TAKING CONTROL OVER NATURAL GAS GATHERING AND TRANSMISSION PIPELINES AND COMPRESSOR STATION COMPANIES

BY

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I. INTRODUCTION

The total annual consumption of natural gas in the United States in 2007 and 2008 ranked as two of the three highest years in our nation's history.[1] In Texas, the preliminary and adjusted Texas natural gas production for October 2008 was reported as 676.57 billion cubic feet (bcf), up from 598.71 bcf in October 2007.[2] With this increased level of production and usage, the United States Natural Gas Wellhead Price reached an all-time high in June 2008 (in terms of dollars per thousand cubic feet), nearly doubling the price in June 2007, and representing a five-fold increase over the price in June 1998.[3]

The United States' increased thirst and reliance upon natural gas, coupled with the rising price of this energy source, has resulted in the proliferation of natural gas wells and increased production of this commodity in Texas. Specifically, the Railroad Commission of Texas reported that in 2007, there were 81,371 wells producing natural gas in Texas- a record high- which resulted in a record level of natural gas produced in this state.[4] This number of wells represents a 43% increase over the 56,718 wells that were producing natural gas in Texas in 2002.

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[1] Energy Information Administration, *available at* http://tonto.eia.doe.gov/dnav/ng/hist/n9140us2A.htm.
[2] Railroad Commission of Texas, *available at* http://www.rrc.state.tx.us/data/petrofacts/2009/petro0109.pdf, at 2.
[3] Energy Information Administration, *available at* http://tonto.eia.doe.gov/dnav/ng/hist/n9190us3m.htm.
[4] Railroad Commission of Texas, *available at* http://www.rrc.state.tx.us/data/petrofacts/2009/petro0109.pdf, at 3.

While there are natural gas wells located throughout the state, the most dramatic increase of new natural gas wells and production in Texas has been in the Barnett Shale. The Barnett Shale is a natural gas-bearing formation in north Texas. Spanning over more than 20 counties, the Barnett Shale is one of the largest and most active natural gas reserves in the United States and contains approximately 26 trillion cubic feet of natural gas, or enough to supply all gas-heated homes in the U.S. for more than five years.[5] Production initially focused in Wise, Denton and Tarrant counties and it has continued to spread as producers try to determine how far to the west and south the field expands.[6]

Despite the recent stabilization of natural gas prices, the demand for natural gas still exists, and new natural gas wells are still being constructed. With the expansion of the Barnett Shale, natural gas wells are no longer being drilled in only rural portions of counties. Rather, natural gas wells are also being constructed within the corporate limits of municipalities.

Such expansion is certainly controversial. There are several groups of entities impacted by the construction of these new natural gas wells, and each of these entities have distinct interests and goals. There are the natural gas companies, who need to secure a steady supply of natural gas that they can refine, transport, and sell to the public for a profit. Landowners located over the Barnett Shale certainly want to exercise their property rights and construct wells to produce natural gas and capitalize on their valuable commodity. To this end, landowners traditionally grant leases to natural gas companies

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[5] http://startelegram.typepad.com/barnett_shale/files/sp.pdf.

[6] http://www.dallasnews.com/sharedcontent/dws/img/04-06/0427gaswells.pdf. In addition to the core area of the shale, there are natural gas wells located in Bosque, Clay, Comanche, Cooke, Dallas, Eastland, Ellis, Erath, Hamilton, Hill, Hood, Jack, Johnson, Montague, Palo Pinto, and Somervell Counties. An Enduring Resource: A Perspective on the Past, Present, and Future Contribution of the Barnett Shale to the Economy of Fort Worth and the Surrounding Area, The Perryman Group, Barnett Shale Expo March 11, 2009, located at http://www.barnettshaleexpo.com/docs/2009_eco_report.pdf.

for a royalty and/or bonus payment. Next, the general public has an interest in maintaining the safety and aesthetics in their homes, community, and city. The Railroad Commission of Texas ("RCT") certainly has an interest regulating natural gas wells, and its role to regulate pipelines is codified in the United States Code, Texas Utilities Code ("TUC") and Texas Natural Resources Code ("TNRC"). Last, cities have an interest in exercising the police powers to maintain the public health, safety and welfare. Not only are municipalities concerned with the increased number of natural gas wells and gathering and transmission pipelines, they must also be concerned with the location of such infrastructure with respect to the future growth of their respective city and managing these wells and pipelines for decades to come, including when the wells are no longer used or abandoned. This paper provides a background of the natural gas production process and role of the RCT, and highlights the issues between some of these competing interests.

II. BACKGROUND

A. Natural Gas Pipeline Production Process

There are several phases associated with producing natural gas from underground supplies and consumption by the public. As discussed above, natural gas is a naturally occurring hydrocarbon that consists mostly of methane, usually found in underground formations of porous rock, such as the Barnett Shale.[7] During the production process, wells are drilled into these porous rocks, and pipelines are utilized to bring the natural gas to the surface. Gathering lines link production areas to central collection points.[8] Some natural gas gathering systems include a processing facility, which removes such

[7] http://www.naturalgas.org/overview/background.asp.
[8] [8] "How Natural Gas Gets to Consumers," Natural Gas Council, http://www.yankeegas.com/yankeegascommon/pdfs/gastoconsumers.pdf.

impurities as natural gas liquids, water, carbon dioxide or sulfur that might corrode a pipeline, or inert gases such as helium that could reduce the energy value of the gas.[9] Transmission pipelines, the "interstate highway" for natural gas, consist of high-strength steel pipe 20 inches to 42 inches in diameter.[10] These pipelines move huge amounts of natural gas up to thousands of miles from producing regions, such as the Barnett Shale, to local natural gas utilities.[11] Compressor stations are sporadically located along these lines, to boost the pressure that is lost through the friction of gas moving through steel pipe. Ultimately, the produced and refined natural gas is delivered through the transmission pipelines to local gas companies, who then odorize the gas and then supply such gas to local customers through distribution pipelines.[12] Title 16 Texas Administrative Code ("TAC") § 8.215 of the RCT's rules outline the requirements for the timing, process, testing and reporting of odorizing natural gas.[13] To help ensure reliable gas service to their customers, some local natural gas companies store the natural gas supply underground for use during peak demand, such as cold days.

B. Role of the RCT Regarding Natural Gas Gathering and Transmission Pipelines

The RCT is the Texas agency regulating the construction and installation of natural gas pipelines and the transportation of natural gas within Texas.[14] The RCT has jurisdiction over all: (1) common carrier pipelines defined in Section 111.002 of this code in Texas; (2) oil and gas wells in Texas; (3) persons owning or operating pipelines

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[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] 16 Tex. Admin. Code § 8.215 (2009).
[14] The U.S. Department of Transportation – Office of Pipeline Safety has jurisdiction over interstate natural gas pipelines.

in Texas; and (4) persons owning or engaged in drilling or operating oil or gas wells in Texas.[15] The TNRC grants the RCT with authority to "adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the commission…"[16]

The RCT has adopted rules regulating natural gas pipeline safety and the construction and installation of natural gas pipelines in general.[17] With respect to pipeline safety, the scope of the RCT's authority includes all "pipeline facilities," which is defined as "[n]ew and existing pipe, right-of-way, and any equipment, facility, or building used or intended for use in the transportation of gas or hazardous liquid or their treatment during the course of transportation."[18] Further, the term "transportation of gas" is defined as the "gathering, transmission, or distribution of gas by pipeline or its storage within the State of Texas.[19] Finally, the term "gas" includes natural gas. [20]

With this authority to regulate the safety of natural gas gathering, transmission, and distribution, pipelines, the RCT has adopted a rule requiring operators of these pipelines to file reports at the RCT prior to the construction of certain new pipelines. Specifically, the RCT's pipeline safety rules require each natural gas pipeline operator to file a "Form PS-48" report 30 days prior to commencing construction of any installation totaling one mile or more of pipe.[21] A Form PS-48 requires the operator to provide the proposed originating and terminating points for the pipeline, counties to be traversed, size

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[15] TEX. NAT. RES. CODE § 81.051(a)(Vernon 2009).
[16] TEX. NAT. RES. CODE § 81.052(Vernon 2009).
[17] *See* 16 Tex. Admin. Code, Chapters 3 and 8 (regulating in part natural gas wells and pipeline safety, respectively).
[18] 16 Tex. Admin. Code § 8.5(23) (2009).
[19] 16 Tex. Admin. Code § 8.5(28).
[20] 16 Tex. Admin. Code § 8.5(10).
[21] *Id*. A copy of Form PS-48 is located at http://www.rrc.state.tx.us/forms/forms/pipeline/PS48Oct08frmSpl_fill_in_online.pdf.

and type of pipe to be used, type of service, design pressure, and length of the proposed line.[22] However, new construction on a natural gas distribution or master meter system of less than five miles is exempted from this reporting requirement.[23] The RCT has also implemented a penalty system for pipeline safety violations, which is located at 16 TAC § 8.135. Further, the RCT has adopted rules regarding leak detection and maintenance, located at 16 TAC, Chapter 8, Subchapter C.

In addition to its pipeline safety regulations, the RCT has created and implemented a permitting process for the use of pipelines, including those transporting natural gas. Specifically, 16 TAC § 3.70 provides that "[n]o pipeline or gathering system, whether a common carrier or not, shall be used to transport oil, gas, or geothermal resources from any tract of land within this state without a permit from the commission."[24] This permit is more commonly known as the T-4 permit.[25] Section 3.70 also sets forth the standard for approving an application for a T-4 permit, whereby the RCT will grant such application if "the commission is satisfied from such application and the evidence in support thereof, and its own investigation, that the proposed line is, or will be, so laid, equipped, and managed, as to reduce to a minimum the possibility of waste, and will be operated in accordance with the conservation laws and conservation rules and regulations of the commission."[26] There is no discussion in this rule regarding location.

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[22] 16 Tex. Admin. Code § 8.115 (2009). A copy of Form PS-48 is located at http://www.rrc.state.tx.us/forms/forms/pipeline/PS48Oct08frmSpl_fill_in_online.pdf.
[23] *Id*.
[24] 16 Tex. Admin. Code § 3.70(a) (2009).
[25] A copy of a T-4 application is located at http://www.rrc.state.tx.us/forms/forms/gs/T-4_8_06_b.pdf.
[26] 16 Tex. Admin. Code § 3.70(a).

However, a T-4 Permit is not a guaranteed right. The RCT retains the power to revoke T-4 Permits after notice and a hearing. Specifically, 16 TAC § 3.70(b) provides that a T-4 Permit "shall be revocable at any time after hearing held after 10 days' notice, if the commission finds that the line is so unsafe, or so improperly equipped, or so managed, as likely to result in waste."[27] Additionally, the operator is given 5 days written notice to correct the pipeline prior to a notice of hearing if the commission finds "the line is in such condition as to cause waste."[28] Further, the RCT may revoke a T-4 Permit after 10 days' notice and hearing if the commission finds that the operator of the line, in its operation thereof, is willfully violating or contributing to the violation…of the laws of the state to conserve the oil, gas, or geothermal resources, or any rule or regulation of the commission enacted under such laws.[29]

Despite the RCT's scope of authority, there are no provisions in the Form PS-48 or T-4 Permit that regulate whether the location of a pipeline is appropriate. Further, there is no requirement in either of these rules that the natural gas pipeline operator, the applicant, provide a municipality with notice of the new construction form or permit application. Section III of this comment focuses on a municipality's scope of authority to regulate these pipeline companies.

III. AUTHORITY OF A MUNICIPALITY TO REGULATE PIPELINES

Although the RCT has been granted authority to regulate natural gas gathering and transmission pipelines, the TUC and TNRC do provide municipalities with some power to regulate the construction and installation of natural gas pipelines.[30] However,

[27] 16 Tex. Admin. Code § 3.70(b).
[28] *Id.*
[29] *Id.*
[30] This paper does not consider natural gas distribution pipelines.

the scope of such authority is somewhat uncertain. With respect to pipeline safety, the Legislature has carved out some authority to municipalities to regulate natural gas gathering and transmission pipelines in TUC §§ 121.202 and 121.2025. Additionally, municipalities may have additional approval authority regarding the use of land by pipeline companies in TNRC § 111.022. However, there is no precedent regarding the scope of a municipality's authority under the TUC statutes, where neither of those laws have been interpreted by the Texas Court of Appeals or the Texas Supreme Court. The following is a summary of these important statutes.

A. Texas Utilities Code § 121.202

While TUC § 121.202(a) expressly prohibits a municipality's authority to regulate natural gas gathering and transmission pipelines on the basis of pipeline safety, TUC § 121.202(b) contemplates that a municipality may be able to participate in the location, inventorying and mapping of such pipelines. Pipeline safety standards for interstate and intrastate natural gas gathering and transmission pipelines are governed by the Pipeline Safety Act, 49 U.S.C. § 60101, *et seq.*[31] Such authority to regulate intrastate lines has been granted to the State of Texas, and TUC § 121.201 outlines the RCT's scope of authority to regulate pipeline safety aspects over these lines.[32] With this authority, TUC § 121.202(a) provides that "[a] municipality or a county may not adopt or enforce an ordinance that establishes a safety standard or practice applicable to a facility that is regulated under this subchapter, another state law, or a federal law.[33] Thus, Texas law prohibits a municipality from interfering with the Pipeline Safety Act. Clearly, if a

[31] 49 U.S.C. § 60104(c).
[32] The RCT has adopted rules implementing these standards on intrastate lines in 16 TAC, Chapter 8.
[33] TEX. UTIL. CODE § 121.202(a) (Vernon 2009).

municipality attempted to regulate pipeline companies on the basis of pipeline safety, that city could face a challenge on the basis of preemption.

However, TUC § 121.202(b) recites that a municipality has some authority to regulate the locating of pipelines within its corporate limits and the mapping and inventorying of pipelines within its corporate limits and extra-territorial jurisdiction ("ETJ"). Subsection (b) specifically provides that except for the limitations regarding pipeline safety in subsection (a) and TUC § 121.2025 (discussed infra),

> this subchapter does not reduce, limit, or impair:
> (1) a power vested by law in…a municipality; or
> (2) the ability of a municipality to:
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> > (A) adopt an ordinance that establishes conditions for mapping, inventorying, locating, or relocating pipelines over, under, along, or across a public street or alley or private residential area in the boundaries of the municipality; or
> > (B) establish conditions for mapping or taking an inventory in an area in a municipality's extraterritorial jurisdiction.[34]

Thus, the Legislature has noted that a municipality has the ability to adopt an ordinance regulating pipelines to some extent in some portions of its corporate limits and ETJ, so long as the ordinance does not pertain to pipeline safety.

B. Texas Utilities Code § 121.2025

The Texas Legislature also carved out some limited authority in TUC § 121.2025 for municipalities to charge natural gas gathering and transmission line companies a reasonable fee. Similar to TUC § 121.202, this statute initially limits the authority of a municipality to regulate these pipeline companies. Specifically, 121.2025(a) expressly provides that "[e]xcept as otherwise provided by this section or Section 182.025, Tax Code, a municipality may not assess a charge for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal of a gas pipeline

[34] TEX. UTIL. CODE § 121.202(b).

facility on, along, or across a public road, highway, street, alley, stream, canal, or other public way."[35] However, subject to such limitation, § 121.2025(b) provides that a municipality may:

> (1) assess a reasonable annual charge for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal by an owner or operator of a gas pipeline facility on, along, or across the public roads, highways, streets, alleys, streams, canals, or other public ways located within the municipality and maintained by the municipality; and
> (2) recover the reasonable cost of repairing damage to a public road, highway, street, alley, stream, canal, or other public way located within the municipality and maintained by the municipality that is caused by the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal of a gas pipeline facility if the owner or operator of the facility does not repair the damage in accordance with generally applicable paving standards or other applicable standards in the municipality.[36]

Clearly, this statute expressly grants municipalities with some authority to charge gathering and transmission pipeline companies a small reasonable fee. However, this authority is not unbridled. TUC § 121.2025(d) outlines the process for a pipeline operator to appeal the amount of such fee to the RCT, and if such operator is successful, the RCT can reduce or eliminate the fee. Further, this authority is still limited to the extent it relates to pipeline safety.

C. Texas Natural Resources Code § 111.022

Although common carriers, which may include natural gas gathering and transmission line companies, have the authority to condemn land under TNRC § 111.019 for certain purposes related to constructing, operating, and maintaining pipelines, TNRC

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[35] TEX. UTIL. CODE § 121.2025(a) (Vernon 2009).

[36] TEX. UTIL. CODE § 121.2025(b). However, this statute further limits the amount of the "reasonable charge," whereby such charge "may not exceed the cost to the municipality of administering, supervising, inspecting, and otherwise regulating the location of the gas pipeline facility, including maintaining records and maps of the location of the pipeline facility." TEX. UTIL. CODE § 121.2025(c).

§ 111.022 provides municipalities with some authority that conflicts with such condemnation authority. Specifically, this statute provides that "the provisions of this chapter do not grant a pipeline company the right to use a public street or alley in an incorporated or unincorporated city or town except with express permission of the governing body of the city or town or the right to lay its pipes or pipelines along and under a street or alley in an incorporated city or town except with the consent and under the direction of the governing body of the city or town."[37] The Texas Court of Appeals has previously considered the scope of authority provided to a municipality under TNRC § 111.022 in the *City of San Antonio v. United Gas Pipe Line Co.*, 388 S.W.2d 231 (Tex.Civ.App.—San Antonio 1965, pet. denied), holding that regardless of fee ownership, where a utility company desires to install a pipe line, even by tunneling under a city street, a franchise from the city is necessary.[38] However, in such case, United Gas Pipe Line Co. already had the property right to install a pipeline in a right of way, and it was not exercising its condemnation authority.

IV. CONCLUSION

Municipalities are not completely removed from the process of natural gas gathering and transmission pipeline companies constructing and installing pipelines within their corporate limits and ETJ. However, their ability to regulate these entities is clearly limited. A municipality has no authority to adopt an ordinance regulating the safety practices of pipelines, and its ability to otherwise regulate pipelines is limited to locating, relocating, mapping, and inventorying such pipelines or charging a reasonable fee. TUC § 121.202 and 121.2025 certainly have some ambiguity in them, and neither of

[37] TEX. NAT. RES. CODE § 111.022 (Vernon 2009).
[38] *City of San Antonio v. United Gas Pipe Line Co.*, 388 S.W.2d 231, 233 (Tex.Civ.App.—San Antonio 1965, pet. denied).

these statutes have been considered by an appellate court. Additionally, TNRC § 111.022 has never been appealed based upon a pipeline company exercising its condemnation authority. In other words, there is no guidance available for both municipalities or pipeline companies. Ultimately, in practice the enforceability of a municipal ordinance regulating these entities within these confines, or the likelihood of such ordinance being challenged, may be a matter of degree; or at least until some changes are made by the Legislature or the counts have established a precedent.