

## Opinion No. 70-55

June 12, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** John A. Elliott, Director Pipeline Division State Corporation Commission P.E.R.A.  
Building Santa Fe, New Mexico

### QUESTIONS

#### QUESTION

Is a natural gas transmission company transporting natural gas produced in New Mexico for sale at points and places in New Mexico subject to the New Mexico Pipeline Safety Act, Sections 64-4-15 to -24, N.M.S.A., 1953 Comp. (1969 Supp), if the gas is co-mingled with gas transported for sale in interstate commerce?

#### CONCLUSION

See Analysis.

### OPINION

#### {\*93} ANALYSIS

It appears clear that the Pipeline Safety Act is legislation relating to the health, life and safety of the citizens of the State of New Mexico. As such, the legislation may be validly applied to a business engaged in interstate commerce so long as it does "not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." **Huron Portland Cement Co. v. City of Detroit**, 362 U.S. 440, 4 L. Ed. 2d 852, 80 S. Ct. 813 (1960).

It appears that Congress has determined that pipeline safety is an area in which uniformity of regulation is necessary. The Natural Gas Pipeline Safety Act of 1968, contains repeated references to state powers, such as are exercised under the New Mexico Pipeline Safety Act, but expressly excludes state jurisdiction over the transportation of gas subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. See 49 U.S.C. §§ 1672(a) & (b), 1674(a) & (b).

The Natural Gas Act, 15 U.S.C. § 717 et seq., provides for the regulation of the sale of natural gas, i.e., the rates and charges. When natural gas is produced and sold in intrastate commerce and is co-mingled and transported with gas sold in interstate commerce, there is a presumption that the entire transaction is under the jurisdiction of the Federal Power Commission. **California v. Low-Baca Gathering Co.**, 379 U.S. 366, 13 L. Ed. 2d 357, 85 S. Ct. 486 (1965). This presumption of Federal Power Commission

jurisdiction also prohibits state regulatory agencies from requiring certificates of public convenience for and regulating the rates of co-mingled intrastate and interstate shipments. **Louisiana Public Serv. Comm'n v. Federal Power Comm'n**, 359 F.2d 525 (5th Cir. 1966), **cert. denied**, 385 U.S. 833 (1966).

In the absence of the federal Pipeline Safety Act, we believe that the Federal Power Commission regulation of rates and charges would in no way affect the state's regulation of health and safety. But it appears that the adoption of the Natural Gas Pipeline Safety Act of 1968 indicates the intent of Congress to preempt the field insofar as the interstate shipment of natural gas is concerned.

Nevertheless, we feel that the State Corporation Commission must recognize the intent of the New Mexico Legislature to protect its citizens from the potential harm of the negligent transmission of natural gas. The Commission therefore has a duty to work closely with the Department of Transportation to ensure that that agency of the federal government is exercising its responsibilities under the Natural Gas Pipeline Safety Act. If the Commission can show that the federal authorities are failing in their responsibilities, to the detriment of lives and property in this state, then the Commission should take jurisdiction. A federal preemption based upon an unenforced law would probably not be applied by the courts to oust the state from jurisdiction over a problem affecting the health, life and safety of its citizens.

By: Mark B. Thompson, III

Assistant Attorney General