Finally, in *Dominion Transmission, Inc. v. Summers*, Dominion Transmission, Inc. ("Dominion") sought judicial review when Maryland refused to issue an air quality permit under the state's CAA program after Dominion received a CPCN from FERC.<sup>114</sup> While holding that the CPCN did not preempt Maryland's CAA requirement, the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") held that Dominion complied with the "applicable" zoning laws as required by the state's CAA program because Dominion had already received a CPCN from FERC, thus preempting the state's "applicable" zoning laws.<sup>115</sup>

### C. The Confusion Resulting From the Divergent Holdings

Pipeline companies looking to construct or expand much-needed interstate pipeline facilities face several problems when coping with this mass of federal law. First, they must overcome the obstacle of state regulation that is part of a federally-delegated program that can block or delay pipeline projects, discussed above in Part IV. In this instance, the law states that the pipelines must comply with the federally-delegated state programs.<sup>116</sup> In addition to the federally-delegated programs, pipeline owners must also determine whether they must comply with state and local regulations that are not part of a federal program.<sup>117</sup>

## I. FERC Adjudications Regarding NGA Preemption

In determining which state and local regulations with which to comply, pipeline companies are first presented with FERC rulings. FERC has laid out an inconsistent set of precedents that are difficult to follow. FERC states that "any state or local permits issued . . . must be consistent with the conditions of this certificate"<sup>118</sup> and that state agencies may not "undermine through their regulatory requirements, the force and effect of a certificate issued by the Commission."<sup>119</sup> In these holdings, FERC appears to be flexing its preemptive muscle.

In other holdings, FERC appears to encourage pipeline companies to cooperate with state and local agencies.<sup>120</sup> FERC also appears to take a further step by requiring pipeline companies to comply with state and local regulations,<sup>121</sup> so long as the regulations do not cause unreasonable delays, conflict with federal regulations, or impose conditions above the federal requirements.<sup>122</sup> The fact that a state or local authority "requires something more or different than the Commission" does not automatically render that regulation unreasonable.<sup>123</sup>

Several problems arise when reading these holdings together. First, FERC may require a pipeline company to comply with certain state and local regulations. FERC has also issued rulings, however, preserving its vested field preemption.<sup>124</sup> If FERC requires a pipeline company to comply with a state or local rule regulating the siting, construction, operation, or expansion of an interstate natural gas facility, this law also falls within the NGA's preempted field and, thus, should be invalid. FERC appears to be simultaneously asserting its preemptive authority over the field while also requiring pipeline companies to submit to certain state and local regulations within that field.

Second, FERC's holdings contradict themselves in another way. When discussing its preemptive power, FERC cites *Schneidewind*, which held that FERC has preemptive authority over the transmission of natural gas in interstate commerce.<sup>125</sup> When discussing the reasonableness of state and local regulations, however, FERC claims it will not require pipeline companies to comply with state and local regulations to the extent they conflict with federal rules.<sup>126</sup> FERC concurrently cites to its field preemptive authority over the siting, construction, operation, or expansion of interstate natural gas facilities while discussing whether state and local laws conflict with its regulations, which resembles conflict preemption.<sup>127</sup> Under the doctrine of field preemption, if a state or

109. *Id.* at 820–21.

110. *Id.* at 823–24.

111. *Id.*

112. *Islander E. Pipeline Co., L.L.C. v. Blumenthal*, 478 F. Supp. 2d 289, 290–91 (D. Conn. 2007).

113. *Id.* at 295.

114. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

115. *Id.* at 245.

116. Dweck et al., *supra* note 61, at 482.

117. See *Maritimes & Ne. Pipeline LLC*, 81 FERC ¶ 61,666, at 61,728 (1997).

118. *Gulf Crossing Pipeline Co. LLC*, 127 FERC ¶ 61,299, at P 20 (2009).

119. *Iroquois Gas Transmission Sys., L.P.*, 59 FERC ¶ 61,094, at 61,346–47 (1992).

120. *Transcon. Gas Pipe Line Co., LLC*, 141 FERC ¶ 61,091, at P 107 (2012).

121. *Pac. Connector Gas Pipeline, LP*, 134 FERC ¶ 61,102, at P 54 (2011).

122. *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at P 21 (2013).

123. *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at P 112 (2003).

124. *Gulf Crossing Pipeline Co. LLC*, 127 FERC ¶ 61,299, at P 20 (2009).

125. *Id.* at n.7.

126. *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148 at P 21.

127. Conflict preemption exists in two circumstances. First, a federal law preempts a state law if the state law directly conflicts with a federal law, rendering compliance with both laws impossible. See *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941). Second, a state law cannot be inconsistent with a federal scheme or purpose. *Id.* A federal agency may also preempt a state requirement through

local regulation is within a field Congress intends to occupy, the law is preempted, regardless of whether it conflicts with a federal law.<sup>128</sup>

Third, FERC states that the mere fact that a state or local authority “requires something more or different than the Commission” does not render the state or local requirement unreasonable.<sup>129</sup> FERC also states that the Commission will not require pipeline companies to adhere to state and local laws that conflict with federal regulations or impose conditions above FERC’s conditions.<sup>130</sup> Considering the two statements together, what “more or different than the Commission” means is unclear. If a state or local law imposes a stricter standard than FERC, then this could be read as requiring something more than the Commission, which would mean that the standard is not unreasonable *per se*. This could also be read, however, as imposing a condition above FERC’s conditions, which would mean that the Commission would find it unreasonable. If “more or different” means separate laws that FERC does not cover, then this could be reconcilable, but FERC’s field preemptive authority should still trump these laws.

Fourth, when FERC asserts the “reasonableness” of a rule or the delay caused by the rule, FERC has not set guidelines to determine whether a law would be reasonable. FERC examines state and local laws on a case-by-case basis but has not provided a rule of thumb or guidelines.

FERC’s adjudications ultimately establish an unclear set of rules that pipeline companies could have difficulty following. The result is that pipeline companies are unsure of the state and local laws with which they must comply. Pipeline companies are not the only entities potentially confused by these holdings—state and local authorities could also be unsure of whether their regulations apply. This confusion is evidenced by *Maritimes*, in which the pipeline companies asked FERC to sort through a list of state and local regulations and determine which ones are enforceable.<sup>131</sup> Within this list of state and local regulations, the pipeline companies and New Hampshire disagreed on which standards they thought were in conflict with FERC’s regulations.<sup>132</sup> As a result of this confusion, the pipeline companies faced additional costs and delays arising out of this disagreement and out of the litigation before FERC to resolve the issue. These conflicts exemplify the confusion that FERC’s rulings create, thereby delaying development of much-needed natural gas infrastructure.

## 2. Federal Court Holdings Regarding NGA Preemption

Adding to the confusion are the holdings of federal courts. Since *Schneidewind*, federal courts have consistently held that the NGA confers FERC field preemption over the transpor-

tation of natural gas in interstate commerce, including the siting, construction, operation, or expansion of natural gas facilities. Federal courts have also been confused by FERC’s policy of requiring interstate pipeline companies to comply with state and local laws.<sup>133</sup>

These holdings add to the confusion because pipeline companies are stuck between federal court holdings and FERC holdings. FERC requires pipeline companies to comply with state and local laws in some instances, whereas federal courts harmoniously hold that a FERC-issued CPCN preempts state and local laws. Pipeline companies are left to decide with which body of law to adhere—FERC’s or the federal courts’. This confusion, along with the intervention of state and local authorities, has undermined the expansion of natural gas infrastructure.

## 3. Federal Court Holdings Regarding Sub-Delegation of Authority

While FERC’s inconsistent holdings often contradict the federal courts on the issue of state and local regulations after a pipeline company receives a CPCN, the question remains whether FERC has the power to sub-delegate regulatory authority to states. Once Congress confers power to an agency, that agency must faithfully execute the law.<sup>134</sup> Because Congress intended to occupy the field of interstate natural gas facilities regulation by passing the NGA and conferred this field preemption power to FERC,<sup>135</sup> FERC is bound to faithfully execute this preemptive power by exclusively regulating those facilities once they receive a CPCN.

As part of this grant of federal preemptive power, FERC may not sub-delegate regulatory authority to the states.<sup>136</sup> In *U.S. Telecom Ass’n v. FCC*, the D.C. Circuit held that the Federal Communications Commission (“FCC”) could not sub-delegate the authority to decide whether a local market was impaired by bundling telecommunication network elements, a power Congress granted the FCC.<sup>137</sup> The D.C. Circuit clarified that a federal agency may not sub-delegate regulatory authority to an outside entity, such as a state government, absent affirmative congressional authorization.<sup>138</sup> A main reason that such sub-delegation is impermissible is that delegating authority to an outside entity may result in the loss of the agency’s “national vision and perspective.”<sup>139</sup> This logic especially applies to interstate natural gas pipelines. For example, an interstate pipeline connects supply from State A to demand in State B, running through State or Locality C.<sup>140</sup> While taking into account the concerns of State or Locality C remains important, FERC has the national perspective to balance these concerns with the interests of State

133. *See* *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 820–24 (8th Cir. 2004).

134. U.S. CONST. art. II, § 3.

135. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988).

136. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

137. *Id.* at 561–64.

138. *Id.* at 565–66.

139. *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999).

140. *See generally* U.S. ENERGY INFO. ADMIN., *supra* note 3.

the issuance of regulations. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1985).

128. *Gad v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98–99 (1992).

129. *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at P 113 (2003).

130. *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at P 21.

131. *Maritimes & Ne. Pipeline, LLC*, 81 FERC ¶ 61,166, at 61,728 (1997).

132. *Id.*

A and State B, whereas State or Locality C may only have local concerns.

Although federal agencies have this interstate perspective, courts have held that a federal agency entrusted with broad discretion to permit or forbid activities may condition approval on the decision of a state or local government as long as there exists a reasonable connection between the state or local decision and the federal agency's determination.<sup>141</sup> In this scheme, a federal agency may not delegate the entire determination of a specific statutory requirement, but a state or local government may decide a relevant local concern as an element of the decisionmaking process.<sup>142</sup> This allows FERC to *condition the approval of* a CPCN on a pipeline company's acquisition of state and local permits, but this does not allow FERC to require pipeline companies to comply with state and local laws once the company has *already received* a CPCN. In the latter case, federal courts have held that FERC may not require pipeline companies to comply with state and local laws once those companies have received a CPCN because the CPCN preempts state and local laws.<sup>143</sup>

Although *U.S. Telecom Ass'n* held that an agency may not sub-delegate certain decisionmaking authority to a state, the reasoning similarly applies to agencies sub-delegating authority after the decision has been made. Even after approving a CPCN, FERC retains sole regulatory authority over interstate natural gas facilities. Not only should FERC prohibit state and local authorities from asserting state and local laws ex post facto because the conditions of the CPCN preempt these laws, but also FERC should prohibit these assertions because the conditions of the CPCN were considered using FERC's "national vision and perspective."<sup>144</sup>

## VI. Amending the NGA and FERC Clarification

The respective roles of FERC and the states must be clarified in order to alleviate the confusion that pipeline companies face over whether to comply with state and local regulations after receiving a CPCN. This problem should be solved in two parts: (1) Congress should amend section 7 of the NGA to declare that FERC-issued CPCNs preempt the field of siting, construction, expansion, and operation of a natural gas pipeline; and (2) FERC should clarify, through an order, implementing rule, or adjudication, Congress's intent to confer FERC exclusive jurisdiction over this field and that compliance with state and local laws in this field is not mandatory. While FERC should remind companies that compliance with state and local laws in this field is not mandatory, FERC may encourage companies to *voluntarily* comply with these laws *in addition to* the conditions set by FERC. This would eliminate confusion over the applicability of state and local regulations by clearly stating that pipeline companies

need not comply with state and local laws upon receiving a CPCN.

### A. Amending the NGA

First, Congress should amend the NGA to explicitly state its intention to occupy the field of interstate natural gas transportation facilities. The amendment should emphasize that, if FERC grants a CPCN under the NGA, state and local governments may not subject the recipient pipeline companies to state and local laws regarding the siting, construction, expansion, and operation of the facilities. Federal courts already recognize the preemptive effect of the NGA, but the fact that states and pipeline companies continue to argue before FERC and federal courts suggests that the role of state and local authorities remains unclear.<sup>145</sup> Congress may wish to include concrete examples of state and local regulations, such as land use and zoning laws and regulations, state environmental and endangered species laws and regulations, and laws and regulations that impose stricter requirements than FERC. Preempted laws should not be limited to these examples and should include any laws that attempt to regulate the siting, construction, expansion, and operation of interstate natural gas facilities. However, preempted laws should not include state and local laws or regulations that are part of parallel federal programs, such as the CWA, the CZMA, and the CAA.

Adding the proposed provision to the NGA would solve this regulatory confusion by unequivocally stating a congressional intent to occupy the field of siting, construction, expansion, or operation of interstate natural gas facilities. Pipeline companies would know that they are not required to comply with state and local regulations within that field, and state and local regulators would know that their laws do not apply once FERC issues a CPCN. Pipeline companies would only be required to comply with FERC requirements that are part of its certificate conditions, as well as state and local laws that are part of a federal program.

### B. FERC Establishment of a Clarifying Rule

Once Congress amends the NGA, FERC should promulgate an implementing rule using the new statutory provision. Congress's amendment and FERC's clarification should work in tandem. FERC's rule should recognize that Congress has clearly asserted that, once a pipeline receives a CPCN, only compliance with FERC regulations addressing the siting, construction, or expansion of interstate natural gas facilities is required. In addition, the rule should clarify that, although compliance with state and local regulations in the same field is no longer *required*, facilities are free to cooperate with state and local authorities so long as cooperation does not affect the in-service date that FERC schedules.<sup>146</sup>

141. *U.S. Telecom Ass'n*, 359 F.3d at 567.

142. *Id.*

143. *See, e.g., Islander E. Pipeline Co., L.L.C. v. Blumenthal*, 478 F. Supp. 2d 289, 290–91 (D. Conn. 2007).

144. *Nat'l Park & Conservation Ass'n*, 54 F. Supp. 2d at 20.

145. *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 823–24 (8th Cir. 2004).

146. FERC seeks to "avoid the perennial story of big business taking advantage of the little guy playing out in the context of natural gas infrastructure development." Delia Patterson, *FERC, Landowners & Natural Gas Infrastructure Projects*, 24 NAT. RESOURCES & ENV'T 55, 56 (2009). For example, FERC tries to

Because administrative agencies have discretion in how to prescribe regulations, FERC would have a variety of ways to announce this new rule.<sup>147</sup> Administrative agencies are generally free to announce new principles through adjudication, rulemaking, or interpretive rules.<sup>148</sup> Using adjudication, FERC could announce the new rule through a challenge to state conduct before it, and this new rule would become precedent.<sup>149</sup> If FERC chose to use informal rulemaking to issue a clarifying order, FERC would have to publish a notification of the proposed rule in the *Federal Register*, allow interested parties to submit comments, and respond to those comments.<sup>150</sup> Interpretive rulemaking, on the other hand, would allow FERC to informally release a statement advising the public on its new interpretation of the roles of FERC and state and local governments. FERC should choose to use interpretive rulemaking to announce the new principle because it is the most informal and legally sufficient option of the three to pursue, and because the interpretation of the new NGA provision is straightforward and unambiguous.<sup>151</sup>

If FERC were to announce this clarifying rule, this would demonstrate a single interpretation of its rules. Instead of the current confusing body of holdings, pipeline companies and local authorities could reference a single clear FERC policy. By explaining that it no longer requires certified pipeline companies to comply with state and local regulations, FERC would align its rule with the new provision Congress legislated. Whereas pipeline companies would have previously faced contradicting decisions from FERC and federal

courts,<sup>152</sup> FERC and the federal courts would share the same interpretation under this solution.

## VII. Conclusion

The lack of natural gas infrastructure, in addition to the Polar Vortex incident that necessitated more heating, resulted in unprecedented high prices in natural gas markets during the winter of 2013–2014.<sup>153</sup> This translated into abnormally high natural gas prices and electricity prices.<sup>154</sup> In January 2014, the price of natural gas in New England, where infrastructure is especially needed, spiked to almost \$100 per MMBtu, whereas most U.S. gas price hubs traded below \$6 per MMBtu during the same period in other areas of the country. To minimize price increases in natural gas, natural gas capacity should be expanded throughout the country by developing more infrastructure. State and local authorities, however, pose an obstacle to such development.

This Note proposed a two-part solution to the problem that arises with the contradict holdings of FERC and the federal courts regarding the role of state and local governments once a pipeline company receives a CPCN. Together, these changes will clarify that FERC has the exclusive power to regulate certified interstate pipeline facilities. Once pipeline companies understand that compliance with state and local governments is not required, there will be fewer obstacles to the construction of new infrastructure to connect supply and demand.

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balance the interests of property owners and the public interest in natural gas infrastructure development. *Id.* Encouraging pipeline companies to voluntarily cooperate with state and local authorities furthers this goal.

147. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

148. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1974).

149. *Id.* at 770–71.

150. 5 U.S.C. § 553 (2012).

151. *See id.*

152. *Compare Maritimes & Ne. Pipeline, LLC*, 81 FERC ¶ 61,166 (1987) with *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238 (D.C. Cir. 2013).

153. Matthew Phillips, *Northeast's Record Natural Gas Prices Due to Pipeline Dearth*, BLOOMBERG BUSINESSWEEK (Feb. 6, 2014), <http://www.businessweek.com/articles/2014-02-06/northeast-record-natural-gas-prices-due-to-pipeline-dearth>.

154. FERC Staff, *Address at the FERC Conference on Winter 2013–2014 Operations and Market Performance in RTOs and ISOs* (Apr. 1, 2014), *available at* <http://www.ferc.gov/legal/staff-reports/2014/04-01-14.pdf>.