

Commission's approach to regulating OCS facilities. Given the continuing importance of the OCS as a source of natural gas, a principal aim of the Commission is to develop regulatory policies that do not impede or distort developmental activities on the OCS.

III. The Statutory Framework

A. The Natural Gas Act (NGA)

The basic purpose of Congress in enacting the NGA was to "occupy the field" ³ of the regulation of natural gas moving in interstate commerce by the primary grant of jurisdiction to the Commission over those aspects of such regulation over which the states may not act.⁴ To that end, Congress meant to create a comprehensive regulatory scheme of dual state and federal authority.⁵ Section 1(b) of the NGA embodies the primary grant of jurisdiction to the Commission. At the same time, section 1(b) exempts from the Act's coverage "the production or gathering of natural gas." Thus, section 1(b) first grants to the Commission broad plenary authority to regulate the business of transporting and of wholesaling natural gas moving in interstate commerce. Secondly, section 1(b), by operation of the "production and gathering" exemption, removes from that plenary grant of federal jurisdiction those aspects of natural gas regulation which are the proper subject of state regulation.⁶

B. The Outer Continental Shelf Lands Act (OCSLA)

Additional sources of regulatory authority over OCS pipeline facilities and activities are sections 5(e), and 5(f)(1), of the OCSLA.⁷ Generally, sections 5(e) and 5(f)(1) of the OCSLA give the Commission certain responsibilities and authorizations to ensure that natural gas pipelines on the OCS transport for non-owner shippers in a nondiscriminatory manner and operate in accordance with certain competitive principles.

Section 5(e) of the OCSLA requires pipelines to transport natural gas produced from the OCS "without discrimination" and in such "proportionate amounts" as the Commission, in consultation with the Secretary of Energy, determines to be

reasonable. In addition, section 5(f)(1) of the OCSLA requires pipelines transporting gas on or across the OCS to adhere to certain "competitive principles". These "competitive principles" include a requirement that the pipeline must provide "open and nondiscriminatory access to both owner and nonowner shippers."

The applicability of the provisions of sections 5(e) and 5(f)(1) is not restricted to interstate pipelines that are subject to the Commission's NGA jurisdiction. The only pipelines that may be exempt from the Commission's authority under the OCSLA are certain "feeder lines," which are defined in section 5(f)(2) of the OCSLA ⁸ as a pipeline that feeds into a facility where oil and gas are "first collected" or a facility where oil and gas are "first separated, dehydrated, or otherwise processed." These "feeder lines" may only be exempted from the requirements of the OCSLA by order of the Commission.

IV. The Commission's Current Policy

In 1989, in response to the court's decision in *EP Operating v. FERC (EP Operating)*,⁹ which reversed a Commission determination that a 51-mile long, 16-inch diameter OCS pipeline was a jurisdictional transportation facility, the Commission set upon a review of its "gathering policy." The purpose of that review was to assess the impact of *EP Operating* as well as the continuing viability and relevance of the "primary function" test, which at that time was the Commission's preferred methodology for determining the jurisdictional status of gas pipeline facilities.¹⁰ That review culminated in the Commission's articulation and application of the

"modified primary function" test in *Amerada Hess, et. al. (Amerada Hess)*.¹¹

As set out in *Amerada Hess*, the "modified primary function" test consists of the continued application of the "primary function" test, with a modification in its application in accord with *EP*. Specifically, when applying the *Farmland* criteria, the Commission stated that it would consider, especially for offshore facilities, the changing technical and geographic nature of exploration and production. The order explained that because of recent advances in engineering and available technology, offshore drilling operations were moving further offshore and further from existing interstate pipeline interconnections. Accordingly, the order explained that a relatively long pipeline on the OCS may be consistent with a primary function of gathering or production whereas an onshore pipeline of similar length would not. Therefore, in applying the "modified primary function" test to OCS pipeline facilities the Commission stated that it would apply, in effect, a sliding scale that would allow for the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area.

V. Specific Questions for Response by All Commenters

The Commission has compiled a list of questions, set forth below, that will be helpful in assessing the Commission's current policy and possible policy alternatives. This list is not meant to be all inclusive. Parties to this proceeding are invited to present alternative solutions not specifically referenced in this notice.

A. General.

1. It is necessary or appropriate to continue distinguishing between gathering and transportation on the OCS, or would it be better either to declare that under the NGA all such facilities are exempt gathering facilities or to declare that under the NGA all such facilities are jurisdictional transportation facilities?

2. Does the Commission need to continue to regulate offshore transportation under the NGA, or is reliance on the OCSLA sufficient to protect the public interest?

3. Is there a "regulatory gap" pertaining to rates or any other matter respecting gas pipeline facilities or services on the OCS?

4. What is the extent of the Commission's authority under the

⁸ 43 U.S.C. § 1334(f)(2).

⁹ 876 F. 2d 46 (Fifth Cir. 1989).

¹⁰ The "primary function" test was articulated in *Farmland Industries, Inc. (Farmland)*, 23 FERC ¶ 61,063 (1983). In *Farmland* the Commission enumerated several physical and geographic criteria to be included in the analysis for determining whether the "primary function" of a facility is the transportation or the gathering of natural gas. These factors are: (1) the length and diameter of the line, (2) the extension of the facility beyond the central point in the field, (3) the line's geographic configuration, (4) the location of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) the operating pressure of the line. The "primary function" test has been found by the Commission to be applicable to both onshore and offshore facilities. The criteria set out in *Farmland* were not intended to be all inclusive. The Commission has also considered nonphysical criteria such as the intended purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and the Natural Gas Policy Act of 1978 (NGPA).

¹¹ 52 FERC ¶ 61,268 (1990).

³ See *Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 310-311 (1988).

⁴ *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

⁵ *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

⁶ See, e.g., *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682-84 (1954); *Interstate Natural Gas Co. v. FPC*, *supra* at 690.

⁷ 43 U.S.C. § 1334(e), (f)(1).