

# COMMENT

## IS FERC STILL IN THE PICTURE?: THE PRIMARY FUNCTION TEST AS AN OBSTACLE TO FERC REGULATION

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## INTRODUCTION

Natural gas is the United States' fastest growing energy source.<sup>1</sup> Most natural gas is domestically produced,<sup>2</sup> and production is concentrated in the Gulf of Mexico,<sup>3</sup> which constitutes a remarkable 21% of the nation's entire natural gas production.<sup>4</sup> In light of rising environmental concerns,<sup>5</sup> a lack of sustainable renewable energy sources,<sup>6</sup> and the security risk of depending on foreign nations for oil,<sup>7</sup> natural gas will be integral to providing the United States with an adequate energy supply over the upcoming decade.<sup>8</sup> It is not surprising, therefore, that the ability of the Federal Energy Regulatory Commission (FERC or Commission)<sup>9</sup> to

1. EnergyTomorrow.org, Energy Throughout the World, [http://energytomorrow.org/energy/Energy\\_Throughout\\_the\\_World.aspx?pid=4](http://energytomorrow.org/energy/Energy_Throughout_the_World.aspx?pid=4) (last visited Feb. 18, 2009).

2. *See id.* (stating that 84% of natural gas consumed in the United States is produced domestically).

3. *See generally* Minerals Management Service (MMS), Gulf of Mexico Region, <http://www.gomr.mms.gov/homepg/whoismms/regdir.html> (last visited Feb. 18, 2009) [hereinafter MMS Gulf of Mexico] ("The Gulf's contribution to the Nation's energy supply is truly remarkable. Production in the Federal portion of the Gulf [Outer Continental Shelf] (OCS) amounts to 21% of the Nation's natural gas production (just under 5 trillion cubic feet).")

4. *Id.*

5. *See* Natural Gas Facts, Key Comments, [http://www.naturalgasfacts.org/what\\_others/index.html](http://www.naturalgasfacts.org/what_others/index.html) (last visited Feb. 18, 2009) (reporting that as of March 2008 the climate-change legislation under consideration in Congress had the potential to cause a dramatic increase in the use of natural gas); *see also* Natural Gas Facts, Factsheets, <http://www.naturalgasfacts.org/factsheets/index.html> (last visited Feb. 18, 2009) (stating that natural gas is a clean-burning and efficient energy source, and accordingly, has become popular with consumers and the industry).

6. *See infra* note 7 and accompanying text.

7. *See generally* Michael Rozenfeld, The Future of Petroleum Production, Feb. 2005, [http://www.engr.utexas.edu/braden/documents/heavyoilandthefuture\\_05.pdf](http://www.engr.utexas.edu/braden/documents/heavyoilandthefuture_05.pdf) (emphasizing that the United States imports over half of its oil from regions in Africa and the Middle East long held to be politically unsteady).

8. *See* NATURAL GAS SUPPLY ASSOCIATION 2 (2008), [http://www.ngsa.org/facts\\_studies/Docs/NGC\\_GHG\\_Initiatives\\_FINAL\\_021308.pdf](http://www.ngsa.org/facts_studies/Docs/NGC_GHG_Initiatives_FINAL_021308.pdf) ("Until renewable fuels and technologies and nuclear become an energy generation mainstay, natural gas will be an essential and critical part of the U.S. energy and fuel portfolio."). For a brief discussion of the fully developed nature of the natural gas industry and its importance to the United States economy, see David Schwartz, *The Natural Gas Industry: Lessons for the Future of the Carbon Dioxide Capture and Storage Industry*, 19 STAN. L. & POL'Y REV. 550, 550-51 (2008).

9. The Federal Energy Regulatory Commission (FERC or Commission) is an independent agency responsible for regulating and overseeing energy industries in the United States to ensure reliable energy and to promote a just and competitive market. *See*

regulate the rates<sup>10</sup> of natural gas facilities in the Gulf of Mexico<sup>11</sup> has drawn so much attention.<sup>12</sup>

The Natural Gas Act of 1938<sup>13</sup> (NGA) was enacted “to guarantee the consumer a reliable source of natural gas at a price determined to be reasonable” at a time when natural monopoly within the industry drove prices exceedingly high.<sup>14</sup> The NGA grants FERC jurisdiction over pipelines that transport natural gas through interstate commerce, but,

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FERC, About FERC, <http://www.ferc.gov/about/about.asp> (last visited Feb. 18, 2009); *see also* NaturalGas.org, The History of Regulation, <http://www.naturalgas.org/regulation/history.asp> (last visited Feb. 18, 2009) [hereinafter Regulation History] (explaining that the Federal Power Commission (FPC), the agency originally given regulatory oversight over the natural gas market, was abolished and replaced with FERC under the Department of Energy Organization Act of 1977).

10. *See* 15 U.S.C. § 717c(a) (2006) (granting FERC the ability to ensure “just and reasonable” rates). Although not its focus, this Comment also recognizes that regulatory authority over offshore facilities has little meaning unless such regulation protects smaller producers and gatherers from monopolistic practices. *See* FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944) (“The primary aim of [the Natural Gas Act (NGA)] was to protect consumers against exploitation at the hands of natural gas companies.”). This is why Congress should effectively grant FERC blanket jurisdiction over all offshore facilities by holding that all offshore pipeline companies should be treated as common carriers, except in circumstances where such treatment would place an undue burden on a pipeline owner. *Cf.* Interview with Joseph T. Kelliher, Chairman, Fed. Energy Regulatory Comm’n, et al., in Washington, D.C. (Oct. 17, 2008) (stating that FERC appealed to Congress for greater offshore regulatory authority but that Congress took no action); *see also* Joseph Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 TULSA L.J. 707, 721 (1994) (detailing the steps FERC has already taken to encourage pipelines, whether onshore or offshore, to act as “common carriers of natural gas”). Unlike most onshore pipelines, most offshore transportation pipeline owners have market control over their area and, in most cases, have the most convenient route. Thus, the gatherer has little choice in deciding where to connect to transport gas to shore. E-mail from James Day, Professor and Practitioner in the Field of Oil, Gas, and Energy Law, American University Washington College of Law, to Nutan Patel, Law Student, American University Washington College of Law (Nov. 7, 2008, 01:11:00 EST) (on file with author).

However, in the absence of congressional action, MMS and FERC could nonetheless effectively achieve uniform regulation of all offshore natural gas facilities if they were to work in conjunction. MMS and FERC, under the Outer Continental Shelf Lands Act (OCSLA) and NGA, respectively, should turn to basic rate-making to ensure “open and non-discriminatory access.” This includes determining a just and reasonable price based on the cost of service plus a reasonable profit. Furthermore, the pipeline owner should have the burden of establishing that his tariff provides a reasonable profit. Because MMS has absolutely no experience in rate-making, it will need FERC’s expertise in this arena. *See* LEGAL ALERT, MMS ISSUES FINAL RULE ON OPEN ACCESS TO OCS PIPELINES 1 (June 24, 2008), <http://www.sutherland.com/alertspubs/> (follow “View All Alerts” hyperlink; then follow “Legal Alert: MMS Issues Final Rule on Open Access to OCS Pipeline” hyperlink); Regulation History, *supra* note 9.

11. The Gulf of Mexico is defined as the inlet of the Atlantic Ocean on the Southeast Coast of North America. *See, e.g.*, 14 THE NEW ENCYCLOPEDIA BRITANNICA: MACROEDIA, GULF OF MEXICO 310 (15th ed. 1995).

12. *See* MMS Gulf of Mexico, *supra* note 3 and accompanying text.

13. 15 U.S.C. §§ 717–717z; *see also infra* Part I.A (describing the enactment and purpose of the NGA).

14. Fagan, *supra* note 10, at 712.

presumably under federalist ideals, *withholds* jurisdiction over those that gather natural gas.<sup>15</sup> This jurisdiction allows FERC to ensure “just and reasonable rates.”<sup>16</sup> FERC has also used its NGA authority to establish an “open access” regime, which requires that interstate pipeline transportation and storage services be open to all users of gas on a nondiscriminatory basis.<sup>17</sup> Without such regulation over transportation pipelines, smaller offshore independent producers and gatherers will have little protection against the high rates imposed by monopolistic entities to transport gas to shore.<sup>18</sup> However, the difference between what constitutes a gathering pipeline versus a transportation pipeline is not always readily apparent.<sup>19</sup> The NGA does not define these terms,<sup>20</sup> and although agencies have attempted to give meaning to the term *transportation* in particular,<sup>21</sup> an uncontested definition has yet to be developed.<sup>22</sup>

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15. 15 U.S.C. § 717(b) (“The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce . . . and to natural-gas companies engaged in such transportation or sale . . . but shall not apply to . . . the production or gathering of natural gas.”); see Fagan, *supra* note 10, at 711 (specifying that entirely intrastate transactions were not to fall within the ambit of the NGA).

16. 15 U.S.C. § 717c(a); see also FERC, *supra* note 9 (stating that FERC’s vision is to create “[a]bundant, reliable energy in a fair competitive market”). See generally Fagan, *supra* note 10, at 711–14 (explaining the “three major activities of the natural gas industry” that FERC is empowered to regulate and the initial strategy used to regulate these activities in accord with the objectives of the NGA).

17. See generally Fagan, *supra* note 10, at 720–26 (providing the history behind FERC’s implementation of its current “open access” regime). It should be noted that “just and reasonable prices” may be difficult to implement unless there is “open and nondiscriminatory” access to pipelines. Interview with James Day, Professor and Practitioner in the Field of Oil, Gas, and Energy Law, American University Washington College of Law, in Washington, D.C. (Nov. 19, 2008) (transcript on file with author).

18. See Interview with James Day, *supra* note 17 (stating that although FERC and MMS may not receive complaints from producers and gatherers in the OCS, small independent producers in the Gulf of Mexico who are subject to increasing rates are nonetheless “forced to settle” with “the big guys” under duress, as they are not in an advantageous position to file complaints). See generally Mark N. Cooper, *The Failure of Federal Authorities to Protect American Energy Consumers from Market Power and Other Abusive Practices*, 19 LOY. CONSUMER L. REV. 315, 333 (2007) (describing the transport components within the oil and gas industries as natural monopolies and emphasizing the impact of such monopolies on prices even in the absence of collusion). It should be noted that just and reasonable prices may be difficult to implement in the absence of open and nondiscriminatory access to pipelines.

19. See generally *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 323 (D.C. Cir. 2006).

20. *Id.* at 323.

21. The MMS defines the term *transportation* as the movement of gas through an OCSLA pipeline across the OCS. See Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, 73 Fed. Reg. 34,630, 34,632–33 (June 18, 2008) (to be codified at 30 C.F.R. pt. 291) [hereinafter Open and Nondiscriminatory Movement].

22. See *id.* at 34,632 (providing comments by shippers, many of which stated or implied that the definition of “transportation” is overly broad, contrary to the views of MMS).

In an effort to distinguish between gathering and transportation lines, FERC created the “primary function test.”<sup>23</sup> This jurisdictional test, having undergone much judicial scrutiny,<sup>24</sup> currently includes a long list of criteria to consider in distinguishing between a transportation line and a gathering line.<sup>25</sup> Still, because FERC has been unable to apply these criteria consistently, courts have repeatedly declared the Commission’s jurisdictional orders arbitrary and capricious.<sup>26</sup>

This is even more problematic because FERC’s determination of whether a pipeline in the Gulf of Mexico is a “transport” or “gathering” line will now also establish whether the pipeline is subject to FERC or Minerals Management Service (MMS)<sup>27</sup> jurisdiction. The MMS has recently asserted jurisdiction<sup>28</sup> over all pipelines within the Outer Continental Shelf (OCS)<sup>29</sup> under the Outer Continental Shelf Lands Act (OCSLA).<sup>30</sup> However, the agency has deferred to FERC for pipelines subject to the Commission’s NGA jurisdiction.<sup>31</sup> Thus, FERC’s inability to assert jurisdiction through the primary function test will lead to MMS jurisdiction—a result that may have profound consequences.<sup>32</sup> MMS has no experience with rate-making<sup>33</sup> and has failed to set guidelines to ensure

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23. See *Farmland Indus., Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,143 (1983) (listing the original five criteria that created the “primary function test”).

24. See *infra* Part I.B (outlining the case-by-case development of the primary function test in response to judicial scrutiny); see also *Shell Gas Pipeline Co.*, 78 F.E.R.C. ¶ 61,192, at 61,821 (1996) (“[T]he development of an appropriate methodology for determining the jurisdictional status of a facility has been an ongoing task.”).

25. *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 296 (5th Cir. 2007).

26. See *infra* note 35 and accompanying text (vacating FERC’s jurisdictional orders over *Jupiter* and *Williams* under the arbitrary and capricious standard).

27. MMS is a bureau within the United States Department of the Interior and the federal agency responsible for managing mineral resources on the OCS, including natural gas and oil. Minerals Management Service, About the Minerals Management Service, [http://www.gomr.mms.gov/about\\_common.html](http://www.gomr.mms.gov/about_common.html) (last visited Feb. 7, 2009).

28. Open and Nondiscriminatory Movement, *supra* note 21, at 34,631.

29. The OCS includes “all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.” 43 U.S.C. § 1331(a) (2000).

30. *Id.* §§ 1331–1356. MMS helps to administer mineral exploration and development in the OCS under the OCSLA by implementing an OCS oil and gas exploration and development program. See *MMS Gulf of Mexico*, *supra* note 3 (describing the Gulf of Mexico’s contributions to the nation’s energy supply).

31. Open and Nondiscriminatory Movement, *supra* note 21, at 34,632–33.

32. See LEGAL ALERT, MMS ISSUES FINAL RULE ON OPEN ACCESS TO OCS PIPELINES 1 (2008), <http://www.sutherland.com/alertspubs/> (follow “View All Alerts” hyperlink; then follow “Legal Alert: MMS Issues Final Rule on Open Access to OCS Pipeline” hyperlink) (“This resulting division of responsibility between FERC and MMS now makes jurisdictional determinations that much more important.”).

33. Compare *id.* (stating that MMS is only just now asserting jurisdiction under its OCSLA authority), with *Regulation History*, *supra* note 9 (showing FERC’s regulation within the industry for over thirty years), and *Interview with Joseph T. Kelliher et al.*, *supra* note 10 (stating that MMS has never had rate jurisdiction).

that OCS pipelines permit “open and nondiscriminatory access,”<sup>34</sup> which may render it unable to protect small independents from unreasonable prices to the same extent as FERC.

Two recent cases in particular illustrate FERC’s inability to retain jurisdiction over facilities in the Gulf of Mexico.<sup>35</sup> In *Jupiter Energy Corp. v. FERC*, the Fifth Circuit vacated the FERC Order claiming jurisdiction over an offshore Jupiter Energy Corporation (Jupiter) pipeline.<sup>36</sup> The court held that FERC “failed to provide a sufficiently reasoned explanation” for why all of the primary function test criteria were not afforded equal consideration.<sup>37</sup> Similarly, in *Williams Gas Processing-Gulf Coast Co. v. FERC*, the D.C. Circuit vacated the FERC Order asserting jurisdiction over an offshore Transcontinental Gas Pipe Line Corporation (Transco) pipeline.<sup>38</sup> According to the court, FERC failed to clearly explain its reasoning for deviating from established policy in its application of the primary function test.<sup>39</sup>

While these decisions were based on a lack of adequate explanation for a departure from precedent,<sup>40</sup> this Comment argues that FERC’s primary function test is too convoluted to produce consistent results.<sup>41</sup> Part I of this Comment explains the history of the natural gas industry and the federal government’s regulation thereof. Part I also examines the development of the primary function test through an analysis of case law that most significantly affected its formulation. Part II argues that the current test is not conducive to consistent application because (1) the abundance of varying criteria makes the test unpredictable and difficult to apply and (2) the emphasis on physical criteria ignores the more pressing issue of what purpose the pipeline serves. Part III proposes that FERC amend its primary

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34. See Open and Nondiscriminatory Movement, *supra* note 21, at 34,632–33 (failing to require routine reporting of information to ensure “open and nondiscriminatory pipeline access” or specify any other guidelines).

35. See *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 299 (5th Cir. 2007) (vacating FERC’s Jurisdictional Order); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 330 (D.C. Cir. 2006) (vacating FERC’s 2005 Transcontinental Gas Pipe Line Corporation (Transco) Order).

36. *Jupiter*, 482 F.3d at 295, 299.

37. *Id.* at 298.

38. *Williams*, 475 F.3d at 330.

39. *Id.* at 329.

40. See *Jupiter*, 482 F.3d at 298 (finding that the Commission failed to offer an explanation for its “disregard” of various factors in its established primary function test); *Williams*, 475 F.3d at 327 (holding that FERC offered a rationale entirely inconsistent with precedent and made no effort to distinguish its precedents from its current policy).

41. See *Jupiter*, 482 F.3d at 296 (defining the Commission’s multifactor test as inclusive of six physical factors, four nonphysical factors applicable in the offshore context, and three additional modifications); *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,987 (1990) (stating that the Commission’s criteria have evolved with its changing objectives and the developing nature and structure of the natural gas industry).

function test to better fit the offshore context by (1) giving primary consideration to the original purpose of the pipeline and (2) creating a separate offshore primary function test to eliminate confusion caused by an abundance of ineffective criteria. Part IV applies the proposed offshore primary function test to recent cases where FERC has failed to assert jurisdiction under the present test.

## I. REGULATION OF THE NATURAL GAS INDUSTRY

### A. FERC Regulation Under the Natural Gas Act of 1938

The natural gas industry has undergone a major transformation since its inception.<sup>42</sup> Congress passed the NGA to regulate the “sale for resale”<sup>43</sup> of natural gas in interstate commerce.<sup>44</sup> The Act’s primary purpose was to prevent monopolistic enterprises from distorting market prices of natural gas so that consumers would have access to adequate supplies at “reasonable prices.”<sup>45</sup> In order to accomplish this, FERC was commissioned with the responsibility of fixing “just and reasonable” rates for natural gas companies engaged in the sale for resale of natural gas in interstate commerce.<sup>46</sup>

The problem with this new system, however, was that it left investors with little incentive to discover and develop other sources of gas.<sup>47</sup> This problem became evident with the interstate gas shortages of the 1970s.<sup>48</sup> The shortage of artificially low-priced gas from the interstate market—the result of FERC rate regulation—was rivaled by the surplus of unregulated

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42. See generally Fagan, *supra* note 10 (outlining the significant transformation of the natural gas industry from a regulated to a deregulated market).

43. “Sale for resale” is defined as “the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.” 15 U.S.C. § 717(b) (2006).

44. *Id.* §§ 717–717w. The 1938 NGA was enacted as a response to two major events. See Pipeline Service Obligations and Revisions to Regulation Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (Apr. 16, 1992) (to be codified at 18 C.F.R. pt. 284) [hereinafter Pipeline Service Obligations and Revisions]. First, the Supreme Court Commerce Clause cases essentially excluded wholesales of natural gas from state regulation, which meant that interstate pipelines were unregulated. Regulation History, *supra* note 9. And second, a Federal Trade Commission (FTC) report found that unregulated transmission pipelines and wholesale distribution led to monopolistic practices in the industry. FED. TRADE COMM’N, UTILITY CORPORATIONS, S. DOC. NO. 84-A, at 85 (1st Sess. 1936).

45. Tejas Power Corp. v. FERC, 908 F.2d 990, 1003 (D.C. Cir. 1990).

46. FPC v. Hope Natural Gas Co., 320 U.S. 591, 611 (1944).

47. See Pub. Serv. Comm’n of the State of New York v. Mid-Louisiana Gas Co., 463 U.S. 319, 330–31 (1983) (stating that regulated interstate prices could not compete with unregulated intrastate market prices).

48. Pipeline Service Obligations and Revisions, *supra* note 44, at 13,270.

high-priced natural gas from the intrastate market.<sup>49</sup> These low interstate gas prices encouraged consumption rather than much-needed conservation.<sup>50</sup> The crisis thus sparked a new wave of reform resulting in the deregulation of the natural gas industry in an effort to promote competition and ensure adequate gas supplies.<sup>51</sup>

### B. *The Development of FERC's Primary Function Test*

Section 1(b) of the NGA grants FERC jurisdiction over transportation pipelines but withholds jurisdiction over gathering pipelines.<sup>52</sup> Gathering pipelines are generally understood to be those that collect gas from gas-producing wells and deliver the gas to pipelines that participate in interstate commerce.<sup>53</sup> While this definition may seem clear, the intricacies of today's industry prove quite the contrary. Complications arise when dealing with numerous pipeline segments owned by different companies on a single route between the upstream well and the downstream final destination.<sup>54</sup>

Given FERC's responsibility to provide a meaningful distinction between transportation and gathering pipelines,<sup>55</sup> the Commission created the primary function test in its 1983 *Farmland* decision.<sup>56</sup> The test

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49. Fagan, *supra* note 10, at 716.

50. *Id.*

51. Pipeline Service Obligations and Revisions, *supra* note 44, at 13,270–71; see Christian S. Gerig, Comment, *Appalachian Natural Gas and FERC Order 636: The Deregulation Dilemma*, 24 CAP. U. L. REV. 761, 761 (1995) (“The FERC Commissioners’ deregulation activism has revolutionized almost every aspect of the industry and will have a lasting impact on the nation’s natural gas supply.”). The movement toward deregulation began with the Natural Gas Policy Act (NGPA). The NGPA eliminated FERC-determined prices for first sales of natural gas, which were previously a key aspect of the industry. FERC responded to the NGPA by implementing Order 436. Order 436 provided for open-access, nondiscriminatory transportation, which meant that downstream gas users were now able to buy gas directly through gas merchants in the production area and to ship the gas through interstate pipelines. The combined effect of the NGPA and Order 436 was increased competition and the development of two distinct economic and commercial services through a separation in the sale and transportation of gas. FERC later solidified the movement toward deregulation through its Order 636, which called for an “unbundling”—a process by which pipeline companies separate those entities that produce or gather gas from those that transport gas. Pipeline Service Obligations and Revisions, *supra* note 44, at 13,271.

52. 15 U.S.C. § 717(b) (2006).

53. *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1076 (D.C. Cir. 2002); *Conoco Inc. v. FERC*, 90 F.3d 536, 539 n.3 (D.C. Cir. 1996).

54. *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 323 (D.C. Cir. 2006).

55. *Sea Robin Pipeline Co. v. FERC (Sea Robin I)*, 127 F.3d 365, 370 (5th Cir. 1997).

56. See *Farmland Indus., Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,143 (1983) (acknowledging previous tests or factors the Commission had considered for Section 1(b) jurisdictional determinations before holding that “the ultimate test is whether the primary function of the facility can be classified as transportation or gathering”); see also *Ben Bolt Gathering Co.*, 26 F.P.C. 825, 827 (1961), *aff’d*, 323 F.2d 610 (5th Cir. 1963) (creating a primary function test in which all facts and circumstances should be weighed to determine whether a facility

consisted of five physical criteria to be considered on a case-by-case basis:<sup>57</sup> “1) the diameter and length of the facility; 2) the location of compressors and processing plants; 3) extension of the facility beyond the central point in the field; 4) location of wells along all or part of the facility; and 5) the geographical configuration of the system.”<sup>58</sup> FERC later included a sixth factor, pipeline operating pressure.<sup>59</sup>

Six years later, however, in *EP Operating Co. v. FERC*, the Fifth Circuit found that the primary function test did not account for the realities of isolated operations in the Gulf Coast.<sup>60</sup> Offshore pipelines are typically larger and longer than those onshore, depending on their distance from shore, because these pipelines alone must carry their gas to shore.<sup>61</sup> FERC nonetheless classified EP Operating’s offshore pipeline as a transportation line simply because it was larger and longer than most onshore gathering lines.<sup>62</sup> Consequently, the court reversed FERC’s decision.<sup>63</sup>

In accord with *EP Operating*, FERC added to the primary function test a “sliding scale” to account for variations in pipeline size and length.<sup>64</sup> The Commission also emphasized that, in addition to the *Farmland* criteria, it may also consider other nonphysical criteria “such as the 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 NGPA.”<sup>65</sup>

Despite FERC’s attempts to make the primary function test applicable to

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serves the purpose of transportation or gathering); *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957) (formulating the more mechanical “central point” in the field test in which a pipeline is deemed a transmission line if it operates beyond the point where gas from separate wells collected by several gathering lines converge to feed into a single line); *Phillips Petroleum Co.*, 10 F.P.C. 246, 277 (1951), *rev’d on other grounds*, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) (formulating the “behind the plant” test, a mechanical test that bases classification on whether or not the facility is located behind a gas processing plant).

57. *See EP Operating Co. v. FERC*, 876 F.2d 46, 48 (5th Cir. 1989) (highlighting the individualized assessment of the primary function test by the consideration of relevant factors as opposed to the application of bright-line standards).

58. *Id.*

59. *Id.*

60. *See id.* at 48–49 (asserting that FERC’s emphasis on the pipeline’s length, diameter, and operating pressure, as well as its emphasis on the central-point-in-the-field analysis, did not take into consideration the physical differences in offshore gas collection in the OCS).

61. *See id.* at 49 (describing the unique circumstances of deep-water drilling at far distances from shore).

62. *See id.* (emphasizing FERC’s shortcomings in applying the primary function test in the offshore context, and in attaching particular weight to the central-point-in-the-field analysis, the validity of which the court questioned).

63. *Id.* at 50.

64. *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990). This was meant to account for the changing “technical and geographical nature” of the industry. *Id.*

65. *Id.* at 61,987 (footnotes omitted).

offshore facilities, the Fifth Circuit again found fault with the test in *Sea Robin Pipeline Co. v. FERC*.<sup>66</sup> The court found that the Commission, in asserting jurisdiction over a Sea Robin pipeline, made the same mistake as it had in *EP Operating* by treating the physical size of the pipeline as determinative.<sup>67</sup> In addition, the court observed that FERC focused on nonphysical criteria at the expense of more than half of the *Farmland* criteria.<sup>68</sup> This conflicted with the court's narrow interpretation of the NGA—requiring a *physical* distinction between gathering and transportation lines and thereby compelling a focus on physical criteria.<sup>69</sup> Consequently, the court vacated FERC's Order and invited the Commission to reformulate its primary function test.<sup>70</sup>

On remand, FERC modified its test to more effectively distinguish the point at which offshore gas gathering ends and its interstate transportation begins.<sup>71</sup> First, the Commission announced that it would place greater weight on physical criteria in applying the jurisdictional test.<sup>72</sup> Second, the Commission included two modifications of the *Farmland* criteria in an effort to make them more applicable in the offshore context, one of which was the consideration of a centralized aggregation point.<sup>73</sup>

In all, these modifications resulted in the addition of seven criteria to the primary function test such that, in March 2007, the *Jupiter* court described the test as including thirteen total criteria.<sup>74</sup>

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66. See *infra* notes 69–70.

67. See *Sea Robin I*, 127 F.3d 365, 370 (5th Cir. 1997) (finding that the Commission had abandoned its “sliding scale,” thereby reverting to its single-factor, bright-line approaches).

68. See *id.* at 370 (“[B]y excluding consideration of a large number of the *Farmland* factors, the Commission, in effect, reduced the primary function analysis to a litmus test that turned on the length and diameter of the overall system.”).

69. *Id.* at 371 (finding that Congress's distinction between physical aspects of the industry—gathering versus transportation—requires the Commission to base its jurisdictional inquiry primarily on physical criteria).

70. *Id.* at 371–72.

71. See *Sea Robin Pipeline Co. (Sea Robin II)*, 87 F.E.R.C. ¶ 61,384, at 62,427 (1999) (noting the Fifth Circuit's assertion that when gas is destined for interstate commerce, there must be a point at which gathering ceases and interstate transportation begins), *reh'g denied*, *Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072 (2000).

72. *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 296 (5th Cir. 2007).

73. This included minimizing the weight placed on the “behind the plant” factor, which corresponds to the second *Farmland* criterion, “the location of compressors and processing plants,” since nearly all offshore facilities are located upstream of processing plants. *Sea Robin II*, 87 F.E.R.C. at 62,425. This also included adding an inquiry into whether there is a point at which “gas is aggregated for further transportation to shore,” which is the offshore equivalent to the third *Farmland* criterion, “the extension of the facility beyond the central point in the field.” *Id.*

74. See *Jupiter*, 482 F.3d at 296. This included a consideration of six physical criteria, four nonphysical criteria, and three additional modifications where the Commission adopted an additional analytical element applicable to systems that contain a centralized aggregation point, . . . adjusted the weight to be afforded the “behind-the-

C. *FERC's Failed Attempts to Assert Jurisdiction in the Gulf of Mexico*

Recently, in *Jupiter*, the Fifth Circuit vacated FERC's Order asserting jurisdiction over an eight-inch Jupiter pipeline and remanded the case because of FERC's failure to articulate its reasons for dismissing certain criteria.<sup>75</sup> The Commission based its determination on the centralized aggregation point and summarily dismissed other physical criteria such as length, diameter, and operating pressure.<sup>76</sup> The Commission also ignored the nonphysical criteria that it had announced in response to *EP Operating*.<sup>77</sup>

FERC was similarly critiqued in *Jupiter's* twin case, *Williams*, for making a jurisdictional determination "devoid of reasoned decisionmaking."<sup>78</sup> The Commission, after thorough application of the primary function test, initially found that a twenty-four-inch Transco pipeline was a nonjurisdictional gathering line.<sup>79</sup> However, FERC's earlier jurisdictional claim over the eight-inch Jupiter line created an "anomalous" situation, whereby a series of gathering pipelines fed into a transportation pipeline (Jupiter's eight-inch line), which fed into a gathering pipeline (the Transco line).<sup>80</sup> In light of this anomaly, FERC reversed its earlier decision and designated the Transco line a jurisdictional transportation line.<sup>81</sup> The D.C. Circuit, however, vacated FERC's order asserting jurisdiction because the Commission failed to provide a reasoned analysis for deviating from its previous application of the primary function test.<sup>82</sup>

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plant" criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors; and . . . places greater focus on the physical factors rather than the non-physical factors [when considering the totality of the circumstances].

*Id.*

75. *Jupiter*, 482 F.3d at 298–99 (holding that a reasoned analysis for dismissing any of the primary function test criteria is even more important when such criteria point to a nonjurisdictional function).

76. *Id.* at 297.

77. *Jupiter Energy Corp.*, 103 F.E.R.C. ¶ 61,184, at 61,713 (2003) ("[T]his is not a case where the physical factors are so ambiguous that we need to consider nonphysical factors, such as the nature of the prospective owner's business, in order to reach a finding regarding the primary function of facilities."), *reh'g denied*, 105 F.E.R.C. ¶ 61,243 (2003).

78. *See Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 330 (D.C. Cir. 2006) (finding that FERC did not provide a reasoned analysis for overturning its earlier determination that the Transco pipeline served a gathering function).

79. *Id.* at 324.

80. *Id.* at 325.

81. *Id.*

82. *Id.* at 327–29 (acknowledging two possible principles that could explain FERC's ruling, but concluding that the Commission ultimately based its decision on an "incomplete information" rationale instead of openly adopting these principles).

#### D. *If Not FERC Regulation, MMS Regulation*

In light of FERC's struggle to assert jurisdiction over offshore facilities under the NGA,<sup>83</sup> the Commission, in *Williams*, attempted to assert jurisdiction under its OCSLA authority.<sup>84</sup> Prior to this case, it was unclear whether FERC or MMS, through their respective OCSLA responsibilities, had authority to enforce the Act's "open and non-discriminatory access"<sup>85</sup> provisions in the OCS.<sup>86</sup>

The D.C. Circuit in *Williams* established that the OCSLA grants enforcement of its "open access" provisions to MMS through the Department of the Interior.<sup>87</sup> MMS recently embraced its OCSLA authority by promulgating a rule to regulate all OCS pipelines.<sup>88</sup> The rule, however, defers enforcement to FERC for pipelines already under the Commission's NGA jurisdiction.<sup>89</sup>

## II. PROBLEMS WITH FERC'S PRIMARY FUNCTION TEST

FERC's effort to promote competition by deregulation of natural gas pipelines has resulted in less regulation than FERC is comfortable with.<sup>90</sup>

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83. An increasing number of pipelines asserted that they were nonjurisdictional lines based on the modified primary function test that followed the Fifth Circuit's decision in *Sea Robin I*. Although FERC agreed with these pipelines for the most part, it was alarmed by the fact that a pipeline located in water was becoming synonymous with a gathering line. See Edwin I. Malet, *Outer Continental Shelf Oil Pipelines Under the Interstate Commerce Act*, 43 LA. L. REV. 1143, 1173 (1983) ("Indeed, most, if not all, offshore oil movement might be characterized as gathering."). Consequently, in an effort to remedy this effect, FERC attempted to assert jurisdiction over gathering pipelines under OCSLA. Interview with Joseph T. Kelliher et al., *supra* note 10.

84. 345 F.3d 910, 911 (D.C. Cir. 2003).

85. 43 U.S.C. § 1334(f)(1)(A) (2000).

86. The OCSLA grants MMS broad authority to oversee operations on the OCS. But the Act also authorizes FERC to exempt certain OCS oil and gas pipelines from nondiscrimination requirements and to consult with the Attorney General in regard to the Act's "open and non-discriminatory access" requirements. *Id.* § 1334(f).

87. 345 F.3d at 913 (finding that FERC's attempt to enforce OCSLA's open-access provisions by imposing a reporting requirement was beyond its grant of authority, and that "Congress presumably intended that enforcement would be at the hands of the obligee of the conditions, the Secretary of the Interior"). This holding not only applies to FERC rulemakings but also to FERC adjudications. *William Gas Processing-Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1344-45 (D.C. Cir. 2004).

88. Open and Nondiscriminatory Movement, *supra* note 21, at 34,631 (establishing a complaint procedure for shippers who believe that they have been denied open and nondiscriminatory access to offshore facilities).

89. *Id.* at 34,632-33.

90.

The Commission raises the potential for a "regulatory gap" problem by urging that if *Sea Robin* is found to be a gathering system, then other large gas transporters may seek similar declarations, thus upsetting the investment-backed expectations of producers and shippers who have come to rely upon the Commission's exercise of regulatory authority.

The Commission now appears to be struggling to retain jurisdiction over pipelines in the Gulf of Mexico to prevent the resurgence of monopolistic practices by the larger pipeline owners.<sup>91</sup>

### A. An Abundance of Criteria

Applying all thirteen criteria of the primary function test is a cumbersome task in light of the fact that not all criteria are relevant in the offshore context. The jurisdictional test was created primarily for onshore facilities, as FERC did not contemplate the type of offshore presence that is prevalent today.<sup>92</sup> Consequently, the test's thirteen criteria are not all applicable to offshore pipelines.<sup>93</sup> This is evident from *Sea Robin I*, in which FERC reconsidered the application of two of the *Farmland* criteria specifically for the offshore context.<sup>94</sup>

Although seven of the test's criteria were created to accommodate the realities of offshore drilling,<sup>95</sup> FERC has struggled<sup>96</sup> with the courts' insistence that it must address all thirteen criteria.<sup>97</sup> In both *Williams* and *Jupiter*, the court vacated FERC orders because the Commission failed to consider all of the test's criteria.<sup>98</sup> However, because not all criteria are

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*Sea Robin I*, 127 F.3d 365, 371 (5th Cir. 1997). The Commission has not only attempted to assert jurisdiction over offshore natural gas facilities through its OCSLA authority, it has also specifically asked Congress for such jurisdiction. Interview with Joseph T. Kelliher et al., *supra* note 10.

91. See *supra* Part I.C; see also Interview with Joseph T. Kelliher et al., *supra* note 10 (stating that the Commission probably has a worse record in the courts on gathering than it has in any other area, but that there is good reason for this: offshore gathering is an unregulated monopoly); cf. *Sea Robin I*, 127 F.3d at 371 ("Need for regulation cannot alone create authority to regulate.").

92. Interview with Joseph T. Kelliher et al., *supra* note 10 (explaining that no one had ever contemplated a substantial growth in offshore facilities). The outcomes of decisions onshore were relatively uncontroversial. *Id.* In fact, FERC's primary function test has only been modified in response to offshore jurisdictional disputes. See *supra* Part I.B.

93. See, e.g., *Sea Robin I*, 127 F.3d at 370 (noting the Commission's recognition that over half of its *Farmland* criteria were not probative in the offshore context).

94. See *supra* note 72 and accompanying text.

95. See *supra* Part I.B (detailing the seven modifications made to the primary function test in an effort to accommodate the realities of offshore operations).

96. See, e.g., *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 321 (2006) (stating that "FERC's efforts to properly classify Transco's pipeline are emblematic of its struggle" to distinguish between pipelines that transport natural gas and those that gather it).

97. See, e.g., *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 298 (5th Cir. 2007) (holding that despite FERC's assertion that "this is not a case where the physical factors are so ambiguous as to necessitate" their analysis, nonphysical factors, although secondary to physical factors, cannot be ignored when applying the primary function test); *Sea Robin I*, 127 F.3d at 370 ("The Commission must . . . not discount, without reasoned analysis, application of any factor which points to a non-jurisdictional result."), *remanded to Sea Robin II*, 87 F.E.R.C. ¶ 61,384, at 62,425 (1999).

98. See *supra* Part I.C.

relevant to a jurisdictional determination in every case,<sup>99</sup> requiring such analysis not only wastes judicial resources<sup>100</sup> but also presents an opportunity for inconsistency.<sup>101</sup>

Unfortunately, FERC's attempts to make the primary function test applicable to offshore facilities have simply created an abundance of criteria that the Commission cannot apply consistently; FERC is guilty of attempting to fit the proverbial square peg into a round hole.<sup>102</sup>

### B. *The Courts' Emphasis on Physical Criteria*

The Supreme Court has narrowly construed the NGA, holding in 1947 that “[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed.”<sup>103</sup> The Court stepped in again in 1989, requiring that the terms *production* and *gathering* be narrowly confined to “the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution.”<sup>104</sup> The requirement that FERC focus on the physical distinction between gathering and transporting, however, has ironically interfered with FERC's ability to make this distinction. While the Fifth Circuit concedes that certain nonphysical criteria are relevant to determining where gathering ceases and transportation begins, it presumes that such criteria cannot be relevant unless physical criteria are first considered.<sup>105</sup> This conflicts with FERC's belief that nonphysical criteria may be sufficient to ascertain the primary function of a pipeline.<sup>106</sup>

Although FERC has not been entirely consistent in its application of the primary function test in the offshore context, courts do not have the expertise required to regulate the natural gas industry.<sup>107</sup> The need for

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99. See *supra* note 96 and accompanying text.

100. Cf. *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring) (stating that sometimes the *Saucier* qualified immunity rule “wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily”).

101. See *supra* Part I.C.

102. See Interview with Joseph T. Kelliher et al., *supra* note 10 (discussing how the test appeared to apply less and less as offshore facilities expanded and the nature of those facilities changed, i.e., they were situated in deeper and deeper waters).

103. *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690–91 (1947).

104. *Nw. Cent. Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 510 (1989) (internal quotation marks and citation omitted).

105. See *Sea Robin I*, 127 F.3d 365, 371 (5th Cir. 1997) (emphasizing that nonphysical factors are secondary to physical factors despite the Commission's OCS Policy Statement, which took into account the voice of the industry with regard to application of these nonphysical factors).

106. See *id.* at 369–70 (“The Commission repeatedly emphasized that the non-physical criteria in its test supported its conclusion that *Sea Robin* was a transporter . . .”).

107. See *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 690 (1954) (Douglas, J., dissenting) (“Regulation of the business of producing and gathering natural gas involves considerations of which we know little and with which we are not competent to deal.”); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges

expertise in a specialized area of law such as this is precisely why courts give agency interpretations a high level of deference.<sup>108</sup> Ultimately, FERC, and not the courts, has the responsibility of drawing a meaningful distinction between gathering and transportation.<sup>109</sup> Thus, although the standard of review used by the courts<sup>110</sup> is arguably similar to *Chevron* deference,<sup>111</sup> perhaps the effective application of a still more lenient standard of review is necessary in light of the complicated nature of the issues at hand.

The consequences of the Fifth Circuit's involvement in defining the distinction between gathering and transporting pipelines are illustrated in *Sea Robin*.<sup>112</sup> The court criticized FERC for placing too much emphasis on physical criteria, even though it also held that the Commission relied too heavily on *nonphysical* criteria.<sup>113</sup> A confused FERC, believing it rightfully applied its jurisdictional test,<sup>114</sup> nonetheless adhered to

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are not experts in the field, and are not part of either political branch of the Government.”).

108. See *CFTC v. Schor*, 478 U.S. 833, 845 (1986).

An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.

*Id.* (internal quotation marks omitted).

The *Sea Robin I* court, although delineating the deferential standard of review of agency determinations and stating that the court is not to substitute its own judgment for that of the agency, still effectively overshadowed the Commission's OCS Policy Statement, 74 F.E.R.C. ¶ 61,222 (1996), by making sure that consideration of nonphysical criteria “be put in its place” as secondary to physical criteria. 127 F.3d at 369–71.

109. See *supra* text accompanying note 55; see also ANDREW F. POPPER & GWENDOLYN M. MCKEE, *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* 141 (2009) (asserting that *Chevron* can be viewed as putting forth the political position and, perhaps, “constitutional precept” that “[i]t is not the task of federal courts to re-write the policy preferences of the legislative or executive branches of government”).

110. The Fifth Circuit in *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 296 (5th Cir. 2007), and the D.C. Circuit in *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006), applied the “arbitrary and capricious” standard of review under 5 U.S.C. § 706(2)(A).

111. See JOHN F. DUFFY & MICHAEL HERZ, *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 96 (2005) (“Courts do sometimes conduct their [*Chevron*] step two analysis in a way that tracks the arbitrary and capricious test of the APA. Despite this practice, however, the doctrinal relationship between [the two] is a source of confusion in the lower courts.”).

112. The Fifth Circuit for the most part told FERC what the central point of aggregation should be. Interview with Joseph T. Kelliher et al., *supra* note 10.

113. *Williams*, 475 F.3d at 323–24.

114. According to FERC, the court's finding that the Commission did not pay adequate attention to the physical criteria was an odd admonition. FERC believed it *was* focusing on physical factors and *did* explain why certain factors were poor indicators of the primary function of the facility. However, the court seemed to think FERC overemphasized the fact that *Sea Robin* had always been jurisdictional and that customers relied on FERC's jurisdiction. Additionally, the court's emphasis on physical factors, which in reality was simply an emphasis on the size of the pipeline, is not a good jurisdictional indicator because pipelines offshore tend to be much longer and larger than those onshore. Interview with

court-prompted modifications.<sup>115</sup> Unfortunately, these modifications did not result in a rule conducive to consistent application,<sup>116</sup> and instead caused an alarming reduction of FERC offshore regulation.<sup>117</sup>

Moreover, the literal focus on physical criteria does not allow for changing industry practices.<sup>118</sup> While it is true that the primary function test includes certain criteria that have accounted for the industry's geographical and technical changes,<sup>119</sup> these criteria were a product of court-prompted modifications rather than part of an easily adaptable jurisdictional test.<sup>120</sup> Furthermore, the focus on physical criteria neglects the fact that some pipelines that transport natural gas in interstate commerce are physically characteristic of gathering lines.<sup>121</sup> As stated in FERC's 2003 Notice of Public Conference on the Application of the Primary Function Test for Gathering on the OCS, the result of the primary function test is that "[s]ystems with generally similar physical characteristic[s] may have a different regulatory status because of relatively minor physical differences. This result can produce different regulatory results for competitors who perform essentially the same economic function."<sup>122</sup> If FERC is to avoid continual modifications and burdensome litigation,<sup>123</sup> it needs a more workable test conducive to evolving practices.

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Joseph T. Kelliher et al., *supra* note 10.

115. See *Sea Robin I*, 127 F.3d 365, 370 (5th Cir. 1997).

116. See, e.g., *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 296 (5th Cir. 2007); *Williams*, 475 F.3d at 322 (contesting FERC's application of the primary function test).

117. See *supra* note 87 and accompanying text.

118. See *infra* notes 121–23 and accompanying text.

119. See *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990) (including a sliding scale for determining what pipeline size and length, when compared to the depth at which the pipeline is situated, will indicate a gathering line). FERC made this modification to bring the primary function test in line with the industry's gradual movement offshore.

120. *Id.*

121. See generally Sean Hennessee, Note, *Williams Gas Processing-Gulf Coast Company, L.P. v. FERC: Remedies for Producers in the Absence of FERC Regulation*, 26 ENERGY L.J. 497, 504–05 (2005) (describing how deregulation has left producers like Shell unprotected from monopolistic practices of spun-down gatherers who have come up with innovative ways to operate their facilities, and proposing as remedies "(1) regulation via antitrust law and (2) regulation imposed by the natural laws of economics inherent in free markets"). *But cf.* *Nw. Pipeline Corp. v. FERC*, 905 F.2d 1403, 1407 n.10 (10th Cir. 1990) ("[T]he production and gathering exemption 'applies to the physical activities, facilities, and properties used in the production and gathering of natural gas and not to the business of production and gathering' . . ."). Although FERC is able to retain jurisdiction over "spun-down" gathering affiliates who engage in anticompetitive practices, this is only true when two entities act in concert to frustrate FERC's ability to regulate the pipeline. *Arkla Gathering Servs. Co.*, 67 F.E.R.C. ¶ 61,257, at 61,871 (1994).

122. Application of the Primary Function Test for Gathering on the Outer Continental Shelf, Docket No. AD03-13-000 (Aug. 21, 2003) (notice of public conference).

123. See, e.g., *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 321 (D.C. Cir. 2006) (describing five years of litigation surrounding Transco's twenty-four-inch lateral).

### III. PROPOSED AMENDMENTS TO THE PRIMARY FUNCTION TEST

As the primary function test stands today, FERC cannot faithfully fulfill its statutory mandate to regulate natural gas transported through interstate commerce.<sup>124</sup> This is why the primary function test should be applied with a macroscopic view of the pipeline's purpose.

#### A. *Step One: Emphasize the Original Purpose*

##### 1. *Look to Pipeline Permits and Construction*

The first step in assessing the purpose of a pipeline is to determine whether the pipeline served a transportation or gathering function when the owner was initially granted a permit and constructed the pipeline. If a pipeline owner, originally subject to FERC regulation, claims that the pipeline in question now serves a nonjurisdictional gathering function, the owner should have the burden of establishing this fact by a preponderance of the evidence.<sup>125</sup> This relatively high burden of proof is warranted because the proposed test aims to take advantage of the many benefits that accompany a focus on the original purpose, as outlined below.

##### 2. *Advantages of Focusing on Original Purpose*

Placing the primary inquiry on the original purpose of a pipeline serves four functions. First, it allows for a simple, single-factor test—the original purpose—and only requires consideration of additional criteria if a pipeline owner desires a change in jurisdictional status. Second, on its face it promotes adherence to precedent. If MMS, before issuing permits, were more attentive to the transportation and gathering system patterns amidst the web-like pipeline structure of the OCS,<sup>126</sup> it may be able to aid in uncovering the relative point at which gathering ceases and transportation

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124. See *Sea Robin II*, 87 F.E.R.C. ¶ 61,384, at 62,432 (1999) (Bailey, Comm'r, dissenting) ("In the end, I fear that we will continue to have a mixed group of gathering and transmission lines on the OCS, and that the jurisdictional status of certain of those lines will be based solely upon different applications of the primary function test."), *reh'g denied*, *Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072 (2000).

125. Although FERC may certainly choose to dispute an original licensed purpose in light of a pipeline's changing business practices, this Comment focuses on claims the pipelines themselves bring, as this is what brought about a significant reduction in FERC's offshore presence. Furthermore, although Order 636—a call for unbundling—is the cause of much of these claims, a focus on original purpose is a prospective approach to the primary function test that is meant to allow for only limited future unbundling efforts.

126. An aerial view of the pipelines on the OCS would reveal a web-like visual. Interview with James Day, *supra* note 17.

begins.<sup>127</sup> Consequently, a focus on original purpose may be sufficient to satisfy the court's narrow construction of the NGA,<sup>128</sup> as opposed to emphasizing consideration of specific physical pipeline attributes. Furthermore, such MMS findings would provide FERC guidance when dealing with jurisdictional disputes over original purpose. Third, because pipeline owners will carry the relatively high burden of proving an alternative jurisdictional status, they will have greater incentive to thoroughly consider the function of their facilities before obtaining a permit and commencing construction. This, in turn, will help to prevent costly and time-consuming litigation down the line. And finally, a high burden of proof on pipeline owners will also compel them to think twice before engaging in monopolistic practices because reviewing courts may negatively construe such behavior.

*B. Step Two: Apply Only Relevant Criteria Through a  
Consideration of the Totality of the Circumstances*

*1. Separate from the Onshore Context*

If a pipeline owner chooses to dispute a pipeline's original purpose, FERC will need a more refined test to guide pipeline owners in determining what they must show to succeed on their claim.<sup>129</sup> This requires FERC to create a separate jurisdictional test for offshore pipelines. Given the fact that the original *Farmland* criteria were not designed for the offshore context, but rather simply create an abundance of criteria for FERC to apply mechanically, these criteria should largely be eliminated for an offshore jurisdictional test.<sup>130</sup>

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127. *Sea Robin II*, 87 F.E.R.C. at 62,427. Ascertaining the technical distinction between gathering and transportation—by establishing a pattern within the web where certain pipelines would certainly be jurisdictional and others would not—may require the combined efforts of FERC and MMS.

128. See *supra* note 71 and accompanying text for the court's narrow interpretation of the NGA.

129. See *Sea Robin II*, 87 F.E.R.C. at 62,433–34 (Hébert, Comm'r, dissenting) (recognizing “the various reformulations of the modified primary function test which fail to provide any clear guidance” and noting the Commission's desire for greater “clarity and simplicity” in a prospective jurisdictional test for the OCS), *reh'g denied*, *Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072 (2000). This Comment also notes that a more defined test would induce FERC to be more consistent not only with its application of the primary function test, but also with its policies. *Cf. Williams Gas Processing-Gulf Co. v. FERC*, 475 F.3d 319, 323–24 (D.C. Cir. 2006) (discussing FERC's reversal of prior precedents and policies without consideration of its primary function test).

130. See *Sea Robin II*, 87 F.E.R.C. at 62,432 (Bailey, Comm'r, dissenting) (respecting FERC's effort to reformulate the primary function test to accommodate OCS facilities, but contending that each new case will be factually different and that the Commission will continue to have problems determining what weight to accord each factor in any given situation).

## 2. A Defined Offshore Primary Function Test

The proposed jurisdictional test should consist of the factors FERC created when it modified the primary function test. These include the centralized point of aggregation<sup>131</sup> as well as the following four nonphysical criteria: “the purpose, location, and operation of a facility; the general business activity of the owner of the facility; whether the jurisdictional determination is consistent with the objectives of the NGA and the NGPA”; and “the changing technical and geographic nature of exploration and production.”<sup>132</sup> Additionally, although pipeline length, diameter, and operating pressure may still be considered,<sup>133</sup> they should not weigh heavily since they may be poor indicators of an offshore pipeline’s purpose.<sup>134</sup>

Given the intricacies of the natural gas industry, this step of the proposed primary function test requires consideration of these criteria through a totality of the circumstances standard.<sup>135</sup> Accordingly—like the present primary function test—the amount of weight accorded to such criteria should be determined on a case-by-case basis.<sup>136</sup>

### IV. APPLICATION OF THE PROPOSED OFFSHORE PRIMARY FUNCTION TEST TO *JUPITER* AND *WILLIAMS*

The benefits of the proposed offshore primary function test<sup>137</sup> are

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131. See *id.* at 62,427.

132. Amerada Hess Corp., 52 F.E.R.C. ¶ 61,268, at 61,987–88 (1990) (internal citations omitted).

133. See *Sea Robin II*, 87 F.E.R.C. at 62,433 (Hébert, Comm’r, dissenting) (believing that even in the offshore context, pipeline length, diameter, and operating pressure need to be analyzed in the primary function test).

134. See Interview with Joseph T. Kelliher et al., *supra* note 10 (explaining how the onshore test was not an ideal fit for expanding offshore facilities, which were inherently different in nature).

135. See *EP Operating Co. v. FERC*, 876 F.2d 46, 48 (5th Cir. 1989) (emphasizing that the intricate nature of the natural gas industry is not conducive to application of bright-line standards).

136. See *supra* text accompanying note 72.

137. FERC could enforce this test through notice-and-comment rulemaking or, perhaps, a negotiated rulemaking if the Commission does not wish to devote the time and resources necessary to undergo the notice-and-comment process. Implementing the test in this way, as opposed to doing so through case law, would have many advantages. First, it would produce a test reflective of both FERC expertise as well as the voice of varied players within the industry, which would put the industry on notice as to what is required for jurisdictional changes. See *POPPER & MCKEE*, *supra* note 109, at 64 (describing the notice-and-comment process, whereby any member of the public is given the opportunity to submit his or her perspective on a proposed rule after the agency has issued a “notice of proposed rule making”). Additionally, this may result in greater predictability and public approval. See *id.* at 85 (proposing that *Morton v. Ruiz*, 415 U.S. 199 (1974), stands in part for the idea that “properly promulgated rules enhance fairness” and that fairness is furthered by providing the public with advance notice of “standards by which the government will allocate benefits”). While FERC did attempt to accomplish something similar through its OCS

evident in *Jupiter* and *Williams*. Both of the pipelines at issue in these cases were originally classified as jurisdictional transportation lines.<sup>138</sup> Given the high burden on the pipeline owner to change a pipeline's jurisdictional status, a test that focuses on original purpose may have prevented both pipeline owners from asserting that their pipelines served a nonjurisdictional gathering function.<sup>139</sup>

Assuming, however, that both pipeline owners nonetheless chose to dispute their jurisdictional status, the proposed offshore primary function test would have helped FERC retain jurisdiction. This is particularly true if general adherence to the original purpose of a pipeline gradually unveils where gathering ends and transportation begins. Such a distinction would have prevented the "anomalous" situation in *Williams*, where FERC oscillated in its Transco Orders out of an uncertainty as to where to draw this line.<sup>140</sup>

Regardless of whether such a distinction is so clearly produced, there is less room for inconsistency with a test that requires consideration of only five relevant criteria<sup>141</sup> and does not mandate a focus on a pipeline's physical characteristics.<sup>142</sup> This is most evident in *Jupiter*, where FERC's inconsistent application of the primary function test stemmed in part from its failure to consider pipeline length, diameter, and operating pressure.<sup>143</sup> Under the proposed test, this issue would not have been as noteworthy

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Policy Statement, 74 F.E.R.C. ¶ 61,222 (1996), Commission Notice of Inquiry on Alternative Methods for Regulating Natural Gas Pipeline Facilities and Services on the Outer Continental Shelf, 83 F.E.R.C. ¶ 61,235 (1998), and Application of the Primary Function Test for Gathering on the Outer Continental Shelf, 68 Fed. Reg. 50,530 (Aug. 21, 2003), such efforts were made a number of years ago and are still not equivalent to a more thorough, well-rounded solution that would likely result from a notice-and-comment rulemaking. And third, notice-and-comment or negotiated rulemaking could help FERC be more consistent with its policies, especially if the Commission included its most basic principles in the rule. See POPPER & MCKEE, *supra* note 109, at 103 ("State Farm obligates agencies to disclose the basis for their reasoning when they rescind or repudiate a rule."). For example, the principle that there is one point where gathering ends and transportation begins, which implies that a transportation line cannot logically flow into a gathering line, should be embodied in an official regulation.

138. See *Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 295 (5th Cir. 2007) (specifying that the Federal Power Commission determined in 1966 that the Jupiter line served a transportation function); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 324 (D.C. Cir. 2006) (describing the twenty-four-inch Transco line as a gathering line after Transco asked FERC to authorize the "spin down" of its gathering affiliate, Williams).

139. This would be so despite Order 636's call for unbundling. See *Pipeline Service Obligations and Revisions*, *supra* note 44, at 13,270.

140. *Williams*, 475 F.3d at 325.

141. See *supra* Part II.A (arguing that an abundance of criteria is not conducive to consistent application of the primary function test).

142. See *supra* Part II.B (asserting that a focus on physical criteria may not always be relevant to jurisdictional determinations and may undermine an assessment of a pipeline's functional purpose).

143. *Jupiter*, 482 F.3d at 297.

since less weight would be accorded to these physical criteria. Furthermore, FERC may have been less likely to so quickly dismiss consideration of the nonphysical criteria in a test that so clearly emphasizes them.<sup>144</sup>

#### CONCLUSION

FERC's outdated primary function test has led to inconsistent application, an abundance of litigation, and an image of the Commission as arbitrary and capricious. The test's abundance of criteria makes it difficult to apply consistently, and an emphasis on physical criteria has undermined the test's objective—determining the primary function of the pipeline at issue. As a result, FERC's regulatory authority in the Gulf of Mexico has significantly diminished, with the larger pipeline owners scrambling to get out from under FERC's rate regulations in an effort to increase their rates and profit margins. This is certainly a cause for concern for small consumers, whom FERC is mandated to protect. As one scholar noted in the wake of FERC's shift toward deregulating the natural gas industry, "If, as consumer groups fear, the restructuring proceedings resemble dictations of terms more than bona fide negotiations, it is highly unlikely that the . . . transition will be completed with minimum fuss."<sup>145</sup> Now, seventeen years after the move toward deregulation, this fear appears to be a reality, especially in the offshore context where only a select few pipeline owners have the ability—and consequently, the bargaining power—to set terms to transport gas from far offshore locations onshore.<sup>146</sup>

To retain its presence in the Gulf of Mexico, FERC should focus on the original purpose of a pipeline in its application of the primary function test. To provide guidance to pipeline owners disputing their original jurisdictional status, FERC should create a separate jurisdictional test for offshore facilities. This can be achieved by eliminating criteria that are primarily meant for onshore facilities and by considering these criteria through a totality of the circumstances standard.

Applying the test in this manner may help FERC draw a more meaningful distinction between gathering and transporting pipelines, leaving the Commission more confident that it is fulfilling its statutory

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144. On remand, FERC found that Jupiter's facilities performed a gathering function exempt from the Commission's NGA jurisdiction, and that the Transco pipeline did in fact serve a transportation function subject to the Commission's NGA jurisdiction. *Transcontinental Gas Pipe Line Corp.*, 121 F.E.R.C. ¶ 61,157 (2007), *reh'g denied*, 124 F.E.R.C. ¶ 61,040 (2008).

145. Fagan, *supra* note 10, at 734.

146. See *supra* note 18 and accompanying text; see also E-mail from James Day, *supra* note 10 (describing the limitations upon the businesses of gatherers in the offshore context).

mandate. This is important because any OCS pipeline that is not regulated by FERC will be regulated by MMS, which simply does not have experience in protecting small, independent producers and gatherers through rate regulation and open and nondiscriminatory access enforcement.<sup>147</sup> At a time such as this, we need a balance of regulation to ensure reasonable prices<sup>148</sup> while at the same time maintaining the incentive to provide for an adequate supply of natural gas through competition.<sup>149</sup> Indeed, while complete deregulation may have its benefits in an ideal world,<sup>150</sup> today's consumers will inevitably suffer if the lifting of regulatory controls results in increased rates. With an escalating financial and energy crisis and a significant projected growth of production of natural gas in the OCS,<sup>151</sup> deregulation is no longer the solution to an uncompetitive market; indeed, it may be the problem.<sup>152</sup>

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147. See *supra* note 15 and accompanying text.

148. See Cooper, *supra* note 18, at 410 (“We need to assume that market failure and market power will be a prominent and permanent feature of the markets and implement policies to prevent abuse. In oil and natural gas, this means . . . escalating the oversight of abusive behaviors.”).

149. Deregulation has created a clear tension between FERC’s statutory mandate to protect individual customers and the need to ensure a reliable supply of natural gas. Fagan, *supra* note 10, at 733.

150. See Hennessee, *supra* note 121, at 503 (“[T]hose market theorists in favor of deregulation often make assumptions that depend on perfect information, nominal barriers to entry, and other assertions in the way of perfect competition.”).

151. If the expected growth in deep-water development becomes a reality, by 2010 production in the OCS could comprise more than 40% of this country’s oil production and 23% of its natural gas production. See MMS Gulf of Mexico Region, *supra* note 3 (explaining that, currently, OCS production comprises 30% of the country’s oil production and 21% of the country’s natural gas production).

152. See John Burrit McArthur, *Anti-trust in the New [De]Regulated Natural Gas Industry*, 18 ENERGY L.J. 1, 49 (1997) (highlighting the view that in the absence of regulation, firms will eventually turn into monopolists that attempt to drive prices up as high as possible, usually to the detriment of society’s interests). *Contra, e.g.*, Fagan, *supra* note 10, at 733 (“No one disputes that a free, unregulated market for natural gas will benefit all concerned.”); U.S. GEN. ACCOUNTING OFFICE, NATURAL GAS REGULATION: LITTLE OPPOSITION TO FERC’S RECENT POLICIES ON TRANSPORTATION-RELATED SERVICES 1 (1994) (establishing that many segments of the industry did not oppose FERC’s effort to lessen regulation).