

June 12, 2002

The Honorable Ken Egbert, Jr.  
Seneca County Prosecuting Attorney  
71 South Washington Street, Suite E  
P.O. Box 667  
Tiffin, Ohio 44883-0667

SYLLABUS:

2002-017

1. Pursuant to R.C. 1723.01, a company that is organized for any of the purposes set forth therein, including that of transporting natural or artificial gas, may “enter upon any private land to examine or survey lines” for its pipes or other conduits, and “may appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building of such ... conduits [or] pipes” that are necessary to the company’s purposes. An entry upon private property authorized by R.C. 1723.01 is privileged, as “[p]rivilege” is defined in R.C. 2901.01(A)(12), and does not constitute a violation of R.C. 2911.21(A)(1).
2. A county or township may not exercise a statutory power or duty in a manner that regulates an interstate natural gas pipeline facility for which a certificate of public convenience and necessity has been issued under 15 U.S.C.A. § 717f (West 1997), unless that power or duty falls outside the extensive federal regulatory scheme governing the interstate transportation of natural gas.

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OPINION NO. 2002-017

The Honorable Ken Egbert, Jr.  
Seneca County Prosecuting Attorney  
71 South Washington Street, Suite E  
P.O. Box 667  
Tiffin, Ohio 44883-0667

Dear Prosecutor Egbert:

You have requested an opinion regarding the authority of a company to enter upon private property in order to perform surveys of such lands prior to, and in conjunction with, the installation of an interstate natural gas pipeline through such properties. We have restated your questions as follows:

1. Does a pipeline company's entry upon private property, without the permission of the property owners, in order to examine or survey lines for the installation of an interstate natural gas pipeline through such property constitute a trespass?
2. Does a board of county commissioners or board of township trustees have authority to restrict or regulate the installation of an interstate natural gas pipeline in the right-of-way of county or township roads?
3. If the answer to question 2 is yes, what conditions or regulations may a board of township trustees impose upon the pipeline company with regard to the maintenance or restoration of the roadway or other right-of-way property?

As mentioned in your opinion request, the pipeline company in question has received a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) for the construction of an interstate natural gas pipeline.<sup>1</sup> The company intends to

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<sup>1</sup> Pursuant to 42 U.S.C.A. § 7172(a)(1)(D) (West 1995), the Federal Energy Regulatory Commission (FERC) has the power, in certain circumstances, to issue certificates of convenience and public necessity under 15 U.S.C.A. § 717f (West 1997), authorizing, among other things, the interstate transportation of natural gas or the operation, construction, or extension of certain

conduct preliminary surveys on private property through which the pipeline will pass. Certain private property owners, however, question the right of the company to enter upon their properties for this purpose without first securing their permission. You question the manner in which the county sheriff should respond to a complaint by a private property owner that the company, when engaged in the above activities, is committing a trespass on private property.<sup>2</sup>

Let us, therefore, begin with your first question, which asks whether a pipeline company's entry upon private property, without the permission of the property owners, in order to examine or survey lines for the installation of an interstate natural gas pipeline through such property, constitutes a trespass.

The fundamental prohibition against trespass is set forth in R.C. 2911.21(A)(1), which states in pertinent part: "*No person, without privilege to do so, shall ... [k]nowingly enter or remain on the land or premises of another.*"<sup>3</sup> Violation of R.C. 2911.21(A)(1) is a misdemeanor of the fourth degree. R.C. 2911.21(D).

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facilities for natural gas. *See generally* 15 U.S.C.A. § 717f(c) (West 1997) (prohibiting natural gas companies from engaging in certain activities without a certificate of public convenience and necessity).

<sup>2</sup> Whether a private property owner may bring a civil action against the company for trespass is a separate question that will not be addressed in this opinion, because neither the county prosecuting attorney, *see* R.C. 309.09, nor the Attorney General, *see* R.C. 109.02; R.C. 109.14, has the duty or authority to advise a private property owner about possible civil remedies in these matters. *See* note five, *infra*. Similarly, this opinion will not discuss remedies provided to the Federal Energy Regulatory Commission or possible criminal actions that may be instituted by the Attorney General of the United States for violations of federal law. *See, e.g.*, 15 U.S.C.A. § 717s (West 1997) (enforcement of 15 U.S.C.A. § 717, *et. seq.*); 15 U.S.C.A. §§ 717t and 717u (West 1997) (penalties and jurisdiction of offenses). *See generally* 1999 Op. Att'y Gen. No. 99-007 at 2-55 ("[t]his office is not empowered to render authoritative interpretations of federal law"). Rather, this opinion will discuss the nature of trespass only with respect to the enforcement of the state's criminal laws prohibiting such activity.

<sup>3</sup> The remainder of R.C. 2911.21(A) describes other conduct that also constitutes criminal trespass, as follows:

*No person, without privilege to do so, shall do any of the following:*

.....

(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows he is in violation of any such restriction or is reckless in that regard;

As stated in *State v. Cimpritz*, 158 Ohio St. 490, 110 N.E.2d 416 (1953) (syllabus, paragraphs one and two): “In Ohio, all crimes are statutory. The elements necessary to constitute a crime must be gathered wholly from the statute.” *See generally State v. Warner*, 55 Ohio St. 3d 31, 52, 564 N.E.2d 18, 38 (1990) (“[t]he elements of a crime must be gathered wholly from the statute”). The court in *State v. O’Neal*, 87 Ohio St. 3d 402, 408, 721 N.E.2d 73, 82 (2000), summarized the elements of this criminal offense, as follows: “[a] criminal trespass occurs when a person ‘without privilege to do so,’ ‘[k]nowingly enter[s] or remain[s] on the land or premises of another.’ R.C. 2911.21(A)(1). ‘Land or premises’ includes ‘any land, building, structure, or place belonging to, controlled by, or in custody of another.’ R.C. 2911.21(E).”<sup>4</sup>

An essential element of the crime of trespass, as defined by R.C. 2911.21(A)(1), is the absence of “privilege” to enter upon the land of another. *See State v. Hirtzinger*, 124 Ohio App. 3d 40, 44-45, 705 N.E.2d 395, 398 (Clark County 1997) (“the state must prove absence of privilege as an element of its case for criminal trespass under R.C. 2911.21. Therefore, it must prove the absence beyond a reasonable doubt” (various citations omitted)).

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(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of either.

(B) It is no defense to a charge under this section that the land or premises involved was owned, controlled, or in custody of a public agency.

(C) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.

....

(E) As used in this section, “land or premises” includes any land, building, structure, or place *belonging to, controlled by, or in custody of another*, and any separate enclosure or room, or portion thereof. (Emphasis added.)

Although R.C. 2911.21(A)(2), (3), and (4) establish other types of trespass and contain elements different from those set forth in R.C. 2911.21(A)(1), this opinion will discuss, by way of example, the elements of a violation of only R.C. 2911.21(A)(1).

<sup>4</sup> Pursuant to R.C. 1.59, “[a]s used in any statute, unless another definition is provided in such statute or a related statute: ... (C) ‘Person’ includes an individual, corporation, business trust, estate, trust, partnership, and association.”

As used in R.C. 2911.21, “[p]rivilege” means “an immunity, license, or right *conferred by law*, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.” R.C. 2901.01(A)(12) (emphasis added). The court in *State v. Gordon*, 9 Ohio App. 3d 184, 186, 458 N.E.2d 1277, 1279-80 (Hamilton County 1983), explained the concept of privilege, in the following manner:

A privilege is an immunity, license or right that springs from constitutional law, statutory law or common law, or that is bestowed by express or implied grant. The range is broad, and the number of possible privileges is tremendous. The *existence, nature and scope of a privilege claimed* in any particular instance *depend on the circumstances* surrounding the actor, matters primarily within the grasp of the actor himself.... We believe that “privilege” is a justifying circumstance precluding conviction.... (Footnotes omitted; emphasis added.)

*See generally, e.g., State v. Lilly*, 87 Ohio St. 3d 97, 717 N.E.2d 322 (1999) (rejecting claim that R.C. 3103.04 precludes prosecution of one spouse for trespass in or burglary of the residence of the other spouse who is exercising custody or control over that residence); *State v. Clelland*, 83 Ohio App. 3d 474, 490, 615 N.E.2d 276, 287 (Hocking County 1992) (“‘[p]rivilege’ for purposes of criminal trespass includes permission to enter the premises given by a resident of the premises. The concept of privilege has been broadly construed” (citation omitted)).

Thus, if a person has a type of immunity, license, or right conferred by law to enter upon the land of another, such entry does not constitute a violation of R.C. 2911.21(A)(1). We must, therefore, determine whether a company that plans to enter upon private property to examine or survey lines in conjunction with construction of an interstate natural gas pipeline possesses a privilege to enter upon private property in order to examine or survey lines for such pipelines, or whether such action is a trespass in violation of R.C. 2911.21(A)(1).<sup>5</sup>

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<sup>5</sup> Because the company you describe has been granted a certificate of public convenience and necessity under 15 U.S.C.A. § 717f, *see* note one, the question arises whether all types of actions for trespass against this company under state law are preempted by federal law. The question of federal preemption of civil actions for trespass under state law is unsettled, and we are unaware of any authority regarding the federal preemption of state criminal trespass laws. *Compare Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 747 F. Supp. 401 (N.D. Ohio 1990) (finding that, in the course of a condemnation proceeding under 15 U.S.C.A. § 717f(h), property owner does not possess civil remedies for trespass provided by state law for the company’s entry upon the property prior to condemnation proceedings) *with Humphries v. Williams Natural Gas Co.*, 48 F. Supp. 2d 1276 (D. Kansas 1999) (finding that a property owner retains civil remedies under state law for trespass, unlawful taking, and damages when a company possessing a certificate issued under 15 U.S.C.A. § 717f enters upon landowner’s property prior to condemnation proceedings for that property). We will assume, for

R.C. 1723.01<sup>6</sup> authorizes, among others, a company that is organized for the transportation of natural or artificial gas to “enter upon any private land to examine or survey lines” for its pipes and to “appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building” of such pipes.<sup>7</sup> The right of a company

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purposes of discussion, that the enforcement of laws governing the criminal offense of trespass under Ohio law against holders of certificates issued under 15 U.S.C.A. § 717f has not been preempted by federal law.

<sup>6</sup> R.C. 1723.01 states:

*If a company is organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water; for constructing and maintaining canals, locks, and raceways to regulate and carry such head of water to any plant or powerhouse where electricity is to be generated; for erecting and maintaining lines of poles on which to string wires or cables to carry and transmit electricity; for transporting natural or artificial gas, petroleum, coal or its derivatives, water, or electricity, through tubing, pipes, or conduits, or by means of wires, cables, or conduits; for storing, transporting, or transmitting water, natural or artificial gas, petroleum, or coal or its derivatives, or for generating and transmitting electricity; then such company may enter upon any private land to examine or survey lines for its tubing, pipes, conduits, poles, and wires, or to examine and survey for a reservoir, dams, canals, raceways, a plant, or a powerhouse, and to ascertain the number of acres overflowed by reason of the construction of such dams, and may appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant, powerhouse, storage yards, wharves, bridges, workshops, receiving and delivery structures or facilities, pumping stations, and any other buildings, structures, appliances, or facilities necessary to the purposes of such companies, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such lines. (Emphasis added.)*

<sup>7</sup> A company that has received a certificate of public convenience and necessity under 15 U.S.C.A. § 717f is authorized to obtain necessary easements or other property interests in accordance with 15 U.S.C.A. § 717f(h) (West 1997), which states, in pertinent part:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of ...

organized for any of the purposes described in R.C. 1723.01 to enter upon another's property to examine or survey lines necessary for its purposes is, therefore, expressly authorized by statute. Moreover, nothing within R.C. 1723.01 conditions such a company's right of entry to examine or survey lines upon the company's obtaining the property owner's permission or the company's prior appropriation of such property.

It is our opinion, therefore, that this statutory grant of authority to enter upon the property of another for the purpose of examining or surveying lines constitutes a "[p]rivilege," as defined in R.C. 2901.01(A)(12). *See generally* R.C. 2901.04(A) (with certain exceptions not here applicable, "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused"). Accordingly, a company's entry upon private property pursuant to, and in accordance with, the terms of R.C. 1723.01 is not an entry without privilege and is thus not a criminal trespass as set forth in R.C. 2911.21(A)(1).

Your second and third questions concern the authority of county commissioners or township trustees to restrict or regulate the installation of an interstate natural gas pipeline in the right-of-way of county or township roads.<sup>8</sup> We begin by noting that boards of county

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equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.... *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

*See generally* *Natural Fuel Gas Supply Corp. v. 138 Acres*, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000) ("the Natural Gas Act does not give private natural gas companies ... the substantive right to immediate possession of property"); *Tennessee Gas Pipeline Co. v. Massachusetts Bay Transp. Auth.*, 2 F. Supp. 2d 106 (D. Mass. 1998) (FERC certificate is not subject to collateral attack in eminent domain proceedings in district court); *USG Pipeline Co. v. 1.74 Acres*, 1 F. Supp. 2d 816, 822 (E.D. Tenn. 1998) ("[i]n seeking condemnation, a holder of an FERC Certificate must demonstrate he 'cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for' the interest in the property he seeks. 15 U.S.C. § 717f(h). Courts also have imposed a requirement that the holder of the FERC Certificate negotiate in good faith with the owners to acquire the property"); *Kern River Gas Transmission Co. v. Clark County, Nevada*, 757 F. Supp. 1110 (D. Nev. 1990) (finding that property owners' failure to negotiate in good faith for necessary easements was not barrier to certificate holder's commencement of eminent domain proceedings).

<sup>8</sup> *See, e.g.*, R.C. 1723.02 (authority of county commissioners and township trustees, with respect to roads within their jurisdictions, to grant companies mentioned in R.C. 1723.01,

commissioners and township trustees are creatures of statute, and thus may exercise only those powers and duties conferred upon them by statute. See *Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696, 699 (1993) (“[c]ounties ... may exercise only those powers affirmatively granted by the General Assembly”); *Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875). Thus, whether county commissioners or township trustees may regulate with respect to the installation of an interstate natural gas pipeline within the right-of-way of county and township roads depends, in part, upon whether such authority has been conferred upon them by statute.

You have not specified any particular statutory powers of counties or townships with which you are concerned. According to your request, however, your concerns arise from an interstate natural gas pipeline project for which a certificate of public convenience and necessity has been issued by the Federal Energy Regulatory Commission under 15 U.S.C.A. § 717f. We must, therefore, examine the federal regulatory scheme governing interstate natural gas pipelines and the manner in which that scheme affects the powers of local governmental entities such as counties and townships.

The breadth of the federal scheme regulating the interstate sale and transportation of natural gas was explained by the United States Supreme Court in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-02, 108 S. Ct. 1145, 1151-52 (1988), in part, as follows:

The NGA [(Natural Gas Act), 15 U.S.C.A. § 717, *et seq.*] long has been recognized as a “comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.” *Northern Natural Gas Co. v. State Corporation Comm’n of Kansas*, 372 U.S. 84, 91, 83 S.Ct. 646, 650-51, 9 L.Ed.2d 601 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682, 74 S.Ct. 794, 799, 98 L.Ed. 1035 (1954). The NGA confers upon FERC [Federal Energy Regulatory Commission] exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. *Northern Natural Gas Co.*, 372 U.S., at 89, 183 S.Ct., at 649. FERC exercises authority over the rate and facilities of natural gas companies used in this transportation and sale through a variety of powers....

....

[A] natural gas company must obtain from FERC a “certificate of public convenience and necessity” before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce. § 7(c)(1)(a) of the NGA, as amended, 15 U.S.C. § 717f(c)(1)(A). FERC will grant the certificate only if it finds the company able and willing to undertake the project in compliance with the rules and regulations of the federal regulatory scheme. § 7(e), as amended, 15 U.S.C. § 717f(e). FERC may attach “to the

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“subject to such regulations and restrictions as such public officials prescribe, the right to lay such tubing, pipes, conduits, poles, and wires therein”).

issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” *Ibid.* (Footnotes omitted.)<sup>9</sup>

The *Schneidewind* court found that the challenged state law was an attempt to regulate “in a field the [Natural Gas Act] has occupied to the exclusion of state law,” 485 U.S. at 300, 108 S. Ct. at 1151, and was thus preempted by the Natural Gas Act. In support of its conclusion, the *Schneidewind* court cited the “imminent possibility of collision” between the state law and the federal regulatory scheme, and explained:

When a state regulation “affect[s] the ability of [FERC] to regulate comprehensively ... the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act” or presents the “prospect of interference with the federal regulatory power,” then the state law may be pre-empted even though “collision between the state and federal regulation may not be an inevitable consequence.”

485 U.S. at 310, 108 S. Ct. at 1156 (citation omitted).

Other attempts by state and local governments to regulate with respect to interstate natural gas pipeline projects have also been found to be preempted by federal law. For example, in *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49 (D.R.I. 2000), the court considered whether a city’s zoning and building codes applied to a modification of a natural gas storage facility for which a certificate of public convenience and necessity had been issued by FERC under 15 U.S.C.A. § 717f. In explaining why the city’s code provisions were inapplicable to the modification of such facility, the court stated:

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<sup>9</sup> In addition to the provisions of the Natural Gas Act, there are other federal statutes that address specific aspects of the interstate transportation of natural gas, *e.g.*, Natural Gas Pipeline Safety Act (NGPSA), 49 U.S.C.A. §§ 60101, *et seq.* (West 1997 & Supp. 2001). *See Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49, 51 (D.R.I. 2000) (stating that the Natural Gas Act and the Natural Gas Pipeline Safety Act, “together with the regulations promulgated pursuant to them, establish a comprehensive scheme of federal regulation that the Supreme Court has said confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce”). *See generally ANR Pipeline Co. v. Iowa State Commerce Comm’n*, 828 F.2d 465, 469 (8th Cir. 1987) (finding that legislative history of Natural Gas Pipeline Safety Act indicates express rejection of argument that strong police powers vested in state and local governments warrants state and local regulation of pipeline safety, and stating, “courts interpreting [legislative discussions preceding enactment of NGPSA] universally have held that the text and the legislative history of the NGPSA indicate an express intent by Congress to preempt state regulations of safety issues with respect to interstate pipeline facilities”); *Swango Homes, Inc. v. Columbia Gas Transmission Corp.*, 806 F. Supp. 180, 185 (S.D. Ohio 1992) (“the Natural Gas Pipeline Safety Act completely preempts the field of pipeline safety”).

Because of the strong federal interest in establishing a uniform system of regulation designed to implement a national policy of ensuring an adequate supply of natural gas at reasonable prices; and, because the federal regulatory scheme comprehensively regulates the location, construction and modification of natural gas facilities, there is no room for local zoning or building code regulations on the same subjects. In short, Congress clearly has manifested an intent to occupy the field and has preempted local zoning ordinances and building codes to the extent that they purport to regulate matters addressed by federal law.

The [city zoning ordinance] and building code are also preempted because they directly conflict with the federal regulatory provisions. FERC has determined that the proposed modifications to [the] facility meet all of the requirements under federal law, including those relating to siting and construction standards.

79 F. Supp. 2d at 52. Ultimately, the *Loqa* court concluded that, “the ordinance and any licensing requirements contingent upon compliance with it are preempted by federal law.” *Id.*

The *Loqa* court also noted that, in the process of issuing certificates of public convenience and necessity, the Federal Energy Regulatory Commission considers local interests through the notice and public hearing requirements associated with certification proceedings. *See, e.g.*, 18 C.F.R. §§ 157.9-11 (2001) (notice of application for certificate; intervention and protests; public hearing). Moreover, “any party aggrieved by a FERC decision may seek reconsideration, pursuant to 15 U.S.C. § 717r(a), or appeal to a United States Court of Appeals, pursuant to 15 U.S.C. § 717r(b).” *Algonquin LNG v. Loqa*, 79 F. Supp. 2d at 52. *See Tennessee Gas Pipeline Co. v. Massachusetts Bay Transp. Auth.*, 2 F. Supp. 2d 106, 110 (D. Mass. 1998) (“[u]nder the statutory framework, there is no appeal of a FERC decision save to the appropriate Court of Appeals. Disputes as to the propriety of FERC’s proceedings, findings, orders, or reasoning, must be brought to FERC by way of request for rehearing. Appeals may thereafter be brought before a U.S. Court of Appeals only” (various citations omitted)).<sup>10</sup>

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<sup>10</sup> In fact, the Federal Energy Regulatory Commission has conducted various proceedings in which it has exhaustively examined issues concerning the construction and location of the pipeline project with which you are concerned. For example, attached to the Federal Energy Regulatory Commission’s interim order, dated December 17, 1999, *Independence Pipeline*, 89 F.E.R.C. 61,283, 1999 FERC LEXIS 2624, are Exhibit A, which prescribes various conditions upon the issuance of the certificate, and Exhibit E, which describes numerous environmental conditions with which Independence Pipeline Company, among others, must comply in installing the pipelines you describe. The Commission has also issued various orders addressing these topics, *see, e.g., Independence Pipeline Co.*, 92 F.E.R.C. 61,268, 2000 FERC LEXIS 1904 (order September 28, 2000) (slip op. at 12) (stating, in part: “The Commission did not specifically require that Independence enter into mitigation agreements with landowners. However, *any agreements with landowners concerning mitigation measures to be performed on their particular*

As a final matter, the *Loqa* court explained the extent to which an interstate natural gas facility may be subject to state or local regulation, as follows:

State and local laws that have only an indirect effect on interstate gas facilities are not preempted. *See Schneidewind*, 485 U.S. at 308, 108 S.Ct. 1145; *ANR Pipeline*, 828 F.2d at 474. Moreover, local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective.

79 F. Supp. 2d at 53. *See Kern River Gas Transmission Co. v. Clark County, Nevada*, 757 F. Supp. 1110, 1115 (D. Nev. 1990) (finding the particular state and local safety requirements for construction of an interstate natural gas pipeline to be preempted, but noting that, “some permits which do not target concerns already exhaustively reached by the Natural Gas Act may properly be the subject of County and City action,” and holding that, “it is unnecessary for [the gas company] to apply for and acquire permits which conflict with federal requirements or unduly delay or encumber this federally approved interstate gas facility”); *see also Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm’n*, 464 F.2d 1358, 1362 (3rd Cir. 1972) (a state may not exercise its zoning authority, one of its police powers, “where the necessary effect would be to place a substantial burden on interstate commerce”).

Accordingly, although a county or township possesses various powers and duties in regard to the right-of-way of county and township roads, *see generally* 2001 Op. Att’y Gen. No. 2001-003, it may not exercise such powers with respect to the construction of an interstate natural gas pipeline facility for which a certificate of public convenience and necessity has been issued by the Federal Energy Regulatory Commission under 15 U.S.C.A. § 717f, unless those

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*property should be part of the easement agreements.* Finally, numerous alternatives for the Independence project were discussed in the Final EIS (final environmental impact statement) and in the December 17 [1999] and April 26 [2000] orders. We will not reiterate that discussion here” (emphasis added; footnote omitted). *See also Independence Pipeline Co.*, 91 F.E.R.C. 61,102, 2000 FERC LEXIS 866 (April 26, 2000) (slip op. at 53) (in part, denying a request for a stay of Independence Pipeline Company’s eminent domain power, and, in part, amending a condition formerly imposed upon the applicants to read as follows: “No applicant shall proceed on any construction-related activity until access is granted to all properties not previously surveyed, environmental surveys are completed, and all consultations with resource agencies are finalized, pursuant to NEPA [(National Environmental Policy Act of 1969)] requirements, for its respective project. The Director of the Office of Energy Projects may issue a Notice to Proceed with construction only when an individual applicant has fulfilled its environmental permitting requirements”).

powers fall outside the extensive federal regulatory scheme governing the interstate transportation of natural gas.<sup>11</sup>

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. Pursuant to R.C. 1723.01, a company that is organized for any of the purposes set forth therein, including that of transporting natural or artificial gas, may “enter upon any private land to examine or survey lines” for its pipes or other conduits, and “may appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building of such ... conduits [or] pipes” that are necessary to the company’s purposes. An entry upon private property authorized by R.C. 1723.01 is privileged, as “[p]rivilege” is defined in R.C. 2901.01(A)(12), and does not constitute a violation of R.C. 2911.21(A)(1).
2. A county or township may not exercise a statutory power or duty in a manner that regulates an interstate natural gas pipeline facility for which a certificate of public convenience and necessity has been issued under 15 U.S.C.A. § 717f (West 1997), unless that power or duty falls outside the extensive federal regulatory scheme governing the interstate transportation of natural gas.

Respectfully,

BETTY D. MONTGOMERY  
Attorney General

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<sup>11</sup> See generally *Kern River Gas Transmission Co. v. Clark County, Nevada* (suggesting that disputes over the use of a public right-of-way by a company that has been granted a certificate of public convenience and necessity may be subject to negotiation between the local governmental entities and the company in the company’s negotiations for necessary rights-of-way, and may ultimately be determined in an eminent domain proceeding).