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**FEDERAL *OIL* AND GAS PIPELINE REGULATION: AN OVERVIEW**

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The Commerce Clause of the United States Constitution delegates to Congress the power to regulate commerce among the States. The Tenth Amendment to the United States Constitution reserves to the individual states all powers not delegated to the United States or prohibited to the States by the Constitution. Therefore, the federal government has the constitutional authority to regulate interstate commerce and the state governments have the constitutional authority to regulate matters of state or local concern.

Congress did not exercise its authority under the Commerce Clause to regulate pipelines transporting crude ***oil***, liquids and refined petroleum products until the Hepburn Amendment in 1906 extended the Interstate Commerce Act ("ICA") to such pipelines. Congress did not exercise its authority under the Commerce Clause to regulate natural gas pipelines until the Natural Gas Act of 1938 ("NGA") was passed. Although both the ICA and the NGA apply to transportation in interstate commerce, there is no similarity in the factors which determine whether federal jurisdiction exists under the ICA and the NGA. Furthermore, although the ICA and the NGA both require reasonable rates, terms and conditions of service and prohibit discrimination, the application of these requirements to the two types of pipelines is very different. Activities which are permitted for one type of pipeline may be prohibited for the other.

The purpose of this paper is to provide a brief overview of the purpose and major provisions of the ICA and the NGA and then to focus on the factors under each of these statutes which determine the threshold question of whether a particular pipeline is or may be subject to the ICA or the NGA.1 The State regulation of ***oil***, gas and liquids pipelines is outside the scope of this paper-[[2]](#footnote-3)2

**I. FEDERAL REGULATION OF NATURAL GAS PIPELINES**

**1.1 The Governing Laws**

**A. The Natural Gas Act of 1938**

Prior to the early 1980s, most natural gas was sold at or near the wellhead to the intrastate or interstate pipeline in the field. These pipeline purchasers transported the gas from the production area and resold it, usually to local distribution companies for distribution to residential, commercial and industrial customers, and occasionally directly to industrial customers connected to the pipeline. The pipeline purchasers typically provided a bundled service which included the gathering, processing, storage and transmission of the gas to market. Occasionally, the producers had to gather and process their gas to the pipeline in the field.[[3]](#footnote-4)3 Sometimes third parties gathered or processed the gas, often after first purchasing the gas at the wellhead- There were very few, if any, independent or pipeline affiliated marketers or brokers, and local distribution companies and end users did not usually buy their gas directly from producers or independent gatherers or processor.

This marketing arrangement developed because of the large capital expenditures required to build transportation facilities. Long term contracts with secure supplies and demand were required to obtain the funds to finance construction of such facilities. These financing requirements led to the formation of natural pipeline monopolies. However, before 1938, there was no regulation of these monopolies.

Before 1938, the only regulation of the natural gas pipeline industry was on the state or local level. The states regulated the production of natural gas for conservation purposes. The distribution of natural gas was also regulated, generally through the issuance of franchises. However, because of the Commerce Clause, the states were not permitted to regulate the transportation of natural gas in interstate commerce,[[4]](#footnote-5)4 the rates charged by interstate natural gas pipeline companies at the city gates,[[5]](#footnote-6)5 or the price at which interstate pipelines could sell outside the producing state-[[6]](#footnote-7)6 Because the federal government was not regulating these activities before 1938, these activities fell into a regulatory gap.

In 1935, the Federal Trade Commission recommended to Congress that Congress complement state regulation by filling the regulatory gas. In a report issued to Congress by the FTC based upon an eight year investigation of the interstate and international gas and electric business, the FTC advised Congress that monopoly conditions existed in the gas pipeline industry which were leading to excessive prices for service. In 1938, Congress filled the regulatory gap by enacting the Natural Gas Act of 1938 ("NGA").[[7]](#footnote-8)7

NGA was first enforced by the Federal Power Commission ("FPC")- Since 1978, the Federal Energy Regulatory Commission ("FERC") has been responsible for implementing the NGA.[[8]](#footnote-9)8 In this section of the paper, the term "Commission" will refer either to the FPC or the FERC, as appropriate.

**B. The Natural Gas Policy Act of 1978**

In 1954, in *Phillips Petroleum Co. v. State of Wisconsin*,[[9]](#footnote-10)9 the United States Supreme Court held that the Commission's jurisdiction under the NGA extended to sales by independent producers to pipelines- The Federal Power Commission then attempted to establish rates for such sales, first through area rate proceedings and then national rate proceedings. However, this scheme of regulation under the NGA resulted in supply and demand problems. On the supply side, gas reserves were declining because area and national rates were inadequate to encourage exploration and development and price disparities existed between the unregulated intrastate market and the regulated interstate markets. On the demand side, the demand for natural gas was increasing which caused gas supplies to be rationed during the winter of 1976-77. However, surplus gas available to the intrastate market was not available to the interstate market because of the reluctance of producers to dedicate their gas to interstate commerce and the reluctance of intrastate pipelines to become subject to the NGA as transporters by transporting gas to the interstate market.

Congress responded to these supply and demand problems with passage of the Natural Gas Policy Act of 1978[[10]](#footnote-11)10 (NGPA)- The NGPA encouraged the drilling of new gas wells, deregulated the price for most producer and other first sales of new gas supplies and certain old (i.e., existing) gas supplies, and encouraged transportation of natural gas from areas of surplus to areas of shortage by exempting from the NGA transportation by interstate and intrastate pipelines on behalf of each other or on behalf of certain local distribution companies.[[11]](#footnote-12)11

**C. Regulations implementing the NGA and the NGPA**

FERC's regulations governing natural gas pipelines can be found in the Code of Federal Regulations at Title 18, Chapter 1, Subchapters E through H in the following subparts:

|  |  |
| --- | --- |
| SUBCHAPTER E--REGULATIONS UNDER NATURAL GAS ACT |  |
| Part 152 | Application for exemption from the provisions of the Natural Gas Act pursuant to section 1(c) thereof and issuance of blanket certificates authorizing certain sales for resale |
| Part 153 | Applications for authorization to construct, operate, or modify facilities used for the export or import of natural gas |
| Part 154 | Rate schedules and tariffs |
| Part 156 | Applications for orders under section 7(a) of the Natural Gas Act |
| Part 157 | Applications for certificates of public convenience and necessity and for orders permitting and approving abandonment under section 7 of the Natural Gas Act |
| Part 158 | Accounts, records, memoranda and disposition of contested audit findings and proposed remedies |
| SUBCHAPTER F--ACCOUNTS, NATURAL GAS ACT |  |
| Part 201 | Uniform system of accounts prescribed for natural gas companies subject to the provisions of the Natural Gas Act |
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| Part 225 | Preservation of records of natural gas companies |
| SUBCHAPTER G--APPROVED FORMS, NATURAL GAS ACT |  |
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| Part 270 | Determination procedures |
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| Part 280 | General provisions applicable to Subchapter I |
| Part 281 | Natural gas curtailment under the Natural Gas Policy Act of 1978 |
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| Part 286 | Accounts, records, memoranda and disposition of contested audit findings and proposed remedies |

**1.2 The NGA - Regulation of transportation of natural gas in interstate commerce and sales for resale of natural gas**

**A. Regulated activities under the NGA**

Section 1(b) of the NGA[[12]](#footnote-13)12 describes the activities subject to the provisions of the NGA as follows:

The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas-

[Emphasis added.]

In the NGA, Congress thus exercised its constitutional authority to regulate the interstate commerce of natural gas by giving its delegated agent, the Commission, jurisdiction over three areas:

(1) Transportation in interstate commerce,[[13]](#footnote-14)13

(2) Sales in interstate commerce for resale, and

(3) Natural gas companies engaged in such transportation or sale-

Each of these areas of jurisdiction is independent so that, for example, even though the NGA does not give the Commission authority to regulate direct sales to consumers,[[14]](#footnote-15)14 the transportation in interstate commerce of the gas to the consumer is subject to the Commission's authority under the NGA-[[15]](#footnote-16)15

The following statement of purpose is contained in Section 1(a) of the NGA:

As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, First Session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

Based upon this statement of purpose and the legislative history of the NGA, the Commission and the Courts have determined that the basic mandate of the NGA is to protect consumers from excessive rates and charges.

**B. Interstate commerce under the NGA**

The key to the Commission's jurisdiction over pipelines transporting natural gas is the term "interstate commerce." The term is defined in Section 2(7) of the NGA as follows:

Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

It has been held that natural gas which crosses state lines at any stage of its movement from wellhead to ultimate consumption is in "interstate commerce" within the meaning of the NGA.[[16]](#footnote-17)16 This means, for example, that sales by producers, regardless of the point of sale, are sales for resale in interstate commerce if the gas is ever ultimately transported across state lines- This also means that gas is in interstate commerce even when it is being gathered and even after it leaves an interstate pipeline and is delivered into a local distribution system or into an intrastate pipeline for transportation to a local distribution system. This is why, as discussed below, gathering and distribution had to be specifically exempted in the NGA. This is also why intrastate pipelines were unwilling to transport natural gas to interstate pipelines until section 311 of the NGPA exempted such transportation from the NGA.

Note that the definition of "interstate commerce" does not mean that if a pipeline facility crosses state lines, it must be a jurisdictional transportation facility. The Commission has recognized that exempt gathering may occur across a state line without triggering regulation.[[17]](#footnote-18)17

**C- Transportation under the NGA**

The term "transportation" is not defined in the NGA. However, it has been interpreted broadly to encompass all movement of natural gas from the wellhead to the burnertip. If any portion of that transportation is in interstate commerce, the gas is considered to be in interstate commerce for the entire transport from the wellhead to the burnertip. As previously mentioned, this is why Congress had to exempt certain portions of that transportation (production, gathering, local distribution) from the NGA, as discussed in section 1.4 of this paper.

The Tenth Circuit used the term "transportation" in this broad a sense in the case of *Northwest Pipeline v. FERC*,[[18]](#footnote-19)18 a case involving the issue of whether the interstate pipeline status of Northwest Pipeline determined whether its facilities in the Piceance Basis were jurisdictional- In holding that ownership is not a determinative factor, the Court stated:

Northwest's status in interstate transportation cannot alone transform the character of these particular facilities. Some must occur to move the gas from the wellhead in some manner. What the Commission must decide in applying the primary function test is whether that transportation is incidental to traditional gathering functions and, thus, exempt from its jurisdiction.[[19]](#footnote-20)19 [Footnotes omitted-]

[Emphasis added.]

The term "transportation" is defined in the Commission's regulations to include storage, exchanges, backhauls, displacements or other methods of transportation.[[20]](#footnote-21)20 Shippers under an interstate pipeline's "open access" tariff are prohibited from effectively assigning their capacity by entering into buy/sell arrangements- Such arrangements are an unlawful circumvention of the Commission's capacity release rules under FERC Order No. 636.[[21]](#footnote-22)21

**D. Sales for resale**

The term "sale for resale" is also not defined in the NGA. The term was always understood to include sales by interstate pipeline companies to other pipeline companies or to local distribution companies for resale. As previously mentioned, in 1954, in *Phillips Petroleum Co. v. State of Wisconsin*,[[22]](#footnote-23)22 the United States Supreme Court held that the phrase "sale for resale" also included sales by independent producers to pipelines- Following the *Phillips* decision, the phrase "sale for resale" was defined as "all wholesale sales of natural gas in interstate commerce, whether by pipeline company or not, and whether occurring before, during, or after transmission by interstate pipeline company."[[23]](#footnote-24)23 The only sales not included in the term were direct sales to consumers and sales of gas not in interstate commerce.

In 1978, Congress passed the NGPA[[24]](#footnote-25)24 which, among other things, removed certain "first sales" (i-e., sales by producers, gatherers, processors and any other "first sellers") from the Commission's jurisdiction under the NGA.[[25]](#footnote-26)25 However, it was not until 1989 that Congress passed legislation which would ultimately remove, by no later than January 1, 1993, all remaining first sales from the Commission's jurisdiction under the NGA.[[26]](#footnote-27)26

Today, "sale for resale" continues to have the meaning it was originally understood to have- FERC's on-line glossary defines "sale for resale" as "a type of wholesale sale covering energy supplied to other electric utilities, cooperatives, municipalities, and Federal and state electric agencies for resale to ultimate consumers."

FERC is currently exercising "light handed" regulation over persons who are not interstate pipelines and who make sales for resale. They are granted a blanket certificate of public convenience and necessity pursuant to section 7 of the NGA and are authorized to make sales for resale at negotiated rates in interstate commerce. This is a limited jurisdiction certificate that does not subject the holder to any other regulation under the NGA other than as set forth in Subpart L of Part 284 of the Commission's regulations.[[27]](#footnote-28)27 Additionally, abandonment of the sales service is authorized pursuant to the NGA upon the expiration of the contractual terms or upon termination of each individual sales arrangements-[[28]](#footnote-29)28 The Commission has adopted a code of conduct for persons holding blanket marketing certificates.[[29]](#footnote-30)29

**E- Natural-Gas Companies subject to regulation under the NGA**

Section (2) of the NGA defines a "Natural-gas company" as a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.[[30]](#footnote-31)30

**F- NGA jurisdiction focuses on facilities; ICA jurisdiction focuses on movements**

Under the NGA, the jurisdictional focus is on the primary function of the pipeline facilities. A pipeline is either a jurisdictional line or not, *all of the time*. Under the ICA, the focus is not on the pipeline facilities but on whether particular movements on a pipeline are interstate or intrastate in character.

**1.3 Overview of the regulatory requirements under the NGA and the NGPA**

Natural gas companies subject to federal regulation must comply with the following regulatory requirements:

**A. Certificates of convenience and necessity; abandonment authority**

**1. Construction of facilities. Section 7(c) of the NGA provides that natural-gas companies must obtain a certificate of convenience and necessity before constructing jurisdictional facilities.**[[31]](#footnote-32)31 **Additionally, Section 7(b) of the NGA provides that authority from the Commission has to be obtained before certificated transportation or sales service can be abandoned, even if the underlying contract has already expired-**[[32]](#footnote-33)32 **The regulations concerning applications for certificates of convenience and necessity and orders permitting and approving abandonment of facilities are published at 18 CFR Part 157, Subpart A.**

"Blanket" certificates and authorizations under section of the NGA for certain transactions and abandonments may be obtained. A blanket certificate authorizes the certificate holder to engage in the permitted activities without the necessity of obtaining prior approval.[[33]](#footnote-34)33

Prior approval is not required for the construction of facilities to provide section 311 service under the NGPA-[[34]](#footnote-35)34 However, the Commission must be given 30-days advance notice[[35]](#footnote-36)35 and the Commission's environmental compliance regulations apply to all section 311 construction-[[36]](#footnote-37)36

In contrast, FERC has no jurisdiction over the siting of ***oil*** and liquids pipelines and no certificate of convenience and necessity is required from FERC to construct an ***oil*** or liquids pipeline. Siting authority rests with state authorities such as the Railroad Commission in Texas or State public utility or public service commissions.

**2. Transportation service.**

Traditionally, before an interstate pipeline could provide transportation or sales service for a particular customer, the pipeline had to obtain a certificate of convenience and necessity for the specific transaction and had to obtain authority from the Commission before it could abandon the service upon the expiration of the transaction.[[37]](#footnote-38)37 That is no longer the case- Subsequent to Congress' passage of the NGPA, the Commission issued a series of orders, culminating in FERC Order No. 636,[[38]](#footnote-39)38 which allow interstate pipelines to obtain "blanket" open-access transportation certificates under Part 284 of the Commission's regulations.[[39]](#footnote-40)39 Interstate pipelines providing service under a Commission-approved Part 284 tariff, do not have to obtain individual certificates to provide open access transportation or to abandon open access transportation; transportation may begin and end on a self-implementing basis-[[40]](#footnote-41)40

Prior Commission approval is not required for an interstate pipeline to provide transportation under section 311 of the NGPA.[[41]](#footnote-42)41 However, such transportation is subject to the Commission's rate regulation and reporting requirements-[[42]](#footnote-43)42

In limited circumstances, interstate pipelines can still obtain a traditional section 7(c) certificate authorizing single purpose transportation instead of open access transportation.[[43]](#footnote-44)43 However, the Commission has refused to allow some natural gas companies to provide traditional section 7(c) service and has, instead, ordered them to provide open access service-[[44]](#footnote-45)44

**B. Just and Reasonable Rates**

The NGA requires that all rates and charges be just and reasonable[[45]](#footnote-46)45 and authorizes the Commission to alter any rate or charge determined to be unjust, unreasonable, unduly discriminatory or preferential-[[46]](#footnote-47)46 Rates must be established under a rate schedule that is filed with and approved by the Commission.

Traditionally, interstate pipeline rates had to be cost-based rates and cost-based rates are still required today.[[47]](#footnote-48)47 However, in certain circumstances, rates may be established by alternative methods pursuant to a 1996 Commission policy statement concerning negotiated rates, market-based rates, and incentive rates-[[48]](#footnote-49)48

Rates charged by intrastate pipelines for providing transportation under section 311 of the NGPA must be fair and equitable as determined in accordance with 18 CFR §284.123.[[49]](#footnote-50)49

**C- Nondiscrimination**

No undue preferences or advantage may be granted to any person; no person may be subject to any undue prejudice or disadvantage; and no unreasonable differences in rates, charges, services or facilities may be maintained.[[50]](#footnote-51)50 Interstate and intrastate pipelines that offer service under section 311 of the NGPA and interstate pipelines that offer open access transportation under Part 284, Subpart G, of the Commissions regulations must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind-[[51]](#footnote-52)51

Any interstate pipeline that provides transportation service under section 311 of the NGPA (subpart B of Part 284 of the Commission's rules) or under the Commission's open access transportation regulations (Subpart G of Part 285 of the Commission's regulations) must offer transportation on a firm basis.[[52]](#footnote-53)52 Such pipelines must also offer transportation service on an interruptible basis-[[53]](#footnote-54)53 Rates for transportation service under Subparts B and G must include both maximum and minimum rates and the pipeline may charge an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate on file.[[54]](#footnote-55)54

**D- Reporting requirements**

Reports have to be filed as prescribed by the Commission.[[55]](#footnote-56)55 Natural gas companies subject to the NGA must maintain their books according to the FERC uniform system of accounts-[[56]](#footnote-57)56

On May 20, 2010, FERC issued Order No. 735 revising the contract reporting requirements for interstate pipelines providing service under section 311 of the NGPA and for Hinshaw pipelines.[[57]](#footnote-58)57

**1-4 Activities excluded from federal regulation under the NGA**

The following activities are not subject to federal regulation under the NGA (although section 311 transportation is subject to rate regulation and other rules under the NGPA):

**A. Intrastate transportation; sales for resale of gas not in interstate commerce**

The NGA does not cover the transportation of gas which is not in interstate commerce or sales for resale of gas which is not in interstate commerce.

An intrastate pipeline is a pipeline that does not meet the FERC test for either a gathering line or an interstate pipeline. NGPA section 2(16) defines an intrastate pipeline as "any person engaged in natural gas transportation (not including gathering) which is not subject to the jurisdiction of the Commission under the Natural Gas Act (other than any such pipeline which is not subject to the jurisdiction of the Commission solely by reason of section 1(c) of the Natural Gas Act [the Hinshaw exemption]." If a pipeline meets the FERC test for being an interstate pipeline, then it cannot be an intrastate pipeline.

An intrastate pipeline is a pipeline whose primary business (i.e., business exclusive of section 311 transportation) is the transportation of gas to local utilities (also known as local distribution companies) and end users. The following is a description of an intrastate pipeline from a 2005 FERC decision:[[58]](#footnote-59)58

WTG is a corporation organized and existing under the laws of the State of Texas, with its principal office in Midland, Texas- WTG is predominantly engaged in the transmission and distribution of natural gas through discrete, non-interconnected intrastate pipeline systems located in West Texas and the Texas and Oklahoma Panhandles. It serves chiefly non-jurisdictional users and small residential and commercial customers subject to the jurisdiction of the TRC and the Oklahoma Corporation Commission.

[Emphasis added.]

The issue in the case was whether a pipeline to be acquired by WTG would be exempt from the Commission's jurisdiction under the NGA. The Commission described that pipeline as follows:

As to the Snyder Pipeline, once acquired by WTG, it will be operated as part of WTG's existing intrastate pipeline business, which is regulated by the TRC. Initially, WTG plans to receive gas from the outlet of two existing natural gas processing plants located on the Snyder Pipeline system, for delivery to two municipal gas distribution customers (the Cities of Goldsmith and Spur, Texas), and to certain industrial end users in Texas (including Alon USA, L.P. and Sid Richardson Carbon Company). WTG will also deliver gas to numerous low-volume domestic taps owned and operated by Atmos Energy, an unaffiliated Texas local distribution company.

[Emphasis added.]

The Commission held that the Snyder Pipeline was an intrastate pipeline. The Commission explained its conclusion as follows:

In regard to the operation of the Snyder pipeline, once acquired by WTG, the facility will be operated as part of WTG's existing intrastate pipeline business, which is exempt from the Commission's jurisdiction. Specifically, the Snyder pipeline system will be cut and capped at the existing interconnection with EPNG, physically isolating this facility from EPNG's interstate pipeline system. WTG will be operating entirely within the state of Texas and will continue to be regulated by the TRC. The Commission has emphasized that any transportation or sale of natural gas within a state that does not cross into another state should be exempt from the Commission's jurisdiction pursuant to Section I (b) of the Natural Gas Act. WTG's activities and the location of its Snyder facility will be consistent with that exemption.

In contract, in a recent case, FERC refused to grant abandonment of existing interstate facilities to a Texas Railroad Commission regulated intrastate pipeline because those facilities were performing an interstate service.[[59]](#footnote-60)59 This case illustrates the fact that it is the status of the facilities and not the owner of the facilities that determines jurisdictional status- FERC described the proposed buyer as follows:

Crosstex CCNG, which is not affiliated with Transco, is an intrastate pipeline company subject to the jurisdiction of the Texas Railroad Commission with a system consisting of 295 miles of pipeline extending from supply points in south Texas to markets in the Corpus Christi, Texas area. Crosstex CCNG's system interconnects with multiple third-party pipelines both directly and through hubs.

The proposed seller was Transco, a natural gas company as defined in the NGA, engaged in the transportation and sale of natural gas in interstate commerce. Transco proposed to abandon its South Texas Pipeline Facilities by sale to Crosstex CCNG. Crosstex CCNG argued that the South Texas Pipeline Facilities would be intrastate pipelines. The Commission summarized the argument as follows:

Crosstex CCNG requests that the Commission find that the South Texas Pipeline Facilities and transportation services conducted thereon by Crosstex CCNG will be exempt from the Commission's NGA jurisdiction upon Crosstex CCNG's acquisition of such facilities for use as intrastate pipeline facilities. Crosstex CCNG states that, as part of its intrastate pipeline system in Texas, the subject facilities will enable Crosstex CCNG to provide expanded intrastate gathering, transportation and gas processing services and expanded market access to producers, revitalizing the acquired assets to the mutual advantage of producers and end-use markets. Crosstex CCNG asserts that the proposed acquisition will create an economic incentive for full utilization of an existing 175,000 Dth/d interconnection, in Nueces County, Texas, between the acquired facilities and Crosstex CCNG's existing underutilized system serving the Corpus Christi Ship Channel industrial markets.

Crosstex CCNG was operating under a cost-based rate approved by the Texas Railroad Commission (TRRC) that had been recently updated and filed with the Commission. Indicated Shippers opposed the abandonment and sale to Crosstex CCNG and argued that if abandonment was approved, Crosstex CCNG should be declared jurisdictional because Crosstex CCNG would continue to receive offshore jurisdictional volumes from the NPI Lateral for transportation in interstate commerce. Indicated Shippers further argued that NGPA section 311 was not intended for the purpose proposed, but was intended to be no more than a limited exception to regulation under the NGA.

FERC held:

As discussed above, we find that the South Texas Pipeline Facilities are part of a seamless interstate system that is currently flowing significant volumes and is likely to continue do so in the foreseeable future. Shippers have contractual commitments to continue to deliver gas to Station 30. Sunoco's 41,400 Dth/d of FT capacity, although currently flowing only about 7,000 Dth/d, is contracted through July 31, 2012, for delivery at Station 30. In addition, the NPI Lateral volumes, representing over 29 percent of the currently flowing volumes (about 45,000 Dth/d), will likely continue to be delivered to Station 30. Since we are denying Transco's request to abandon the facilities, however, we need not reach the question of whether Crosstex CCNG or any other third party could operate the facilities in a manner that would not subject them to regulation under the NGA.

**B. First sales**

First sales, as defined in Section 2(21) of the NGPA are no longer subject to the Commission's jurisdiction under the NGA because of the provisions of Section 601(a)(1)(B) of the NGPA and the Decontrol Act.[[60]](#footnote-61)60

**C- Direct sales**

Sales to natural gas consumers are not subject to the NGA because they are not sales for resale.[[61]](#footnote-62)61 However, the transportation in interstate commerce of gas to a direct sales purchaser is regulated-[[62]](#footnote-63)62

**D. Production**

Section 1(b) of the NGA expressly exempts the production of natural gas.

**E. Gathering - not what you think**

Section 1(b) of the NGA expressly exempts the gathering of natural gas. Determining where gathering ends and interstate transportation begins, for purposes of the NGA, can be very difficult. The Commission's current methodology for making this determination, the modified primary function test, is discussed in detail in section 1.5 of this paper.

**F. Transportation by Hinshaw Pipelines**

Section 1(c) of the NGA, added in 1954, expressly exempts one type of transportation of gas that is in interstate commerce. Section 1(c) provides:

The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

This exclusion allows State-regulated intrastate pipelines and local distribution companies to receive gas from interstate pipelines without becoming subject to the Commission's jurisdiction under the NGA.[[63]](#footnote-64)63

The 2001 decision in *KN Wattenberg Transmission Limited Liability Company*[[64]](#footnote-65)64 applied section 1(c) to a 4-mile long, 6-inch diameter lateral line that received gas at an interconnection with Colorado Interstate Gas Company and delivered it directly to two industrial end users located in Fort Morgan, Colorado- When the issue of the line's jurisdictional status first came before the Commission, the Commission determined that it was a jurisdictional line because the facility was neither a local distribution facility, exempt under section 1(b) of the NGA, nor a Hinshaw pipeline, exempt under section 1(c) of the NGA.[[65]](#footnote-66)65 On appeal, the United States Court of Appeals for the Tenth Circuit reversed and remanded for further proceedings. The Court directed the commission to review its rationale for determining whether a person or facility is exempt from jurisdiction under section 1(c) (the Hinshaw amendment to the NGA).

On remand, the Commission reversed its previous position and concluded that the lateral qualified as an NGA-exempt Hinshaw pipeline.[[66]](#footnote-67)66 What makes this case particularly interesting is that KN Wattenberg and the two industrial end users wanted the line to be subject to FERC jurisdiction and objected to the Hinshaw designation-

In discussing the purpose of the Hinshaw exemption, the Commission explained:

The amendment was intended to relieve from unnecessary dual state and federal jurisdiction, companies engaged in the distribution of natural gas whose operations take place wholly within a single state, [Footnote omitted] by providing an exemption from federal jurisdiction. However, the public interest was to be fully protected by the state regulatory commissions.[[67]](#footnote-68)67

The Commission found that the lateral met the requirements of the Hinshaw exemption, over arguments to the contrary by KN Wattenberg and the end users based on the following analysis:

Person to person requirement- Under the Hinshaw Amendment, as interpreted by the courts, if the person who receives the gas within the state is the same person who transmits the gas into the facility in the first place, the facility cannot be exempt. In other words, the requirement of a "person-to-person" exchange at the point of receipt ensures that the exemption will not extend to local branches of "a single integrated system, all of which is operated by the same person.

All gas consumed within Colorado. The end users' claim that some of the gas so received by KN Wattenberg is delivered to CIG and ultimately flows outside of Colorado, is simply wrong. The record shows that all the gas received by KN Wattenberg at the interconnect of its new lateral with CIG will be consumed within Colorado.

State PUC asserted jurisdiction over the rates and service on the line. Since the time that our initial order was issued in this proceeding, the Colorado PUC, through its representative attorney, filed a certification of jurisdiction with this Commission. Section 1(c) provides that a certification from the state commission that it has "regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. ... Nothing in the language of the Hinshaw Amendment or its legislative history suggests that local challenges at the state level concerning the state commission's exercise of jurisdiction over a Hinshaw facility is sufficient to render a state commission's assertion of jurisdiction before the Commission invalid.

...

Hinshaw amendment cannot be overridden by the Commission's policy on bypass. KN Wattenberg also argues that the Commission's exercise of NGA jurisdiction over the subject lateral would further the Commission's pro-competitive policies and, in particular, the Commission's bypass policy. Whether or not the Commission's exercise of jurisdiction in this case might further the Commission's pro-competitive bypass policy, the Commission's policy on bypass cannot override or circumvent the statutory mandate of the Hinshaw Amendment

The *KN Wattenberg* case is distinguishable from cases in which companies have attempted to avoid jurisdiction under the NGA by segregating their facilities into alleged jurisdictional and non jurisdictional segments. Thus, in *Louisiana Power & Light*[[68]](#footnote-69)68 the court held that two physically connected segments owned and operated by the same interstate pipeline company "functioned" as an interstate system and that, therefore, the Hinshaw Amendment's exemption was not available, even if all the gas received and transported in one segment was also consumed within the same state- Similarly, in *Kansas Pipeline Company, et al.*,[[69]](#footnote-70)69 the physical interconnections and operational relationships between a number of facilities led the Commission to conclude that the entire enterprise should be subject to NGA jurisdiction. In reaching that decision, the Commission looked beyond the corporate structures and ownership arrangements that attempted to segregate interconnected pipeline facilities into jurisdictional and nonjurisdictional segments, and, looked, instead, at the natural operations of the facilities and transportation services being provided.

**G. Sales and transportation under section 311 of the NGPA**

Prior to passage of the NGPA, transportation and sales arrangements between interstate pipelines on the one hand and intrastate pipelines or local distribution companies on the other hand, were subject to the Commission's jurisdiction under the NGA. For example, if an intrastate pipeline or local distribution company transported gas received from an interstate pipeline, that would make the intrastate pipeline or local distribution company an interstate pipeline as well.

Section 311 of the NGPA changes that result. Section 311(a)(1) provides that the Commission, by rule or order, may authorize any interstate pipeline to transport natural gas *on behalf of any* intrastate pipeline and location distribution company. Section 311(a)(2) provides that the Commission, by rule or order, may authorize any intrastate pipeline to transport natural gas *on behalf of* any interstate pipeline and any local distribution company served by any interstate pipeline. All rates and charges must be just and reasonable within the meaning of the NGA and FERC does exercise jurisdiction over such rates.[[70]](#footnote-71)70

Section 601(a)(2) of the NGPA provides that, for purposes of section 1(b) of the NGA, the provisions of the NGA and the jurisdiction of the Commission under the NGA shall not apply to any transportation in interstate commerce of natural gas if such transportation is authorized by the Commission under section 311 of the NGPA- Furthermore, the term "natural-gas company, as defined in section 2(6) of the NGA, shall not include any person by reason of, or with respect to, any transportation of natural gas under section 311 of the NGPA.

Key to a permitted transaction under section 311 is the "on behalf of" requirement. For a period of time, the Commission applied a liberal test that only required that the "on behalf of" entity receive "some economic benefit" from the transportation. This was struck down in *Associated Gas Distributors v. FERC*.[[71]](#footnote-72)71 In order to avoid violating the "on behalf of" requirement, It is important for shippers not to rely on FERC decisions prior to that case-

In response to *Associated Gas Distributors*, FERC issued Order No. 537[[72]](#footnote-73)72 which adopted the current "on behalf of test"- This test can be found in the regulations at 18 CFR §284.102(d) (for transportation under section 311 by interstate pipelines on behalf of intrastate pipelines or local distribution companies) and 18 CFR §284.122(d) (for transportation under section 311 by intrastate pipelines on behalf of interstate pipelines or local distribution companies served by an interstate pipeline). Prior to providing transportation services, the transporting pipeline must obtain shipper certifications to verify that their services quality under 18 CFR §284.102(d) or 18 CFR §284.122(d), as applicable.

**H. Local distribution**

Section 1(b) of the NGA expressly exempts the local distribution of natural gas and the facilities used for such distribution.

**1.5 Whether a pipeline is a gathering line or an interstate pipeline under the NGA**

**A. Jurisdictional status is facility specific, not activity or ownership specific**

Whether a company is a natural gas company subject to FERC regulation is *facility specific*. The same *company* can be a non-jurisdictional gatherer as to some facilities, an intrastate pipeline as to other facilities, and an interstate pipeline as to other facilities.

However, in contract to the approach taken under the ICA, under the NGA, the same facility cannot provide both interstate service and intrastate service (although the services a pipeline provides may fall within one of the exemptions discussed in the prior section of this paper).

There is no company-specific jurisdictional status; only facility-specific status.[[73]](#footnote-74)73

**B- Importance of determining jurisdictional status; declaratory orders; civil and criminal remedies if wrong about jurisdictional status**

Gathering is not defined in the NGA. However, the distinction between a gathering pipeline and a jurisdictional transportation pipeline is very important because of the regulatory burden imposed on jurisdictional transportation pipelines (also known as interstate pipelines). The only certain way to know whether facilities are exempt gathering facilities or jurisdictional transportation facilities is to file a petition with the Commission requesting a declaratory order that the facilities are exempt. If a company makes a business decision not to file a petition and is later found to have provided jurisdictional transportation without obtaining certificate authority under the NGA, the Commission has a host of civil and criminal remedies available to it under the NGA.[[74]](#footnote-75)74 Notice of petitions for a declaratory order are published in the Federal Register-

**C. Development of FERC test to distinguish between gathering and interstate facilities**

The Courts have held that the gathering exemption is confined to matters of state and local concern. In *Interstate natural Gas 2A-13 Co. v. FPC*,[[75]](#footnote-76)75 the United States Supreme Court stated that, "[c]learly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or any other consideration of legitimate local concern-"[[76]](#footnote-77)76 Similarly, in *Northern Natural Gas Co. v. State Corporation Comm'n*,[[77]](#footnote-78)77 the Supreme Court stated that the gathering and production exemptions are limited to the physical activities of gathering and production-[[78]](#footnote-79)78

Over time, the Commission developed tests to determine what facilities were exempt gathering facilities. These tests became known as the central point test,[[79]](#footnote-80)79 the behind-the-plant test,[[80]](#footnote-81)80 and the primary function test-[[81]](#footnote-82)81 The primary function test was the standard methodology relied on by the Commission throughout the 1980's. The Commission has acknowledged that, over the years, its tests were modified to reflect changes in the Commission's regulatory objectives and the nature and structure of the natural gas industry. However, "the overriding principle in the Commission's jurisdictional determinations has been to fulfill the objections of the NGA and the Natural Gas Policy Act of 1978."[[82]](#footnote-83)82

In October of 1985, the Commission issued Order No- 436.[[83]](#footnote-84)83 This order was intended to facilitate competition in the market for natural gas as a commodity distinct from transportation by encouraging pipelines to provide transportation services on an open access, nondiscriminatory basis. This included transporting, without discrimination, gas which competed with the pipeline's own sales gas.

Pipelines which applied for open access certificates under Order 436 had to unbundle their rates (i.e., separately identify cost components attributable to transportation, storage and gathering services) so that shippers would know the total cost of services they planned to purchase.

With the issuance of Order 436, the Commission became concerned that unregulated gathering could defeat the Commission's open access objectives. The Commission revisited its tests for gathering and the scope of its authority to regulate activities provided "in connection with" jurisdictional activities.

While the Commission was revisiting the scope of its jurisdiction, it ran into trouble applying its traditional primary function test. In June of 1989, in *EP Operating Company*,[[84]](#footnote-85)84 the Fifth Circuit Court of Appeals reversed a Commission decision which had held that a 51-mile long offshore pipeline was a jurisdictional transportation line and not an exempt gathering line- The length and design operating pressure of the line were the key factors which influenced the Commission's decision. However, the Court found that these were solely a function of location and not a basis for distinguishing this line from shorter offshore lines which the Commission had declared to be gathering lines.[[85]](#footnote-86)85

The Commission, in response to *EP Operating Company*, issued an omnibus order modifying the primary function test to to reflect the changing technical and geographic nature of exploration and production. The modified primary function test expand rather than restrict edthe gathering exemption. This order is known as *Amerada Hess*.[[86]](#footnote-87)86 This order covered twenty-five pending dockets involving the gathering exclusion-

**D. The modified primary function test - the current jurisdictional test**

Because the Commission's tests for determining jurisdictional status have changed over the years to reflect changes in the Commission's regulatory objectives and the nature and structure of the natural gas industry, it is important to stay current with the Commission's application of the modified primary function test rather than to simply find a Commission decision, from any vintage, that seems to support the non-jurisdictional status of a particular project. In a decision issued in December of 2010,[[87]](#footnote-88)87 the Commission described the current test as follows:[[88]](#footnote-89)88

The Commission has over the years developed a number of legal tests to determine which facilities are non-jurisdictional gathering facilities and which facilities are jurisdictional transmission facilities- The Commission relies on the **modified "primary function test,"** which includes consideration of several physical and geographic factors, including: (1) the length and diameter of the line, (2) the extension of the facility beyond the central point in the field, (3) the facility's geographic configuration, (4) the location of the compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) the operating pressure of the line. In addition, the Commission also considers 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 NGA and the Natural Gas Policy Act of 1978. The Commission does not consider any one factor to be determinative and recognizes that all factors do not necessarily apply to all situations. In addition to the factors enumerated above, the Commission also weighs any and all other relevant facts and circumstances of a particular case, including non-physical criteria. [Footnotes omitted.]

**E. Further revision of the Behind-the-Plant Criteria - residue gas "stub lines"**

Since its adoption in 1990 in *Amerada Hess*, the modified primary function test has been the standard methodology for determining whether a particular facility is exempt from the Commission's jurisdiction under the gathering exemption contained in section 1(b) of the NGA. However, on May 27, 1994, in another decision involving Amerada Hess, the Commission reconsidered and modified its application of the behind-the-plant criteria of the modified primary function test.

The original behind-the-plant test held that facilities located upstream of a plant are gathering facilities while facilities located downstream are jurisdictional transportation facilities falling outside the production and gathering exemption in the NGA.[[89]](#footnote-90)89 Over time, the Commission found in some cases that facilities located downstream of a processing plant could also be gathering- For example, in 1991 in another case involving Amerada Hess,[[90]](#footnote-91)90 the Commission held that a 10-inch diameter, 60.5 mile long pipeline located downstream of a processing plant was an exempt gathering facility. See also, *Ringwood Gathering Co.*,[[91]](#footnote-92)91 in which the Commission found that a 26-mile, 12-inch diameter line moving gas from the outlet of a processing plant to an interconnection with an interstate pipeline was an exempt gathering facility-

The 1991 the *Amerada Hess* decision was appealed to the D.C. Court of Appeals. In July of 1993, the Commission sought and was granted remand of that appeal. On remand, the Commission found that the "behind-the-plant" factor had evolved into a "behind-the-mainline interstate pipeline interconnection" test and for all practical purposes had been eliminated from the primary function test. The Commission announced a different approach which would be a return to the approach which existed prior to adoption of the modified primary function test in the 1990 *Amerada Hess* decision. The Commission described this approach as follows:

The new approach we are adopting here will not result in a totally mechanical application of the "behind-the-plant" factor. Under the new approach, the Commission generally will find that facilities located beyond a processing plant other than those which are incidental to a plant's operations, are jurisdictional transmission facilities. Under this method, depending on the length of the facilities downstream of a plant owned by the behind-the-plant gatherer in relationship to the size of gathering facilities located behind the plant, the downstream facilities may be considered exempt because they are an incidental extension of plant operations or of the behind-the-plant gathering system. The Commission is of the view that this approach will restore substance to the "behind-the-plant" factor and other elements of the "primary function" test while at the same time providing the requisite flexibility to avoid inequitable or illogical results in certain cases, e.g. cases involving sizeable behind-the-plant gathering facilities with relatively short "stub" lines extending beyond the plant.[[92]](#footnote-93)92

Applying this new approach to the remand of the 1991 *Amerada Hess* decision, the Commission still found that the 10-inch, 60-5 mile pipeline was exempt gathering. The Commission noted that in the absence of additional countervailing factors, the fact that the facilities were located entirely downstream of a processing plant would lead to the conclusion that their primary function was jurisdictional transportation.[[93]](#footnote-94)93 However, countervailing factors were present in the case. For example, new production was flowing into the downstream facilities where it was commingled with processed gas. The unprocessed gas had excessive carbon dioxide. However, the commingling produced a gas stream of pipeline quality and, as a result, the Commission found that the facilities operated as the functional equivalent of a treatment facility.[[94]](#footnote-95)94 For this and other reasons, the Commission concluded that the facilities downstream of the processing plant were exempt gathering facilities-[[95]](#footnote-96)95

In a second decision issued on the same day involving Superior Offshore Pipeline Company, the Commission applied this new approach to a pipeline system extending from an offshore platform to an onshore processing plant with laterals extending from the outlet of the plant to Columbia Gulf's and Texas Gas' pipeline systems. The laterals were 2 and 5 miles in length as compared to the 73 mile and 38 mile offshore gathering lines behind the plant. The Commission found that the latter were relatively short "stubs" when compared to the upstream gathering facilities and that they performed a primarily gathering function and acted as an expansion and extension of the existing upstream gathering facilities. As such, the laterals were held to be exempt gathering facilities.[[96]](#footnote-97)96

However, in a third decision issued on the same day involving Trunkline Gas Company, the Commission applied this new approach and found that 13 facilities located downstream from the tailgate of a processing plant were constructed to provide producers behind the plant with a way to deliver processed gas to transmission lines for delivery to market areas- The Commission considered the downstream location of the pipeline and the lack of relationship to upstream gathering facilities in concluding that these facilities were transmission facilities for rate and accounting purposes.[[97]](#footnote-98)97

On January 13, 2009, Colorado Interstate Gas Company (CIG) filed an application under section 7(b) of the Natural Gas Act (NGA) seeking Commission approval for CIG to abandon by sale to Chipeta Processing LLC (Chipeta) the Natural Buttes Compressor Station and Processing Plant, a five-mile segment of Line No. 155A, including two meter stations, and other appurtenant facilities, all located in Uintah County, Utah. The application was granted on August 3, 2009. In that Decision, the Commission summarized the stub line exception as follows:

In *Superior Offshore Pipeline Company (SOPCO)*, the Commission explained that generally facilities located downstream of a processing plant, other than incidental extensions such as stub lines, are jurisdictional transportation facilities. [Footnote omitted.] **In regard to stub lines, the Commission stated that downstream facilities may be considered exempt because they are an incidental extension of plant operations or of the behind-the-plant gathering system.** [Footnote omitted.] **The Commission has declined to extend the stub line exception beyond the five miles approved in *SOPCO*.** [Footnote omitted.]

Here, the Plant Interconnect Line, when operated as a beyond the processing plant line, will be approximately five miles in length. The line will act as an extension of the hundreds of miles of gathering facilities upstream of the processing plants and will merely interconnect the tailgates of the Chipeta and Natural Buttes Processing Plants to downstream pipelines. Thus, the Commission finds that the Plant Interconnect Line when operated as a downstream line will be a non-jurisdictional line exempt from the Commission's jurisdiction.

The Commission may also consider non-physical factors, such as the general business activity of the owner in determining the jurisdictional status of facilities. [Footnote omitted.] Here, Chipeta, its managing member, Anadarko Uintah, and its ultimate corporate parent, Anadarko Petroleum, are engaged in the exploration and production of natural gas and the gathering and processing of natural gas. With the exception of the ownership by Anadarko Petroleum of a small interstate pipeline in Wyoming -- MIGC LLC, acquired as part of Anadarko Petroleum's purchase of Western Gas Resources, Inc. in August 2006 -- Chipeta, Anadarko Uintah, and Anadarko Petroleum, are not involved in the transportation of natural gas in interstate commerce. The Commission finds that Chipeta's general business activity is consistent with a determination that the Plant Interconnect Line should be exempt from the Commission's jurisdiction.

This is the most current description of the stub line exception.[[98]](#footnote-99)98

**F- Application of the Central Point Criteria**

The behind-the-plant decisions cited in the previous section and other decisions issued by the Commission on the same day are also instructive regarding the application of the central point criteria. In determining whether a facility serves a gathering function, the Commission considers whether the pipeline extends past the central point in the field, i.e., where all of the gas is delivered into a single line. The Commission has stated that, "[T]he central point in the field test is based on the idea that gathering involves the collection and movement of natural gas through various lines to a central point where the gas is delivered into a single line for transmission. Facilities located upstream of the central point normally are considered non-jurisdictional gathering facilities."[[99]](#footnote-100)99

This factor is usually considered in situations where no processing plant is included in the system configuration-[[100]](#footnote-101)100

However, this factor is not always applicable because sometimes there is no central point. For example, the Commission found that the central point factor was not applicable to a pipeline system in a spider-web configuration where the pipeline formed a network of short length pipelines originating at wells and ending at a processing plant.[[101]](#footnote-102)101 In another case involving an area consisting of pipelines that form a backbone-type structure, or short pipelines that are attached to one or a few wells, the Commission has held that the central point test does not apply-[[102]](#footnote-103)102

With regard to OCS platforms, the Commission has recognized that the relevance of making a central point analysis in the case of isolated OCS operations is limited because production platforms are unitary structures with no true central point in the field. This does not mean that the pipeline cannot be classified as a gathering line.[[103]](#footnote-104)103 However, some OCS facilities are jurisdictional based upon a recently-developed, additional analytical element applicable to OCS pipeline facilities that exhibit a particular physical design feature-*i-e.*, a "centralized aggregation point."[[104]](#footnote-105)104

**G. Incidental sales to end users**

Incidental sales to end users or utilities (the two customers of an intrastate pipeline) will not convert what would otherwise be classified by FERC as an interstate pipeline into an intrastate pipeline. It is not uncommon for interstate pipelines to make direct sales to end users and that does not change their status as an interstate pipeline. See, for example, *Public Utilities Commission of Colorado vs. Colorado Interstate Gas Company*.[[105]](#footnote-106)105

**H- Pipeline straddling a state line**

Note that gathering lines may cross state borders. The six part modified primary function test is the applicable test; not whether the line crosses a state border. Thus, for example, a field could straddle a state border and there could be a pipeline system that gathers gas from wells on both sides of the border to a processing plant. The system behind the processing plant could constitute a gathering system, even though it crosses the border, as long as the other parts of the test are also met. If, however, there are central facilities, such as field compressors, upstream of the processing plant, further analysis would be required to determine whether the system would be classified by FERC as a gathering system or an interstate pipeline system.[[106]](#footnote-107)106

**I- Pipelines located entirely within a single state - not determinative**

Note also that an interstate pipelines may be located entirely within a single state. Again, the six part modified primary function test is the applicable test; if a line connects with an interstate pipeline and, under the modified primary function test, it is determined that the line is not a gathering line, then it is an interstate pipeline even if it is located entirely within a single state.[[107]](#footnote-108)107

**J- Decertification - changing policies can affect status**

Finally, facilities which have been certificated can be decertified, upon the filing of an application with the Commission, if the primary function of the facilities is determined to be gathering. Some facilities were certificated in the past because they fit one of the tests for jurisdictional transportation, such as the central point test, but over time their configuration has evolved to the point where, under the modified primary function test, they are now properly characterized as gathering facilities. Other facilities were certificated by interstate pipelines because, under the pre open-access regulatory regime at FERC, pipelines had an incentive to have all of their facilities, including gathering facilities, certificated. Certification facilitated recovery of the facilities' costs in the pipeline's jurisdictional rates. In either case, upon application, the facilities can be decertified.[[108]](#footnote-109)108 Notice of applications for decertification are published in the Federal Register-

**1.6 Case Study - *Williston Basin Interstate Pipeline Company, et al.***[[109]](#footnote-110)109 ***- certificated interstate facilities held to be non-jurisdictional gathering facilities after sale to producers***

In 1993, Williston Basin Interstate Pipeline Company (Williston Basin) sought authority to abandon certain of its transmission and gathering facilities located in central Wyoming by sale to K N Energy, Inc- (K N) and certain of its affiliates. The facilities were described as follows:

Wind River describes the facilities it is acquiring to be all of Williston Basin's pipeline facilities connecting the East Riverton Field, Riverton Dome Field, Fuller Reservoir Field, Poison Creek Field, Pavillion Field, Muddy Ridge Field, Howard Ranch Field, Bonneville Unit, Boysen Field and Carter Draw Field in Fremont County, Wyoming. These facilities, called the "Wind River System," consist of 175 miles of 2-inch through 12-inch pipeline, field separation and dehydration facilities and a 3,030 rated hp compression station and dehydration plant in the Pavillion Field. ... Wind River further states that the gas from the Muddy Ridge, Pavillion, Poison Creek, Fuller, East Riverton, Howard Branch, Bonneville Unit, Boysen and Carter Draw Fields is not processed at any point prior to delivery to the transmission pipelines, and is subject only to the mechanical separation of liquids in the field. Wind River claims that gas from the Riverton Dome Field may be processed at ARCO's processing plant, from which the residue gas is deliverable into the Riverton-Madden line or a transmission line owned by K N. However, states Wind River, since July 1992, when a gas purchase contract between ARCO and Williston Basin expired and ARCO constructed additional facilities, all of ARCO's residue gas has been delivered directly into K N's transmission line.

FERC declared that all of these facilities would be non-jurisdictional gathering facilities upon sale to Wind River. The Commission noted that the primary function of the Wind River System is to gather production of Tom Brown and other producers' gas in the Wind River Basin producing area for delivery into KN's and Williston Basin's interstate transmission systems. FERC concluded that the facilities perform primarily a gathering function and, accordingly, should be classified as nonjurisdictional under section 1(b) of the NGA. The Commission's analysis of the individual criteria of the modified primary function test was as follows:

Wind River System pipeline facilities are 175 miles in length - longer than most gathering facilities but not the longest we have determined to be gathering

Length of the Wind River system represents the distance between the producing areas and the interconnections with the nearest interstate pipeline systems in central Wyoming where the density of transmission lines is light

The 2-inch through 12-inch diameter of the pipeline is consistent with a gathering determination. The configuration of the Wind River System, like its length, is a function of its geographic location in a lightly-developed area. Though not entirely of a network-like configuration, the lines connect wells over most of their length and deliver the wells' production to interconnecting interstate transmission lines.

Gas gathered by the Wind River System facilities from all fields will have been treated only minimally to separate liquids, and little, if any, volumes will be processed. [

Not all of the facilities are located behind the compression facilities [but] primary function of the Wind River System is to deliver gas *in a first sale* at the interconnection with KN (and now also WBI).

Wind River also points out that the pressure of approximately 850 psi raised by the 3,030 hp f compression in the Pavillion Field is that which is necessary to raise the wellhead pressures to a level sufficient to allow the gathered gas to enter into the interconnecting pipelines. Under those circumstances, the pressure is incidental to the gathering function of the facilities.

Although the modified primary function test is applied to specific facilities and not to companies, we have considered that the general business activity of the owner or operator of a facility is a relevant consideration in determining the function of such facility. In the present case, Tom Brown, the parent company of one of the two owners of Wind River, purportedly owns over 70 percent of the production attached to the Wind River System (excluding production from the Riverton Dome Field). Retex was formed to market production in areas where Tom Brown owns interests and to own and operate gathering facilities that enhance its marketing efforts. The other owner of Wind River KN as, owns and operates extensive gathering facilities. Neither Wind River, Retex, nor KN Gas owns any jurisdictional facilities or provide jurisdictional services. Clearly, the acquisition of the Wind River System by Wind River is in substitution for the proposed facilities found to be gathering facilities in Tom Brown [TBI's prior application for a certificate to construct facilities to bypass WBI], and Wind River System's primary purpose, like that of the substituted facilities, is to gather gas of Tom Brown and other producers in the Wind River Basin for delivery to the interstate pipelines.

In light of all these factors, we find that the proposed facilities will function as gathering facilities which will provide Tom Brown and other Wind River Basin producers with access to the interstate natural gas commodity and transportation markets.

**1.7 Case Study - *KN Wattenberg Transmission Limited Liability Company***[[110]](#footnote-111)110***- if at first you don't succeed* -..**

This decision involved facilities that were originally unquestionably interstate pipelines facilities, part of a large, interstate pipeline system in the Denver-Julesberg basin, consisting of approximately 1,275 miles of pipe).

On February 9, 1989, Panhandle Eastern Pipe Line Company (Panhandle) filed an application pursuant to section 7(b) of the Natural Gas Act (NGA) for a Commission order approving abandonment of certain facilities located in Colorado (the Wattenberg System) by sale to Amoco Production Company (Amoco).[[111]](#footnote-112)111 The Commission dismissed Panhandle's application without prejudice to a joint filing with Amoco wherein Amoco would file for a certificate under section 7 of the NGA to operate the portion of the facilities which were deemed to be jurisdictional- FERC noted that the system was currently connected to about 1,527 points of receipt for wells which were completed in 32 separate fields within the J-Muddy sandstone formation (the "J") and at least six other formations. Notwithstanding this fact, the Commission found that at least 90 miles of the system was jurisdictional. It's analysis was as follows:

The Wattenberg system is comprised of approximately 1,275 miles of pipeline, most of which is between four and eight inches in diameter. The Wattenberg system also includes eleven compressor stations which are currently owned and operated by Panhandle. Six of these compressor stations have low compression capability ranging from 30 to 110 psig. These six compressor stations are located throughout the Wattenberg system. However, five of the compressor stations have high compression capability typical of a transportation function. These larger compressor stations are basically located on or near the main trunk of the system. According to Panhandle, the typical operating pressure of the 3-inch, 4-inch and 6-inch pipelines is approximately 100 psig. These smaller lines are typically well connects and lines transporting gas from multiple connects on the suction side of compressor stations. These smaller lines feed into the substantial sections of large, high pressure (1,000 psig) lines at many points throughout the system. Thus, the elements of the "modified primary function" test indicate that while much of the Wattenberg System's primary function might be classified as gathering (the smaller diameter pipelines and the low-pressure compressor facilities), a significant portion of the Wattenberg facilities (the larger diameter pipelines and the large compressor stations) clearly performs a jurisdictional transportation function. These transportation lines are all located on the discharge end of the large compressor stations and flow towards the system's outlets. These lines total 90 miles in length and operate at pressures generally not consistent with a gathering function. The smaller diameter lines, which total approximately 1,185 miles, are generally located behind the five larger compressor stations and thus operate at about 100 psig. These smaller lines are typically well connects and lines that move gas from multiple connects to the compressor stations.

In sum, we conclude that for purposes of our NGA jurisdiction, at least a critical portion of the Wattenberg system functions as a jurisdictional transportation system consisting of approximately 90 miles of 12-inch to 24-inch diameter, high - pressure pipeline which transports natural gas for delivery to other interstate pipelines.

Because Amoco was not willing to apply for a certificate to acquire and operate the Wattenberg system, Panhandle's application for abandonment was dismissed without prejudice.

Subsequently Panhandle sold the gathering facilities to KN Front Range Gathering Company and the interstate facilities to KN Wattenberg Transmission Limited Liability Company. KN Wattenberg obtained certificate authorization to acquire and operate these facilities.

Subsequently, Kerr-McGee entered into an agreement to acquire both the KN Wattenberg facilities and the facilities of KN Gas Gathering.[[112]](#footnote-113)112 In connection with the proposed transaction, on September 18, 2001, KN Wattenberg filed a petition requesting the Commission declare that its entire system, located in Adams and Weld Counties in Colorado, is engaged in gas gathering, and is thereby exempt from the Commission's jurisdiction under the Natural Gas Act- In that petition, KN Wattenberg's facilities were described as follows:

KN Wattenberg's facilities consist of 6.3 miles of 12-inch diameter pipe; 11.9 miles of 16-inch diameter pipe; 33.5 miles of 20-inch diameter pipe; 6.3 miles of 24-inch diameter pipe; and the Brighton, Dougan, Frederick, Fort Lupton, and Hudson compressor stations, which have a combined total of 38,932 horsepower. KN Wattenberg delivers approximately 193 MMcf of wet gas per day to processing plants owned and operated by BP/Amoco, North American Resources Company (North American Resources) and Duke Energy Field Services, LP (Duke).

The Commission's analysis under the modified primary function test was as follows:

Length and diameter most consistent with jurisdictional transportation. With respect to the length and diameter of its pipelines, KN Wattenberg contends that the relatively large size of certain of its facilities reflects the large volumes of raw gas delivered into and collected by its system. In this case, the longest segment is a 32.5-mile long, 20-inch line and the largest segment is a 24-inch diameter, 6.3-mile line. We find the size of these lines is most consistent with facilities used for gas transmission. As contraindicators of this jurisdictional function, KN Wattenberg states that the Commission has found similarly sized facilities gathering and points out that production volumes are introduced into the 20-inch segment at several points along its 32.5-mile length and that the 24-inch diameter line operates at a relatively low pressure. KN Wattenberg's remaining segments are comparatively small - 11.9 miles of 16-inch pipe, 6.3 miles of 12-inch pipe, and a single mile of 20-inch diameter pipe - a size we find more representative of gathering facilities.

Central point - none. Identifying a central point in a producing field can be useful in distinguishing gathering from transmission where numerous smaller lines bring gas to a central point for delivery into a larger line that then carries the aggregated gas volumes from the field. No such central point is apparent here, as aggregation does not cease at any one point on KN Wattenberg's system. Throughout the Denver-Julesberg Basin production area, KN Wattenberg's jurisdictional lines intertwine with more than a thousand miles of nonjurisdictional lines, owned by KN Gas Gathering and others; these production and gathering lines interconnect with and deliver gas into KN Wattenberg's own lines at numerous points along the KN Wattenberg system. Further, the central-point-in-the-field factor is most aptly applied when there is not a processing plant to consider, since the location of a processing plant typically serves as a reliable demarcation point between upstream gathering and downstream transmission.

Behind the plant - one mile stub line - indicative of gathering. Here, there are three separate processing plants, and with the exception of one mile of pipe, all of KN Wattenberg's facilities are upstream of these plants and carry only unprocessed wet gas, indicating that these facilities are engaged in gathering. In view of this, we consider the single mile of pipe exiting the BP/Amoco plant to be an incidental link between KN Wattenberg's system upstream of the plant and CIG, the nearest interstate pipeline downstream of the plant. Given our determination that the KN Wattenberg system is gathering gas, we believe it is most appropriate to characterize this one mile segment as a stub line from the BP/Amoco plant to the CIG interconnect, and view it as extending and continuing the gathering function of the facilities upstream.

Compressor stations upstream of the processing plants. In addition to the BP/Amoco, North American Resources, and Duke processing plants located at the extremities of KN Wattenberg's system, there are five compressor stations owned and operated by KN Wattenberg upstream of these processing plants. KN Wattenberg states that its compression facilities serve to pull gas from wells and lateral lines into its system, push the received gas along its lines to the processing plants, and boost pressure to levels needed for the processing plants' cryogenic liquids separation treatment process.

Cryogenic treatment requires that gas be introduced into the processing plant at a relatively high pressure, since the liquids separation process, to be effective, results in a significant pressure drop. We have determined that compression facilities located upstream of cryogenic processing plants associated with providing pressure for such plants serve a gas processing, i.e., NGA-exempt production or gathering, function. The operating pressure on KN Wattenberg's system is high, ranging from 980 to 1075 psig. However, we accept KN Wattenberg's assertion that the processing plants require that raw gas enter at approximately 950 psig, and its compression facilities are needed to meet this processing criterion. Accordingly, we find that KN Wattenberg's compression facilities, while substantial, serve to move gas on gathering lines and to provide compression needed for gas processing. We thus conclude that the five compressor stations are employed primarily in nonjurisdictional activities.

Configuration of the system - consistent with gathering. KN Wattenberg's system may be described as a 20-inch mainline spine (Line 16-10-075-01) carrying gas north to south, with three attached laterals that carry gas west to east. KN Wattenberg can receive gas at various points along the length of its mainline and lateral lines. KN Wattenberg states that there are approximately 10,000 wells in the Denver-Julesberg Basin, 3,300 of which feed raw gas into its facilities. We find this configuration, along with KN Wattenberg's ability to receive raw gas directly via interconnects with wells and other nonjurisdictional lines at numerous points, to be consistent with a gathering function.

Preponderance of physical and geographic factors - primary purpose of gathering. In view of the above, we find the preponderance of physical and geographic factors weigh in favor of finding that the primary purpose of KN Wattenberg's system is to gather raw gas and carry it to processing plants where the raw gas is treated and then delivered into Public Service's nonjurisdictional intrastate facilities or CIG's jurisdictional facilities. We note that the function of the facilities as a whole has not been considered subsequent to their acquisition by KN Wattenberg. Whereas previously these facilities constituted part of Panhandle's large, interstate system, under KN Wattenberg's ownership the facilities are a stand-alone intrastate system, no longer integrated, as they were under Panhandle, into a larger interstate system that leaves Colorado.

**1.8 *Sea Robin Pipeline Company***[[113]](#footnote-114)113 **- modification of primary function test as applied to offshore facilities**

This decision involved Sea Robin's offshore natural gas pipeline system- The system was described in the Commission's decision as follows:

The system consists of 438 miles of dual-phase pipelines and six compressors, all of which were constructed and have been operated pursuant to certificates of public convenience and necessity. Sea Robin moves a raw stream of natural gas and liquid hydrocarbons, also referred to as condensate, which has not been separated or processed. Sea Robin collects this gas and liquid stream from numerous production fields offshore and carries the raw stream to shore for liquids separation, dehydration, processing, and delivery to five interconnecting transmission pipelines. The system can carry in excess of 288 Bcf annually.

The system is configured in the form of an inverted or upside-down "Y." The size of the pipes constituting the system ranges from 4-inch diameter pipeline to 36-inch diameter pipeline. However, more than 77 percent of the system is composed of 20-inch and larger diameter pipeline.

Sea Robin's system contains ninety-nine miles of 4-inch to 16-inch diameter laterals connecting 57 receipt points to the system. Generally, the receipt points are located on offshore production platforms which provide for the interconnection of the production facilities to Sea Robin's system. In addition to the 57 production platform receipt points, there are two Sea Robin-owned receipt points and laterals connected to Stingray Pipeline Company in West Cameron Blocks 563 and 586.

The longest segment of the system is the Vermilion 149-Erath segment, consisting of 66.3 miles of 36-inch pipeline running in a straight line from the Vermilion 149 compressor station, a manned platform, to onshore processing facilities. Through this segment, Sea Robin carries gas that has been moved by Sea Robin from 67 platforms and brought together, through the arms of the inverted "Y" configuration to the Vermilion 149 station at the fork of the "Y." The Vermilion 149 Station consists of two turbine compressor units of 12,350 horsepower each. From the Vermilion 149 Station the gas is then carried in a straight line, 66.3 miles to shore, through a region where the Vermilion 149-Erath line picks up additional gas from four platforms, all of which are located along the first 25 miles of the 66.3 mile- long segment.

Sea Robin petitioned to have the system declared to be a non-jurisdictional gathering facility. The Commission concluded that it was a jurisdictional transportation facility and Sea Robin appealed. On October 23, 1997, the United States Court of Appeals for the Fifth Circuit vacated and remanded the Commission's decision. The Court found that the Commission failed to give adequate attention to the physical or operational characteristics of Sea Robin's system in applying the "primary function" test to determine the jurisdictional status. The Court concluded that the Commission had decided that Sea Robin performed a transportation function solely on the basis of the single factor of the size and length of the system and had disregarded the rest of the factors of the primary function test. The Court gave the Commission two options: the Commission could either: (1) reapply the existing primary function test in the light of the Court's opinion; or (2) re-evaluate and, if necessary, reformulate the primary function test as applied to OCS facilities.

After the court denied the Commission's petition for rehearing and motion for clarification, the Commission reconsidered the jurisdictional status of Sea Robin's system. It concluded that the portion that the primary function of Sea Robin's facilities upstream of its Vermillion 149 Compressor Station was gathering, and that those facilities therefore were exempt from the Commission's NGA jurisdiction. However, the Commission found that Sea Robin's facilities downstream of the Vermillion 149 Compressor Station were properly classified as transmission. In reaching this conclusion, the Commission reformulated the primary function test as to OCS facilities. The Commission explained:

Only in the last decade or so, has the Commission attempted to apply the primary function test to determine the jurisdictional status of OCS facilities. Because of the physical characteristics particular to OCS facilities, application of several of the factors used in the primary function test onshore has been difficult to apply in the OCS environment. Wells are drilled and operated from production platforms offshore. Large platforms can accommodate up to 36 wells. Although gas may be treated, cost and engineering considerations generally preclude any processing of gas on offshore platforms for the extraction of liquefiable hydrocarbons. In short, the nature of OCS production and the movement of gas from the platform to consumers onshore does not make for a tight fit with the weight afforded the criteria historically applied by the Commission to onshore production and gathering. Accordingly, over the past decade the Commission has modified the application of the primary function test in a fashion that leads to results for OCS facilities that are functionally equivalent to the results obtained onshore. In this order, the Commission, under the guidance of the Court, is further refining its adaptation of the primary function test to the offshore environment.

The Commission found that, as to OCS facilities, the behind the plant factor was not as meaningful as it was onshore, and that the location of collection facilities (the offshore equivalent of the central point in the field factor for onshore pipelines) should be given more weight. The Commission stated:

The Commission believes that offshore the "behind-the-plant" factor is not necessarily determinative and can be outweighed by other factors. In the onshore context, for economic reasons, the location of gas processing plants generally coincides with a centralized location so that at the point where the collected and processed gas leaves the processing plant, all of the physical acts of production and gathering have been completed. Offshore, this coincidence of plant tailgate and centralized location in the field does not occur. Production-related economic, operational, and engineering factors preclude completion of gas processing close to the producing areas as occurs onshore. Cost, engineering and technological considerations limit the amount of production processing equipment that can be near OCS producing fields. These production-related factors dictate that only the most rudimentary separation and dehydration operations to prevent formation of water-hydrocarbon hydrates and permit efficient flow of the wellhead stream be conducted at sea. Accordingly, in assessing the jurisdictional status of offshore facilities, the "behind- the-plant" factor will not be afforded greater significance than the other factors of the primary function test.

In addition, where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation on OCS systems. The Commission recognizes that not all OCS pipeline systems will exhibit a centralized aggregation point. For example, an OCS facility that has a straight-line or spine-and-lateral type configuration may not have such a point. The Commission will determine the jurisdictional status of such systems on the basis of the current formulation of the primary function test as modified in this order, as well as any additional refinements that the Commission may develop to further adapt the primary function test to the physical characteristics of moving natural gas across the OCS to shore.

The Commission then proceeding to analyze the Sea Robin system and concluded that the portion of the Vermilion 149-Erath Line, consisting of 66.3 miles of 36-inch pipeline running in a straight line from the Vermilion 149 Compressor Station to the onshore performed jurisdictional transportation. The portion of the system upstream of the Vermillion 149-Erath Line was a non-jurisdictional gathering facility. The Commission's analysis was as follows:

Behind the plant not determinative for OCS facilities. From the centralized collection point [the Vermilion 149 Station, located at the fork of the "Y"], the gas is transported in a straight line, 66 miles to shore, through a region with few platforms. Although the entire Vermilion-Erath Line is located upstream of the processing plants, that fact, taken alone, is not determinative in assessing the primary function of a major OCS line like Sea Robin. Due to the geographic and technical characteristics of production and transportation on the OCS, it is not feasible to construct a major processing plant closer to the production areas.

Straight shot geographical configuration. In addition to the marked change in physical attributes and geographic configuration exhibited by Sea Robin's facilities occurring at Vermilion Block 149, the straight-shot geographical configuration of Sea Robin's system downstream of the Vermilion 149 Station interconnecting with only two laterals delivering gas from only four wells along its 66.3-mile length, in and of itself, is a further indication of a transportation function.

Location and concentration of significant compression at Vermillion 149. Another element of the primary function analysis indicative of the transmission function of the Vermilion 149 to Erath Line is the location and concentration of significant compression at Vermilion 149. At the Vermilion 149 Station, the gas can be compressed by two 12,500 hp compressors for further transportation. Sea Robin's Vermilion Block 149 compression is typical of compression found on large diameter transportation lines transporting high volumes of gas over relatively long distances. This compression is not field compression and is not needed to deliver gas from OCS production platforms into Sea Robin's system. Rather, these compressors stand ready to assist in transporting large volumes of gas relatively long distances from that centralized collection point, through a large diameter pipeline in a straight line, over 66 miles to shore, through a region with few platforms. Sea Robin explains that compression at the Vermilion 149 Station may be needed "because of the physics of transporting large volumes of gas, along with condensate, through a dual-phase pipeline system for substantial distances." Sea Robin's explanation of the purpose of the Vermilion 149 Station further demonstrates that the Vermilion to Erath Line is engaged primarily in transportation. The location of compressors often serves as an indicator of transportation because, as on Sea Robin's system, compression is usually required to transport large volumes of gas over substantial distances. Sea Robin points out that offshore gathering frequently occurs at high pressures "since gas on the OCS is produced at high pressures." That point is true but irrelevant when compression is added at a central point in order to make possible further transportation "for substantial distances." The location of the two compressors at the Vermilion 149 Station is an additional factor indicating that transportation is the primary function of Sea Robin's facilities downstream of that point.

Overall configuration exhibits clear demarcation point; physical dimensions typical of transmission instead of gathering. Moreover, aside from the fact that the overall configuration of Sea Robin's system exhibits a clear demarcation point between the collection and transmission functions, the Commission cannot ignore the physical dimensions of the Vermilion 149 to Erath Line. While the court in *Sea Robin* viewed the Commission's prior orders to be based primarily on the size of Sea Robin's facilities, the court did not rule that the length and diameter are not relevant in determining the jurisdictional status of an OCS pipeline facility. The 36-inch diameter and 66.3 mile-length of the Vermilion 149 to Erath Line are dimensions typically associated with a transmission function and in this case are factors which, when considered with the other factors are indicative of a transmission function, *i.e.*, geographical configuration, concentration and purpose of compression, presence of a centralized aggregation location, the abrupt change in physical characteristics at the Vermilion 149 Compressor Station, and the paucity of well connections along the 66.3 mile run through relatively shallow OCS waters, have caused the Commission to conclude that the primary function of the Vermilion 149 Compressor Station and the Vermilion 149 to Erath Line are jurisdictional facilities under the NGA.

Totality of circumstances is the bottom line. At bottom, the fundamental purpose of the sum of all of the factors that have been applied under the rubric of the "primary function" test is not to show how long a pipeline segment is, or to designate a name for a generalized type of physical configuration, or to count compressors, *etc.* "Although a variety of labels have been applied to these factors, *the ultimate test* is whether the primary function of the facility can be classified as transportation or gathering. Thus, in determining whether the NGA Section 1(b) gathering exemption applies, "the Commission must make a factual determination whether a [facility's] primary function consists of the interstate transportation of gas or some other activity." If the purpose of the facility can be categorized as being primarily the collection of gas, its principal or primary function is gathering. If, on the other hand, the principal or primary function of the facility is to move gas away from the location where the collection process is completed, its primary function is transportation. In the case of Sea Robin's system, the application of this fundamental concept leads us to the conclusion that Sea Robin's pipeline facilities comprise two distinct components: a collection, or gathering component, upstream of the Vermilion 149 Platform, and a transportation component downstream of that point. In the most fundamental meaning of the "primary function" test, the "totality of the circumstances" demonstrates that the primary function of the Vermilion-Erath Line is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point where the gas is aggregated and compressed.

**1.9 Case Study - *Laser Marcellus Gathering Company, LLC***[[114]](#footnote-115)114 ***- facility crossing state line held to be gathering*-**

In December of 2009, Laser Marcellus Gathering Company filed a petition for a declaratory order requesting that the Commission determine that pipeline facilities it intended to construct from Pennsylvania into New York would perform a gathering function exempt from the Commission's jurisdiction under section 1(b) of the NGA. The proposed facilities were described as follows:

Laser Marcellus states that recent years have seen significant gas exploration and development in the Marcellus Shale Formation in northeast Pennsylvania and southwest New York, with substantial additional drilling planned for the future. Laser Marcellus states that it intends to construct a gathering system, the Marcellus Facilities, to gather gas from wells that have been and will be drilled in Pennsylvania and New York. Laser Marcellus has entered into a gathering agreement with an unaffiliated producer with existing wells. Further, Laser Marcellus anticipates that the presence of the Marcellus Facilities will enhance drilling activity in the area, and that it will gather gas from other producers desiring that service. The Marcellus Facilities will deliver gas from the Marcellus Shale wells to interstate pipelines for redelivery to markets in the northeastern United States.

Laser Marcellus states that it plans a phased construction program because the Marcellus Shale gas supply is still in development. The first phase, consisting of a "core" gathering system, will be followed, where appropriate, by additional phases that connect additional facilities to newly drilled wells. Laser Marcellus expects wells to be attached along the entire length of the Marcellus Facilities in both Pennsylvania and New York.

In concluding that the facilities would perform primarily a gathering function, the Commission applied the modified primary function test as follows:

Length and Diameter of the Lines. During the initial phase, Laser Marcellus will construct 30 miles of 12-or 16-inch diameter pipeline. Laser Marcellus also anticipates that it may construct a 13-mile extension of the same diameter pipe in a later phase. In certain situations such as the one proposed here by Laser Marcellus, we have found that these diameters and lengths are consistent with a system performing a gathering function.

Central Point in the Field. The Marcellus Facilities will initially deliver Marcellus Shale gas northeast into Millennium, but in the long term, could deliver gas southwest into Stagecoach or Tennessee. The spine-like, backbone configuration will collect gas from numerous wells connected along the length of the pipe in both the initial and later phases of the project. There is no "central point in the field" where the gas is collected to a central point and then delivered into a single line for transmission. We have held that the "central point in the field" criterion does not apply to a spine-like, backbone system.

Geographic Configuration. We have recognized that there are three basic gathering pipeline configurations: the web-like-type system, the backbone-type system, and a short, small diameter pipe that connects a few wells directly into a transmission system. The Marcellus Facilities will be located in a region with both existing wells and active development of a major new source of gas supply expected to be produced from the Marcellus Shale Formation. As noted above, the Marcellus Facilities have a backbone-type configuration that gathers gas from multiple wells along its length for delivery to an interstate pipeline. The configuration of this system is consistent with gathering.

Crossing a state line. Further, although the Marcellus Facilities cross the New York-Pennsylvania border, this fact does not keep the facilities from being classified as gathering. As to the jurisdictional consequences of the subject facilities crossing a state line, we do not believe the Section 1(b) exemption is affected... The history of Commission and court interpretation of Section 1(b),... makes clear that there is a distinction between gathering and transportation, such that the two functions are mutually exclusive. Consequently, otherwise non-jurisdictional production or gathering does not become jurisdictional on the basis that the facilities employed therefor cross a state line.

Location of Compressors and Processing Plants. Compression and dehydration equipment will be located near the interconnection with Millennium during the initial phase and, if a future expansion takes place, at the interconnection with Tennessee/Stagecoach, in order to meet the line pressures and gas quality specifications of the interconnecting pipelines. In the event of a future expansion, field compression and dehydration will be added at or near receipt point(s) into the Marcellus system's spine to increase production into the spine and ultimate deliveries into the downstream interstate pipeline(s). In the event of such an expansion, Laser Marcellus will maintain compression and dehydration capability at the delivery point(s) with the interstate pipeline(s) to ensure that the line pressure requirements and gas quality specifications for delivery are met. This type of compression and treatment is consistent with a gathering function. There is no plan for a natural gas liquids processing plant on the Marcellus Facilities, in any of the potential construction phases, as the anticipated gas composition and operating conditions do not necessitate the removal of liquefiable hydrocarbons.

Location of Wells. The location of wells along the length of a line is indicative of gathering. Laser Marcellus plans to initially connect approximately six existing wells in Pennsylvania. Numerous additional wells are expected to be added along the length of the system in the initial and expansion phases of the project. Laser Marcellus anticipates that ultimately there could be between 250 and 500 wells connected to its system along the entire length of the line in both Pennsylvania and New York. We have found that pipelines with well connections along the length are consistent with a gathering function.

Operating Pressures. The 100 to 500 psig operating pressure for the Marcellus Facilities will be driven initially by wellhead pressures. If the system is expanded, compression facilities will be added to field receipt points resulting in increased flow rates and increased operating pressures on the spine in the range of 600 to 1,440 psig. The Marcellus Facilities will have a maximum allowable operating pressure of 1,440 psig. While operating at 1,440 psig is not generally indicative of gathering, we have found similar high pressures to be consistent with gathering where they are driven by wellhead pressures. In this instance, Laser Marcellus contends that the higher operating pressures, to be maintained through field compression, might be necessary to increase production and flow higher volumes to the delivery point(s). However, future operation at such high pressure is not necessarily certain, thus, Laser Marcellus will maintain compression at the delivery point(s) to meet interstate pipeline in-take pressure requirements. While we do not find the potentially high pressures to be generally consistent with gathering, we note that our determination of the primary function of the Marcellus Facilities does not rest on a single factor, but on a weighing of relevant facts and circumstances.

Additional Considerations. The purpose of the planned Marcellus Facilities is to gather gas produced from the Marcellus Shale Formation for delivery to interstate markets in the eastern and northeastern United States. Construction of the Marcellus Facilities is expected to facilitate the development of new gas supplies from the Marcellus Shale Formation. There will be no direct sales off the Marcellus Facilities prior to delivery into any interstate facilities, nor will the Marcellus Facilities be used to move gas between Millennium and Tennessee/Stagecoach. Laser Marcellus' sole business will be gathering and delivering gas. Laser Marcellus will not hold title to the gas moved through its facilities nor will the company engage in the marketing of gas for others, although the initial production will be owned by a producer who has an option to purchase a minority interest in the facilities. Further, neither Laser Marcellus, nor any affiliate, owns an interstate or intrastate gas pipeline. We have found such business activities to be consistent with gathering.

Finally, a finding that these facilities perform a gathering function would be consistent with the NGA. When establishing whether a jurisdictional determination is consistent with the NGA, the Commission considers improving infrastructure, enhancing competition, and providing additional supplies of gas. Construction of the Marcellus Facilities will provide pipeline facilities necessary to promote development of additional gas supplies sourced in the Marcellus Shale Formation, which is in accord with the objectives of the NGA.

**1.10 Case Study - *Pecan Pipeline (North Dakota), Inc.***[[115]](#footnote-116)115 **- a unique "stub line" decision**

On September 18, 2008, Pecan Pipeline (North Dakota), Inc- (Pecan) filed a petition for a declaratory order finding that Pecan's planned Prairie Rose line and compression facilities will perform a gathering function exempt from the Commission's jurisdiction under section 1(b) of the NGA. Pecan's proposed facilities were described by the Commission as follows:

Pecan is a wholly-owned subsidiary of EOG Resources, Inc. (EOG), an independent ***oil*** and natural gas company engaged in the development and production of natural gas, natural gas liquids, and crude ***oil***. Pecan states that in 2008 and 2009 EOG expects to drill approximately 170 wells in the North Dakota portion of the Bakken Shale, a very prolific crude ***oil*** formation which includes, as well, substantial reserves of associated natural gas and NGLs.

Pecan further states there is a shortage of gathering infrastructure to move the associated gas and NGL supplies from the rapidly developing Bakken Shale formation to the interstate pipeline grid. Therefore, Pecan plans to construct and operate approximately 75 miles of 12-inch diameter pipeline (the Prairie Rose line) that will extend eastward from its existing gathering system near Stanley, North Dakota to an interconnection with Alliance Pipeline, LP (Alliance) near Towner, North Dakota. The gas in Alliance's system also is "wet," non-pipeline quality gas. Alliance will provide downstream transportation to the processing complex owned by Aux Sable Liquid Products, LP (Aux Sable) near Chicago, Illinois. At the beginning of the Prairie Rose line, Pecan will construct a compressor station with two primary 2,500 horsepower (hp) compressor units and one standby unit. Pecan will also construct an ***oil*** condensate recovery plant at Stanley to separate ***oil*** condensates from the dense phase natural gas/NGLs vapor stream going into the Prairie Rose line.

Pecan explains that the Prairie Rose line will transport an extraordinarily high Btu, high-pressure "dense phase" natural gas/NGLs stream. Therefore, the Prairie Rose line has been designed to operate at a maximum pressure of 2,100 pounds per square inch gauge (psig) and will typically operate at pressures at or above 1,750 psig to ensure that NGLs remain in the dense vapor phase during transportation. Pressures below 1,600 psig would result in heavier hydrocarbons liquefying and dropping out of the dense phase stream.

Due primarily to the very high Btu content of the liquefiable hydrocarbons in the dense phase gas stream (approximately 1,500 Btu per standard cubic foot), the gas transported by the Prairie Rose line will not meet the gas quality specifications of any interstate pipeline, including Alliance. As a result, Pecan has requested that Alliance waive the hydrocarbon dewpoint specification in its tariff to permit up to 80,000 Mcf per day of deliveries by Pecan's Prairie Rose line into Alliance's system. Pecan states that the waiver is operationally feasible since the 80,000 Mcf/d volume is relatively small in relation to Alliance's mainline throughput of approximately 1.5 Bcf/d. Pecan anticipates that Alliance will grant its waiver because of Alliance's ability to blend the gas without impacting the safety or reliability of its pipeline operations. A heater would be required at the interconnection with Alliance to prevent the liquids from falling out at the interconnection. Pecan emphasizes that the gas to be transported by the Prairie Rose line could not be used directly for any end use without full scale processing to remove the liquefiable hydrocarbons content. Thus, the gas transported by the Prairie Rose line will not constitute merchantable natural gas until it has been blended with the gas in Alliance's system and processed at Aux Sable's plant to recover the NGLs content and bring the gas down to an acceptable Btu content and hydrocarbon dewpoint.

The Commission applied the modified primary function test as follows:

Length and Diameter of the Lines. While the 12-inch diameter of the Prairie Rose line is not inconsistent with a gathering function, the 75-mile length will be longer than typical onshore lines that the Commission has found to be gathering. However, the Commission has found, based on a balancing of criteria, that other relatively long pipelines were nevertheless gathering facilities. Here, the 75-mile length of the Prairie Rose line will be a function of the distance between Pecan's existing ***oil*** field gathering system and its only feasible outlet, the interconnection with Alliance, which will transport the gas to Aux Sable's plant where the gas will be processed to pipeline quality.

Although Pecan plans to construct a plant to recover ***oil*** condensates before the natural gas/NGLs vapor stream enters the Prairie Rose line, the gas in the Prairie Rose line will still be unprocessed, non-pipeline quality gas such that Alliance will not be able to accept the gas without granting a waiver of its hydrocarbon dewpoint specification in its tariff. The gas transported by Pecan will not be acceptable for any end use until it has been processed. As stated above, Pecan will deliver its gas into Alliance's line, which also transports non-pipeline quality gas to Aux Sable's plant for processing. Other factors discussed below also support a finding that gathering will be the primary function of the Prairie Rose line.

Central Point in the Field. The Commission also looks to the extension of facilities beyond the central point in the field. The central point in the field test is based on the idea that gathering involves the collection and movement of natural gas through various smaller lines to a central point where gas is delivered into a single large line for transmission. Here, the central point would be the Stanley ***oil*** condensate recovery plant at the upstream end of Pecan. After the ***oil*** condensate is removed from the stream, the remaining associated gas/NGL mixture remains to be moved in a dense phase state to Alliance. Nevertheless, we find that the central point in the field criterion has little applicability in the unusual circumstances of this case, where the subject facilities will be used to transport a dense phase, natural gas/NGLs stream.

Geographic Configuration. Gathering systems typically comprise one of two types of geographic configuration: the web-like configuration or the spine-type (or backbone) configuration. The Commission has held that longer pipelines connected to smaller feeder lines are indicative of a gathering function. The Prairie Rose line will not be within a web-like configuration of gathering facilities or be a backbone receiving production from gathering facilities along its length. However, as discussed above, the Prairie Rose line will not simply be transporting unprocessed gas; it will be transporting a dense phase, natural gas/NGLs stream that could not be transported absent the specific design of these facilities. Further, the Commission has also found that the location of a system within a single state may be a geographic factor relevant to a gathering determination. As noted above, the entirety of Pecan's Prairie Rose line will be located within North Dakota; the gas/NGLs it transports will be collected by Pecan's existing upstream gathering facilities located entirely within North Dakota; and all of the gas transported by the Prairie Rose line will be produced in North Dakota. In view of these considerations, we find the geographical configuration of the planned Prairie Rose line in relation to Pecan's existing gathering facilities is not inconsistent with a gathering function for the Prairie Rose line.

The Location of Compressors and Processing Plants; removal of condensate not "processing" where resulting gas stream does not meet pipeline specifications. Pecan states that it will deliver only raw, untreated gas/NGLs to Alliance for redelivery to Aux Sable's plant for processing. The removal of ***oil*** condensates at the recovery plant to be located at Stanley cannot be considered "processing" because the removal of ***oil*** condensates will not serve to bring the gas stream up to pipeline quality specifications. The plant serves to maximize the quantity of NGLs that can be entrained in the dense phase vapor state because there is no other economic outlet for the NGLs from the ***oil*** field.

As described above, there will be two primary 2,500 hp compressor units and one standby unit located at the upstream Stanley ***oil*** condensate plant that are necessary for the Prairie Rose line to be operated at relatively high pressure (typically at or above 1,750 psig) to ensure that NGLs, which comprise over 40 percent of the stream, remain in the vapor phase during transportation. Pressures below 1,600 psig would result in heavier hydrocarbons liquefying and dropping out of the dense phase stream. Further, the Commission has found that where compression facilities are located upstream of processing facilities and serve to prepare raw gas for processing, such compression facilities serve a gathering function. In view of these considerations, we find that the planned compression facilities on the Prairie Rose line will serve a gathering function.

Location of Wells Along the Line. The location of wells along the length of a line is indicative of gathering. While Pecan anticipates expanding its existing gathering system upstream of the planned Prairie Rose line, it does not plan to locate wells along the Prairie Rose line. However, under the unusual circumstances in this case where the subject facilities will be used to transport a dense phase, natural gas/NGLs stream, the absence of wells along the Prairie Rose line is not an impediment to finding that the line nevertheless will serve a gathering function.

Operating Pressures of the Line Necessary to Ensure NGLs do not liquefy and drop out. As discussed above, the operating pressure of 1,750 psig is necessary to ensure that the NGLs in the stream do not liquefy and drop out. Thus, in this case, the purpose of adding compression and operating the pipeline at high pressure is not to transport pipeline quality gas but to ensure that the heavily liquid content of the stream remains in a vapor state. Therefore, Pecan's use of compression and the operating pressure will be consistent with a gathering function.

Additional Considerations. In addition, the Commission also weighs any and all other relevant facts and circumstances of a particular case, including non-physical criteria. The Commission also may consider the purpose, location, and operation of facilities, the general business activity of the owner of the facilities, and whether the jurisdictional determination is consistent with the NGA and the Natural Gas Policy Act of 1978. Although non-physical factors may be relevant considerations for determining the demarcation point between transmission and gathering facilities, the United States Court of Appeals for the Fifth Circuit stated in *Sea Robin Pipeline Company* that such non-physical factors are secondary to the physical factors.

The purpose of Pecan's planned facilities is to facilitate ***oil*** production activities in the Bakken Shale by providing a means to deliver the capacity constrained associated natural gas and NGLs that are produced along with the ***oil*** from the region. The line is not intended to provide interstate transportation of pipeline quality gas. Therefore, the purpose of the facilities is consistent with a gathering function.

The Commission also considers the business activities of the owner in applying the primary function test. Pecan is not a natural gas company as defined by the NGA and owns no jurisdictional facilities, intrastate pipelines, or local distribution facilities. Pecan operates exclusively as a gatherer and provider of other midstream services. Pecan does not transport natural gas in interstate commerce or engage in any other NGA-jurisdictional business activities. Upon completion of the subject facilities, Pecan will operate them as a part of its non-jurisdictional raw ***oil*** and gas/NGLs gathering activities.

**1.11 Case Study - *Whiting I***[[116]](#footnote-117)116 **-- limited jurisdiction certificate to a producer**

*Whiting I*[[117]](#footnote-118)117 involved an application filed in 2008 by Whiting ***Oil*** and Gas Corporation under section 7(c) of the NGA requesting that the Commission grant Whiting a limited jurisdiction certificate authorizing Whiting to transport natural gas it owns though the Robinson Lake Residue Line, a 17 mile 6-inch pipeline in Mountrail County, North Dakota, and a waiver of certain regulatory requirements otherwise applicable to an interstate pipeline owner and operator- (The case involved a "stub line" but, because it was more than 5 miles long, Whiting could not qualify under the stub line exception to Commission jurisdiction under the NGA.) The "stub line" moved residue gas from the tailgate of the Robinson Lake Plant to an interconnection with Williston Basin Interstate Pipeline Company. The Commission noted the following other facts regarding the line:

No third party moves gas though the Robinson Lake Residue Line or any of the Robinson Lake Facilities.

Whiting owns all of the gas delivered into the gathering system, either owns and operates the producing wells connected to the gathering system or purchases, on a percentage of proceeds basis, the gas from producers whose wells are connected to the gathering system located behind the Robinson Lake Plant.

Whiting does not intend to move gas through the Robinson Lake Residue Line for other shippers and has received no requests to do so.

Whiting will be solely transporting its own gas.

Whiting requested waiver of the Commission's rate schedule and tariff filing requirements under Part 154 of the Commission's regulations, and waiver of accounting and reporting requirements under Parts 158, 201 (including the Uniform System of Accounts), 225, 250, and 260 (including Form 2) of the Commission's regulations. Whiting also requested confirmation that the following provisions of Part 284 of the Commission's regulations are limited to open-access transporters and do not apply to the Robinson Lake Residue Line: sections 284.4 (Reporting), 284.7 (Firm Transportation Service), 284.8 (Capacity Release), 284.9 (Interruptible Transportation Service), 284.10 (Rates), 284.12 (Standards for Business Practices), 284.13 (Reporting), and subpart G.

The Commission granted Whiting's requested limited jurisdiction certificate for the following reasons:

The Robinson Lake Residue Line is a delivery line located downstream of the tailgate of Whiting's existing Robinson Lake Gas Plant. Whiting will operate the facility on a proprietary basis with the capacity dedicated to delivering only Whiting's gas to the Williston Basin interconnect. Whiting will not be rendering third party transportation service though the Robinson Lake Residue Line and is therefore not requesting blanket Part 284 transportation authority permitting it to render services for others.

The Commission has granted limited jurisdiction certificates in similar cases "to otherwise non-jurisdictional companies engaged in comparatively minor jurisdictional activities" involving residue natural gas delivery lines located downstream of a processing plant where the owner of the facilities transport its own gas. Whiting and the Robison Lake Residue Line fit squarely within this line of precedence. Whiting will not transport gas on behalf of third parties. Whiting asserted that it will continue with its original business purpose and will gather and process its gas. Whiting contends that no party will be affected, much less harmed, by this activity, and nothing will be gained by imposing any unnecessary regulatory requirements on Whiting.

Whiting does not intend to transport third-party gas; therefore, consistent with precedent, we find that the public interest would not be served by subjecting Whiting to all of the regulatory requirements applicable to conventional natural gas pipeline companies. Accordingly, we will grant the request for waiver of the Commission's otherwise applicable regulatory requirements. However, should Whiting in the future apply for blanket transportation authority under Part 284, subpart G of the Commission's regulations, it will have to comply with the applicable regulations and file tariff sheets and rate schedules for the services being provided.

Subsequently, on January 29, 2010, Whiting filed an application pursuant to section 7(b) of the NGA seeking authorization to abandon its limited jurisdiction certificate. Whiting planed to change the operation of the Robinson Lake Plant from (i) a plant that removes most liquid and liquefiable hydrocarbons from the gas stream to deliver pipeline quality, dry residue gas, to (ii) a stabilizer plant that only partially processes the gas stream (to meet Alliance Pipeline, L.P.'s requirements) and will deliver a dense phase, high-Btu, wet gas stream with a maximum Btu content of approximately 1,536 Btu/cf into the Robinson Lake Residue Line. With the reconfiguration of the Robinson Lake Plant, the Robinson Lake Residue Line would deliver such gas to Prairie Rose.[[118]](#footnote-119)118 The Commission granted the application-[[119]](#footnote-120)119

**II. FEDERAL REGULATION OF *OIL* AND LIQUIDS PIPELINES**

**2.1 Governing Law - the Interstate Commerce Act as of October 1, 1977**

***Oil*** and liquids pipelines ("***oil*** pipelines") are governed by the Interstate Commerce Act of 1887 ("ICA")[[120]](#footnote-121)120 which originally applied only to railroads- The Hepburn Act of 1906[[121]](#footnote-122)121 brought ***oil*** pipelines under the ICA. However, there is one unique feature of the statute governing federal ***oil*** pipeline regulation. In 1978, the Interstate Commerce Act was revised and recodified and the pre-existing version of Part I applicable to railroads was repealed. However, the portion of Part I of the ICA applicable to ***oil*** pipelines, as it existed on October 1, 1977, was not repealed and this is the law that FERC must apply in its regulation of ***oil*** pipelines. This law cannot be found by referring to Title 49 in the United States Code as it is published today. The last publication of the October 1, 1977, version of Part I of the Interstate Commerce Act was in the 1988 publication of the United States Code.[[122]](#footnote-123)122

In 1978, regulation of ***oil*** pipelines was transferred from the Interstate Commerce Commission to the Federal Energy Regulation Commission-[[123]](#footnote-124)123

FERC's regulations governing ***oil*** pipelines can be found in the Code of Federal Regulations at Title 18, Chapter 1, Subchapter P (Regulations under the Interstate Commerce Act), in the following subparts:

Part 340 - Rate Schedules And Tariffs

Part 341 - ***Oil*** Pipeline Tariffs

Part 342 - ***Oil*** Pipeline Rate Methodologies and Procedures

Part 343 - Procedural Rules Applicable to ***Oil*** Pipeline Proceedings

Part 344 - Filing Quotations For U.S. Government Shipments At Reduced Rates

Part 346 - ***Oil*** Pipeline Cost-Of-Service Filing Requirements

Part 347 - ***Oil*** Pipeline Depreciation Studies

Part 348 - ***Oil*** Pipeline Applications For Market Power Determinations

Part 356 - Preservation Of Records For ***Oil*** Pipeline Companies

Part 357 - Annual Special Or Periodic Reports

More information regarding ***oil*** and liquids pipeline regulation can also be found at: http://www.ferc.gov/industries/***oil***.asp

**2.2 Interstate Commerce Act - Regulation of Transportation in Interstate or International Commerce by Common Carriers**

The ICA applies to the transportation of ***oil*** and other commodities (except water and natural gas) in interstate and U.S. international commerce by common carriers. Title 49, Chapter 1, Part 1, section 1(1) provides:

The provisions of this chapter shall apply to common carriers engaged in - ... (b) The transportation of ***oil*** or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; ... from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United State, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

Title 49, Chapter 1, Part 1, section 1(2)(a) defines the term "common carrier" as follows:

The term "common carrier" as used in this chapter shall include all pipe-line companies ...; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. ... The term "person" as used in this chapter includes an individual, firm, co-partnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

**2.3 Major Obligations of Pipelines as to Jurisdictional Movements Under the ICA**

**A. Common carrier duty to provide and furnish transportation upon reasonable request therefor**

Section 1(4) of the ICA[[124]](#footnote-125)124 provides that, "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor-" This provision means that in the event of capacity constraints, capacity must be prorationed on some basis.[[125]](#footnote-126)125 FERC explained this common carrier obligation with the following quotation from an American Petroleum Institute text:

[T]here appears to be a misconception ... to the effect that if a shipper owns, say 20 percent of the carrier's stock and is "on the hook" for 20 percent of the throughput, that such owner has a guaranteed right to ship over 20 percent of the available capacity. This is erroneous. Because of the common carrier status of these lines, they must furnish transportation upon reasonable request to any shipper and they are forbidden by law to give any unreasonable preference or discriminate in any way between shippers. Thus, if the line is full, ... the new shippers' tenders, and on some lines, the increased tenders of nonowners, will "back out" shipper-owners' shipments on a pro rata basis.[[126]](#footnote-127)126

Common methods of prorationing are based on nominations, based on past historical volumes shipped, or other methods-

**1. Common carrier service requires prorationing of capacity if demand exceeds capacity. The *Texaco Pipeline Inc.***[[127]](#footnote-128)127 **decision involved a proposed tariff in which Texaco sought authorization to offer a firm service and FERC rejected the tariff- Among the contract terms in Texaco's proposed tariff were the following:**

A party making a tender under this tariff becomes a "Contract Shipper" and is guaranteeing a monthly payment (i.e. "Contract Payment") to Texaco for the shipment of an average of 20,000 barrels per day (i.e. "Contract Throughput") at the Base Rate shown for a period of three years beginning with the first day of the month for which Shipper's initial tender is made.

Texaco guarantees that a Contract Shipper's 20,000 barrels per day of *Contract Throughput capacity will not be subject to proration* as otherwise provided for in Texaco FERC No. 2, Item 140. (Emphasis added.)

*Tenders by a Contract Shipper which exceed an average of 20,000 barrels per day for a month will not be subject to proration, except when and to the extent that the sum of tenders by all Contract Shippers exceed 80 percent of system throughput capacity*. (Emphasis added.)

*A maximum of 60 percent of system throughput capacity will be available for contract under this tariff on a first-come, first-served basis*. (Emphasis added.)

FERC found that these tariff provisions violated the common carrier obligation to provide service upon reasonable request. As FERC explained:

Generally, contract rates are not considered to be *per se* violations of the common carrier duty of nondiscrimination so long as the carrier offering them makes the rate available to all similarly situated shippers of like commodities. However, less clear is whether preferences in access to service may be permitted on a contract basis. Texaco's proposed terms are preferential, and Texaco has not provided any explanation or justification for these preferential provisions. As explained below, these preferential provisions violate the common carrier obligation to provide service upon reasonable request.

Section 3(1) of the Interstate Commerce Act (ICA), makes unlawful any "undue or unreasonable preference or advantage" to any particular shipper. The ICA also establishes the common carrier duty to provide service "upon reasonable request therefor." The contract terms at issue here would grant a preference to Contract Shippers *vis-a-vis* non-contract shippers.

Contract Term No. 8 reserves 60 percent of the pipeline capacity for the use of Contract Shippers. Under Contract Term No. 4, this 60 percent of capacity would not be subject to prorationing regardless of how much volume were tendered by non-contract shippers. Moreover, Contract Term Nos. 2 and 4 provide that Contract Shippers would not be prorated except when the sum of tenders by all Contract Shippers exceeded 80 percent of system throughput capacity and then only on barrels above the 20,000 daily average Contract Throughput level. The effect of these provisions is to take 80 percent of the pipeline out of common carrier service for non-contract shippers. Thus, the proposed tariff would grant a preference for that capacity to Contract Shippers. The only portion of the pipeline that would truly be left in common carrier service for not-contract shippers would be the remaining 20 percent, to which any shipper would have access.

In conclusion, the tariff grants an unreasonable preference by designating a portion of the pipeline for the exclusive use of a special class of shippers. This preference takes the form of a guarantee of service, which, in effect, denies access to other shippers. Thus, the tariff violates the common carrier obligation to provide service upon reasonable request. Further, the tariff rules are unclear and require interpretation. In light of Texaco's failure to demonstrate that its proposed tariff provisions are appropriate \*61202 and permitted under the ICA, the Commission rejects Texaco's proposed FERC Tariff No. 264.

**2. Capacity allocations in connection with volume commitments necessary to fund expansions.**

In recent years, some pipelines have successfully obtained a declaratory order approving, *in advance of construction*, proposed tariffs with a priority service structure for shippers willing to make long term commitments to pay for new pipeline capacity. With regard to the process of requesting an advance ruling, the Commission has stated as follows:

[I]t is better to address these issues [term rate structure and validity of proposed rates] in advance of an actual tariff filing than to defer until the rate filing is made, when the decision-making process would be constrained by the deadlines inherent in the statutory filing procedures. The public interest is better served by a review of the issues presented before a filing to put the rates into effect.[[128]](#footnote-129)128

The Commission has, in a handful of cases, pre-approved tariff provisions allowing committed shippers to receive priority to a percentage of expansion capacity, without prorationing, in exchange for minimum volume commitments on the expansion capacity for a limited period of time (five or ten years)- This priority is permitted in recognition of the financial backing committed shippers provide for the expansion. Uncommitted shippers do not enjoy the same protection from prorationing because they are not providing the financial backing required for the new capacity. However, there must be an open season in which any interested shipper has the opportunity to sign up for the service and a significant percentage of the new capacity must still be available for uncommitted shippers. The Committed shippers may pay a premium rate, negotiated rate, or incentive rate.

*Mid-Atlantic Pipeline Co., LLC*,[[129]](#footnote-130)129 is an example of a successful petition for declaratory order- This decision involved MAPL's FERC Tariff No. 42 which includes a joint incentive rate (Item No. 310 Incentive Rates - Group 100) for movements of demethanized mix from Group 100 origins to the destination at Mont Belvieu, Texas. Pursuant to the provisions of Item No. 300 Incentive Program - Group 100, the incentive rate was available to a shipper signing a written commitment agreeing to ship all of its product for a period of seven years. The commitment period under MAPL's existing volume incentive program was ending on February 1, 2007. With its current incentive program ending, MAPL proposed a new volume incentive program pursuant to Item No. 330 in order to continue to provide shippers the option of reduced rates and rate certainty in exchange for long-term volume commitments. MAPL proposed to maintain its current rules for allocation of the Expansion Capacity for Item No. No. 300 shippers until that program expired in February 2007, and then to continue to allocate Expansion Capacity to all shippers who executed a new dedication agreement under the new volume incentive program using the same 80/20 percent allocation that was currently in effect. MAPL's proposed new incentive program would be available to Groups 100 through 110 origin shippers, rather than being restricted to shippers from the Group 100 origin, as was currently the case.

Williams protested the new tariff. The Commission determined that MAPL's new Item No. 330 Incentive Program was not discriminatory as Williams claimed. In reaching this decision, the Commission considered the following factors:

All shippers, both current and new, will be equally eligible to participate in the new volume incentive program.

The program offers all shippers the same low rates that Williams is receiving under the existing volume incentive program.

MAPL is entitled to offer incentive rates tied to volume and term requirements under its new program, as it has chosen to do.

MAPL has chosen to apply the same capacity allocation methodology applicable to the Expansion Capacity under the new program that it has applied to the existing program in which Williams participates.

Additionally, MAPL has increased Expansion Capacity under the new program, and this increased capacity will be allocated on the same 80/20-percent basis as the original Expansion Capacity.

The total Expansion Capacity to be available in August 2007 under the new program is estimated to be approximately 90,000 bpd, which includes the current Expansion Capacity of 40,000 bpd. The 1999 capacity accounted for only approximately 12 percent of total capacity (80% × 40,000 Expansion Capacity) compared with 225,000 bpd total system-wide capacity. Approximately 25 percent of total capacity will be available under the new incentive program (80% × 90,000 bpd Expansion Capacity) compared with 275,000 bpd total system-wide capacity.

Non-volume incentive shippers will be eligible to ship on approximately 75 percent of the line. Thus, neither historical shippers nor new shippers will be denied access even if they do not sign long-term volume dedications.

**B. Duty to establish reasonable through routes with other carriers**

Section 1(4) of the ICA also provides that it shall be the duty of every common carrier to "establish reasonable through routes with other such carriers" and to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.[[130]](#footnote-131)130

**C- Duty to establish just and reasonable rates, fares, charges and classifications applicable thereto.**

Section 1(5) of the ICA requires that all charges made for any service be "just and unreasonable" and further provides that "every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. Section 2 of the ICA prohibits any special rates or rebates. Rates must be published in FERC-approved tariffs.

The Commission's regulations at 18 CFR Part 342.2 specify how initial rates for new service are established. A carrier must justify an initial rate for new service by (a) filing cost, revenue, and throughput data supporting such rate as required by part 346 of this chapter; or (b) filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question, *provided* that if a protest to the initial rate is filed, the carrier must comply with paragraph (a) of this section.

Carriers may establish rates in one of four ways: indexing,[[131]](#footnote-132)131 cost-of-service,[[132]](#footnote-133)132 market-based rates,[[133]](#footnote-134)133 or settlement rates-[[134]](#footnote-135)134

**D. Prohibition on undue or unreasonable preference or advantage; Elkins Act provides for criminal liability for soliciting or granting rebates, concessions, or discrimination**

Section 3(1) of the ICA makes unlawful any "undue or unreasonable preference or advantage" to any particular shipper. Similarly, pipelines subject to the ICA are not permitted to discriminate as to rates. They must offer the same rate for the same service to all comers who meet the conditions of service. ICA sections 1(5), 2 and 3. Additionally, the Elkins Act, codified at 49 U.S.C. §41 of the ICA, provides:

[I]t shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall *by any device whatever* be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced.

Emphasis added.

The Elkins Act is a criminal statute that provides for fines and imprisonment or both for violation of the Act. In *United States v. Braverman*,[[135]](#footnote-136)135 the United States Supreme Court upheld an indictment under the Elkins Act for solicitation of a rebate from a common carrier respecting transportation in interstate commerce even though the indictment did not allege that the rebate was for the benefit of the shipper- The holding was based upon the very clear purpose of the Elkins Act which was to prevent any form of rate discrimination or preference by any means.

**E. Duty to establish classification of property for transportation; regulations and practices**

Section 1(6) of Part 1 of the ICA requires pipelines subject to the ICA to establish rules and regulations for receiving, handling, transporting, storing and delivery of property. These rules and regulations are published as part of the pipeline's FERC tariff. The Commission has approved proposed rules that provided only a summary of the pipeline prorationing policy and information on where to obtain a more detailed policy statement.[[136]](#footnote-137)136

**F- Recordkeeping and reporting requirements**

Pipelines subject to the ICA must maintain their records in accordance with the Uniform System of Accounts and are required to file various reports pursuant to the Commission's regulations at 18 CFR Parts 356 and 357.

**2.4 What is not regulated by the ICA**

**A. No regulation of pipeline construction or the initiating and termination of service**

In contrast to the scope of the Commission's authority under the NGA, under the ICA no certificates of convenience and necessity or abandonment authority is required either for the construction of pipelines or to initiate or discontinue service. Note, however, that State authorities, such as the Railroad Commission in Texas or public utility or public service commissions in other states, as well as local authorities, may exercise their own jurisdiction over pipeline construction (i.e., siting). The Commission also does not have safety jurisdiction over pipelines subject to the ICA. That jurisdiction rests with the Department of Transportation.

**B. Transportation wholly within one State - not what you think it means**

Title 49, Chapter 1, Part 1, section 1(3) provides for the following exemption from federal regulation:

The provisions of this chapter ... shall not apply (a) To the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, **wholly within one State** and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter; ... .

However, this does not mean that if a pipeline is located wholly within one state, all transportation on that pipeline is free from federal regulation in all circumstances. Product may move from one state to another on a series of pipelines that, together, are providing an interstate movement of the product. In that situation, further inquiry is required to determine whether the movement is interstate in character.[[137]](#footnote-138)137

**C- The Uncle Sam *Oil* Company exception - private carriage - a very difficult test to meet**

**1. Mere ownership of all of the *oil* in the pipeline does not exempt the pipeline owner from ICA regulation.** After the ICC was amended in 1906 to extend to the transportation of ***oil*** and other commodities (except water and natural gas), the Interstate Commerce Commission ordered parties in control of pipe lines to file with the Commission their schedule of rates and charges. Certain pipelines sued alleging that because the statute applied to every pipe line that crosses a state boundary, it was unconstitutional. The case eventually made it to the United States Supreme Court which upheld the constitutionality of the statute, even as applied to existing ***oil*** pipelines. *The Pipe Line Cases*.[[138]](#footnote-139)138 The pipelines involved in the case owned all of the product in their pipelines because they refused to carry any ***oil*** unless it was sold to them- These pipelines cooperated with each other to provide connecting service across the continent. The United States Supreme Court specifically rejected the argument that these pipe lines were not subject to the ICC because of their ownership of the product.[[139]](#footnote-140)139 The Court also rejected the argument that a pipeline could not be subject to the ICC unless it met the common law standard of a common carrier.

**2. Private carriage.** The Supreme Court excepted one pipeline from its holding in *The Pipe Line Cases*. That pipeline was owned by the Uncle Sam ***Oil*** Company which had a refinery in Kansas and ***oil*** wells in Oklahoma with a pipe line connecting the two. The pipeline was used for the sole purpose of transporting the ***oil*** from its own wells to its own refinery. The Court held that, "When, as in this case, a company is simply drawing ***oil*** from its own wells across a state line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."[[140]](#footnote-141)140 This exception has come to be known as the "Uncle Sam ***Oil*** Company exception" or the "Uncle Sam rule-"

Unfortunately, the Uncle Sam rule is very narrow and few pipelines fall within its scope.[[141]](#footnote-142)141 Two cases involving the same pipeline illustrate the difficulty of trying to come within this exception-

**3. *Champlin I* - Transportation of a pipeline owner's own refinery products to its own terminal stations not private carriage**

*U.S. v. Champlin Refining Co.*,[[142]](#footnote-143)142 involved section 19a of the ICC which required the Interstate Commerce Commission to "investigate, ascertain, and report the value of all the property owned or used y every common carrier subject to the provisions of this act-" Following a hearing in which the Commission determined that Champlin was a common carrier under the ICA, the Commission ordered Champlin to file the necessary information. Champlin appealed the order to the courts. The line in question was a six-inch pipe 516 miles in length lying in five states. It originated at Champlin's Enid, Oklahoma refinery, and crossed Kansas, Nebraska, a part of South Dakota, and ended in Iowa. **It was used only to convey the company's own refinery products to its own terminal stations in Kansas, Nebraska and Iowa** where the line connected to storage facilities from which deliveries were made.

Champlin argued that the Uncle Sam ***Oil*** Company exception applied to its use of this pipeline. The District Court found that:

Champlin is the sole owner of the of the products transported through its pipe line; it has never transported, offered to transport, or been asked to transport any products belonging to any other company or person; its pipe line does not connect with any other pipe line but only with storage tanks at the three terminal points; there are no facilities for putting any petroleum product into the line other than at the Enid refinery; delivery of the products at the three terminal points is made from Champlin's storage tanks by means of truck racks or railroad tank car racks and is not made directly from the pipe line in any instance; no tariffs stating transportation charges have been filed with the Interstate Commerce Commission or with any State commission or regulatory body.[[143]](#footnote-144)143

Notwithstanding these facts, the District Court upheld the order of the Interstate Commerce Commission and the United States Supreme Court affirmed- The Supreme Court held that, "the controlling fact under the statute is transporting commodities from state to state by pipe line." The Supreme Court found that while Champlin was technically transporting its own ***oil***, "manufacturing processes have been completed; the ***oil*** is not being moved for Champlin's own use. These interstate facilities are operated to put its finished products in the market in interstate commerce at the greatest economic advantage." The Supreme Court also agreed with the District Court's finding that it was relevant that the price at the terminal points included f.o.b. price at the Enid refinery and a differential which was the through rail rate from Enid to the purchaser's destination minus the charges for local transportation between the nearest pipe-line terminal and the destination.[[144]](#footnote-145)144 Four justices dissented.

**4. *Champlin II - Recordkeeping required but pipeline not required to file rates and charges and provide transportation for others - at least where there was no demand for transportation services*.** Subsequently, the Interstate Commerce Commission ordered Champlin to file special and annual reports, maintain its records according to the Uniform System of Accounts, and to publish and file schedules showing rates and charges for interstate transportation of refined petroleum products. Champlin challenged the order in Court, claiming that the Commission could not lawfully convert a private carrier into a public carrier. This case also made its way to the United States Supreme Court.[[145]](#footnote-146)145 That Court held that Champlin could be required to file the special and annual reports and maintain its records according to the Uniform System of Accounts- However, the Supreme Court held that it could not be required to file its rates and charges and provide transportation for others. In reaching this conclusion, the Supreme Court relied on the fact that there was no demand for transportation services on Champlin's pipeline. After reviewing the circumstances which led to passage of the Hepburn Act in 1906 which extended ICA to ***oil*** pipelines, the Supreme Court stated:

But it would be strange to suppose that congress, in adopting a term broad enough to cover all competitive imbalances which might arise, intended that the Commission should make common carriers for hire out of private pipe lines *whose services were unused, unsought after, and unneeded* by independent producers, and whose presence fosters competition in markets heavily blanketed by large 'majors.' Such a step would at best be pointless; it might well subvert the chief purpose of the Act.[[146]](#footnote-147)146

The majority of the Supreme Court held that "on this record" the Commission's order, insofar as it required the filing of rates and charges for interstate service, went beyond what Congress contemplated when it passed the Hepburn Act-[[147]](#footnote-148)147

**5. *Hunt Refining* - temporary waiver of certain ICA requirements for pipeline not meeting the Uncle Sam exception but whose services are unneeded by any third parties.** The *Champlin II* decision left open the question of whether a company desiring to be a private carrier but engaged in transportation across states lines can be required to provide interstate service under the ICA if its services are needed and sought after by others in the vicinity. This question was answered in *Hunt Refining Company and East Mississippi Pipeline Company*.[[148]](#footnote-149)148 Hunt owned and operated three gathering lines as part of its refinery operations in Tuscaloosa, Alabama- One of the lines was 102 miles long and was used to gather crude ***oil*** produced in Alabama and Mississippi to be used as feedstock for the refinery. Hunt held the title to all of the crude ***oil*** delivered into the line. ***Oil*** was delivered into the system from local supplies and through pipeline facilities owned by Amerada Hess Corporation. Hunt had never gathered ***oil*** for third parties on that line.

The second line was 105 miles long and extended from an interconnection with the first line, in Melvin, Alabama, to its terminus at the refinery. Again, all the ***oil*** transported through the line was owned by Hunt and Hunt had never transported ***oil*** for any third parties on that line. Furthermore, since there were no third party facilities interconnected with the line, the only possible destination of the crude ***oil*** in the line was the refinery.

The third line was a 19 mile line consisting of small diameter pipe and was used to gather crude ***oil*** exclusively from wells in Alabama. All of the ***oil*** in that line was owned or purchased by Hunt for ultimate delivery to the refinery.

Hunt also acquired a fourth line, 90 miles in length, located entirely within the State of Mississippi. Hunt interconnected the line with its existing gathering facilities near the Quitman Station in Mississippi. Hunt stated that the interconnection of the two pipeline facilities "was intended to integrate them into the proprietary gathering facilities of Hunt, thereby enabling Hunt to use these facilities solely to gather crude ***oil*** for delivery to Hunt's refinery in Tuscaloosa."[[149]](#footnote-150)149

Hunt asserted that the operation of these lines fell within the Uncle Sam ***Oil*** Company exception because these were private, proprietary systems- The Commission disagreed, citing to the *Pipe Line Cases* and *Valvoline* which held that the fact that the ***oil*** transported belongs to the owner of the pipeline does not mean that the pipeline is not subject to the ICA. The Commission found that producers were connected to Hunt's pipeline system and ***oil*** was delivered into the system through facilities owned by Amerada Hess. Thus, the facilities did more than merely move Hunts own ***oil*** from its own wells to its own refinery. The Commission concluded that Hunt was not engaged in strictly private carriage.

Hunt attempted to distinguish the *Pipe Line Cases* and *Valvoline* on the grounds that the ***oil*** producing industry had matured considerably since the *Pipe Line Cases* was decided, crude ***oil*** production, gathering, and transportation had been developing in the area for nearly 50 years, and there were alternative outlets for crude ***oil*** production available in the region and to the producers on Hunt's system. Hunt also pointed out that transportation to market by trucks was economically feasible and readily available. The Commission held that these circumstances provided no basis for a finding that Hunt's facilities were not jurisdictional under the ICA.[[150]](#footnote-151)150

Hunt requested that, if the Commission found that Hunt was operating jurisdictional facilities subject to the ICA, it be granted a waiver from the requirement of the ICA to file a schedule of rates pursuant to section 6, the duty to comply with section 19(a) relating to reporting requirements including the submission of valuation data and other documents pertaining to pipeline operations, and the duty to file annual, periodic and special reports and to maintain a uniform system of accounts in accordance with section 20 of the ICA- Hunt argued that its facilities were unneeded by independent producers, that sufficient alternatives existed, and that it was improbable that any third party would request transportation service because the facilities only provided gathering services to Hunt's refinery. The Commission granted a temporary waiver of the section 6, 19a and 20 requirements, except the requirement to maintain a uniform system of accounts. The Commission agreed that there were "no immediate or prospective shippers on Hunt other than itself and no other shippers on East Mississippi other than its parent company to protect under the provisions of the ICA." The Commission concluded that it was unnecessary to subject Hunt to all of the filing and reporting requirements unless and until changed circumstances occurred. The Commission required Hunt to report to the Commission any changes, including:

(1) increased accessibility of other pipelines or refiners to its facilities,

(2) changes in the ownership of the facilities,

(3) changes in the ownership of the ***oil*** or by-products being shipped, and

(4) shipment tenders or requests for service by any person.

**2.5 Whether a particular movement is interstate or intrastate - essential character of the movement - fixed and persisting intent with which shipment made**

**A. Importance of determining jurisdictional status**

Under the NGA, a pipeline is either an interstate pipeline or it isn't. Under the ICA, a pipeline can provide both interstate and intrastate service, depending upon a particular "movement" of product. This difference in regulatory concept goes back to the railroad roots of the ICA. Consider that on a train that travels through several states, some of the passengers or freight may get on in one state and get off in that same state. Other passengers or freight may get on in one state and get off in another state. The train is providing intrastate service in the first instance and interstate service in the second instance. Similarly, ***oil*** pipelines can provide both intrastate and interstate service.

Interstate service is regulated by FERC under the ICA. FERC must approve the rates, terms and conditions of interstate service and pipelines providing interstate service must set forth their rates, terms and conditions of service in their tariffs, rules and regulations on file with FERC.

Intrastate service is regulated by state agencies such as the Railroad Commission in Texas and public service or public utility commissions in other states. These agencies have their own requirements concerning rates, terms and conditions of intrastate service.

The rates, terms and conditions for interstate and intrastate service are not necessarily the same. When they are different, this can lead to disputes between shippers and pipeline owners regarding the interstate or intrastate character of a particular movement.[[151]](#footnote-152)151

Furthermore, regulation is expensive and time consuming- Obviously, if a pipeline provides both interstate and intrastate service, it has to stay in compliance with two sets of statutes and regulations instead of one. This obligation is burdensome for the pipeline owner.

Finally, it can be difficult to avoid federal regulation. A pipeline may not want to provide interstate service but it can sometimes be difficult to determine whether a particular movement of product is interstate or intrastate in character. A pipeline owner desiring to avoid federal regulation has to be very diligent in determining the origins and final destination of each movement of product on its pipeline. However, even with such vigilance, the pipeline may find that it has provided interstate service because the test for when a movement is interstate depends on the fixed and persisting intent with which the shipment is made.

**B. Whether a particular movement is interstate or intrastate - essential character of the movement - fixed and persisting intent with which shipment made**

Under the ICC, whether a particular movement is interstate or intrastate "depends on the essential character" of the movement and the "fixed and persisting intent with which the shipment is made."[[152]](#footnote-153)152 These tests are very different from the test for determining whether a pipeline is an interstate pipeline under the NGA-[[153]](#footnote-154)153 The ICC tests reflect the original purpose of the ICC which was to regulate railroads.

These tests are applied based upon an analysis of the facts and circumstances of each case. As stated in the MAPL decision, some of the factors indicative of an interstate shipment are:

(1) the presence of through billing across different pipeline sections to the final destination;

(2) uninterrupted movement of product;

(3) continuous possession of the shipment by the carrier; and

(4) unbroken bulk of the shipment.[[154]](#footnote-155)154

However, while a movement beginning and ending in one state may constitute a link in a jurisdictional interstate chain of movements, a "sufficient break in the continuity of transportation" demonstrating the lack of intent by the shipper to move product interstate may remove federal jurisdiction-[[155]](#footnote-156)155 As stated in the MAPL decision, some of the factors indicative of a sufficient break in the continuity of transportation and the termination of an interstate journey are:

(1) at the time of shipment, no specific order of a specific quantity of a given product is being filled for a particular destination beyond the terminal storage;

(2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated; and

(3) transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from terminal storage.[[156]](#footnote-157)156

**C- Ownership of the product by the pipeline owner does not affect the jurisdictional status of the movement - the *Pipe Line Cases***

As discussed in detail in section 2.4 C.1. of this paper, ownership of the product by the pipeline owner, by itself, does not defeat the Commission's jurisdiction under the ICA over an interstate movement.

**2.6 Case Study - *Texaco Refining and Marketing v. SFPP* - Jurisdiction Under the ICA Over Interstate Movements on a 3.8 Mile Gathering Line**

Application of these tests can be quite difficult and controversial. For example, in *Texaco Refining and Marketing v. SFPP*,[[157]](#footnote-158)157 the Commission held that it had jurisdiction under the ICC over a 3-8 mile pipeline (Line 109) connecting refineries at Sepulveda, California, to SFPP's pumping facility in Watson Station, California. There was also a line to return transmix to the refiners (Line 110). An Administrative Law Judge issued an initial decision finding that the Commission did not have jurisdiction over ***oil*** movements on the lines. The Commission reversed that Initial Decision.

Summary of the Jurisdictional Test Under the ICA. The Commission stated that jurisdiction under the ICA "depends on the specific facts of the individual case,"[[158]](#footnote-159)158 and cited and discussed the *Pipe Line Cases,*[[159]](#footnote-160)159 *Champlin II*, and *Hunt Refining Company*- The Commission also discussed the line of cases holding that jurisdiction does not attach "when the continuity of interstate transportation ends at a terminal or storage facility so that some portion of that transportation can be considered intrastate."[[160]](#footnote-161)160 In reaching its decision, the Commission considered factors from past ICC decisions which it described as follows:

In determining the "essential character of the commerce" the factor most often relied on is the fixed and persisting transportation intent of the shipper at the time of the shipment. As applied to the type of traffic here involved, the major manifestations of this intent, or the absence thereof, may be found in the following: (1) at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation storage.[[161]](#footnote-162)161

The Commission further elaborated that, "all interstate movements are jurisdictional unless the facts show a sufficient break in the continuity of transportation so that shippers moving product through these lines do not have a fixed intent to move product interstate-[[162]](#footnote-163)162

Holding. The Commission held that SFPP had to file interstate tariffs governing interstate movements on both lines. As to Line 109, the Commission found that SFPP shipped ***oil*** for others on the line and the shipments were intended to and did travel interstate. As to Line 100, the Commission held that it was operated as an integrated part of line 109 and was thus part of the transportation service.

Function of Lines as Gathering Facilities Not Relevant Under the ICA. In reaching this conclusion, the Commission rejected the approach that had been taken by the AU who had applied a gas pipeline analogy and concluded that, "in sum, the evidence establishes that the primary function of lines 109 and 100 is 'gathering' as opposed to transportation. The Commission held:

Although the gathering analogy may be attractive as a matter of policy, it cannot be determinative of jurisdiction because the ICA, unlike the NGA, does not provide for a gathering exception to the exercise of jurisdiction. The Commission has previously found movement over ***oil*** gathering lines to be jurisdictional. [Footnotes omitted.] The ICA is not concerned with the function of facilities, but with whether the movements through those facilities are interstate."[[163]](#footnote-164)163

Storage By Itself Is Not An Indicia of a Purely Intrastate Movement- One of the facts that SFPP argued made the use of the lines non-jurisdiction was the fact that SFPP stored ***oil*** transported over line 109 at Watson Station pending mainline scheduling, the refiners scheduled the line, SFPP did not operate the pumps on line 109 (the refiners pumped their own ***oil***), and SFPP maintained no personnel at Sepulveda. The Commission held that storage by itself is not an indicia of purely intrastate movement and found:

The record shows that storage of product is a component of admittedly interstate transportation as well. Moreover, regardless of who operates the pumps, where personnel are located, or how ***oil*** is scheduled, SFPP owns and operates the lines and transports ***oil*** destined for other states. The record shows no function performed at Watson Station or other facts to suggest that shippers on lines 109 and 110 do not have a fixed intent to make interstate shipments when they move product along these lines.[[164]](#footnote-165)164

Jurisdiction Cannot Be Avoided By Designating a Downstream Point as the Tariff Origin Point- The Commission also strongly rejected the argument that Watson Station was the tariff origin point and that, therefore, movement on line 109 was non-jurisdictional because it was upstream of that point. The Commission stated:

Moreover, an ***oil*** pipeline cannot be given the ability to determine whether movement over a line is jurisdictional by simply designating an origin point. A carrier cannot avoid jurisdiction simply by attempting to separate an interstate rate into component parts and charging a local rate for the intrastate shipment. [Citation omitted.] The *Pipeline Cases* held that pipelines could not avoid jurisdiction by the artifice of requiring the sale of ***oil*** prior to transport. Similarly, jurisdiction cannot be avoided simply by designating a point as an origin for interstate shipment.[[165]](#footnote-166)165

Construction of Lines Under Private Agreements Not a Relevant Factor- The Commission also rejected the argument that construction of the lines under private agreements to build the lines was not a relevant factor. The Commission stated:

Whatever the circumstances giving rise to the construction of the lines, once built, transportation along these lines is jurisdictional because the refiners intend to, and do use these lines for part of their interstate ***oil*** shipments. Simply because a line was built at the behest of shippers does not mean that movements on the line are non-jurisdictional when they move interstate. Jurisdiction depends on the intended use of the line, not whether the pipeline decided to build the line based on its perceived demand or because its potential shippers informed it of their need. ... Moreover, as pointed out above, *The Pipeline Cases* found that a pipeline could not use its market power to manipulate circumstances so as to avoid jurisdiction under the ICA. Permitting a pipeline to avoid jurisdiction simply by entering into specific contracts with the major shippers in an area would again run counter to the Court's injunction to beware of allowing form to supplant substance.[[166]](#footnote-167)166

Existence of Competitive Alternatives Not a Relevant Factor- The existence of vigorous competition from alternative lines was not a relevant factor. The Commission stated:

SFPP places great weight on the existence of vigorous competition from these alternative lines as demonstrating that lines 109 and 110 are not necessary to gain access to Watson Station. However, jurisdictional determinations do not depend on how necessary the lines are: "the existence of adequate competitive alternatives is irrelevant to a pipeline's jurisdictional status."

In the early cases, such as *Champlin*, the Court found jurisdiction even though no shippers sought to use the lines and there were adequate alternatives. The Court did, however, give some consideration to shippers' need for the lines in considering whether to require the pipelines to file tariffs. Under the Commission's rules, consideration of competitive conditions no longer needs to be undertaken in the jurisdictional phase of the proceeding. The regulations permit ***oil*** pipelines to file for market- based rates if they believe there is adequate competition to limit the pipeline's market power.

Other rejected arguments. The Commission also rejected the following arguments:

That the existence of the return transmix line indicated a break in transportation,[[167]](#footnote-168)167

That movement over the line was non-jurisdictional because of the 3-8 mile length of the line,[[168]](#footnote-169)168

That the services provided by SFPP were not essential to interstate service and therefore were not transportation,[[169]](#footnote-170)169 and

That SFPP was merely a passive owner of the lines-[[170]](#footnote-171)170

**2.7 Case Study - *Williams Energy Service et. al.*,**[[171]](#footnote-172)171 **- pipeline located wholly within one state**

The decision in *Williams Energy Service* is a lengthy opinion involving a number of consolidated proceedings including a complaint proceeding filed against Mid-America and Seminole Pipeline Company alleging that the Mid-America/Seminole "joint rates, as well as Seminole's underlying local rates, were unjust, unreasonable, unduly discriminatory, or otherwise invalid-" The Commission dismissed the complaint as to Mid-America's rates but set the complaint regarding Seminole's FERC Tariff No. 3 for hearing, consolidating it with other pending proceedings.

Williams, in supporting its assertion that the Commission did not have interstate jurisdiction over the movements of Seminole Pipeline, enumerated the following, which it claimed to be, uncontested facts:

(a) The Seminole System is located entirely within the State of Texas;

(b) The Seminole System consists of two pipelines: a "Blue" or south line and a "Red" or north line;

(c) The Red Line transports only demethanized mix, while the Blue line transports multiple products which are batched;

(d) Most of the volumes that move on the Seminole System originate outside the State of Texas;

(e) No barrels have ever been shipped on the Seminole System under FERC Tariff No. 3;

(f) With respect to the non-affiliated shipper that signed the "affidavit" in support of Seminole FERC Tariff No. 3, any transportation of product for that shipper on the Seminole System would occur solely within the State of Texas;

(g) Seminole has intrastate transportation tariffs on file with the Texas Railroad Commission;

(h) There is no interstate transportation or movement on the Seminole Pipeline System absent a connecting carrier;

(i) Seminole owns several "caverns" for underground storage of ethane/propane mix and other products waiting to be batched on the Red Line;

(j) At the Enterprise Hobbs and Ineos fractionators, demethanized mix is converted into different products; and

(k) Following fractionation, the movements on the Seminole System are solely within the State of Texas.

Williams argued that the fractionation of natural gas liquids at the Hobbs and Ineos facilities transformed the liquids into different products and caused a break in transportation, resulting in the subsequent transportation being a separate movement in intrastate commerce only. The Administrative Law Judge who issued the Initial Decision did not agree.

Jurisdictional Test under the ICA. The ALI described the jurisdictional test under the ICA as follows:

While at first glance the jurisdictional question of a pipeline lying entirely within one state may seem easy to dispel, only a perfunctory examination of such pipeline would lead to the conclusion that movements occurring on such pipeline are merely intrastate in nature. Ultimately, the issue becomes whether movement of product on a pipeline located entirely within one state constitutes a link in an interstate chain of movements. *Hydrocarbon Trading & Transport Co., Inc., v. Texas Eastern Transmission Corp.*, 26 FERC at p. 61,470. To the extent that it does, the movement is subject to the Commission's jurisdiction. *Id.*

Determining whether an ***oil*** pipeline movement is interstate or intrastate "depends on the essential character" of the movement and the fixed and persisting intent with which the shipment is made. *Baltimore & Ohio Southwestern Railroad Co. v. Settle*, 260 U.S. at p. 170. Reviewing courts have found the following factors indicative of an interstate shipment: (1) the presence of through billing across different pipeline sections to the final destination; (2) uninterrupted movement of product; (3)continuous possession of the shipment by the carrier; and (4) unbroken bulk of the shipment. *Id.* at p. 171.

Conversely, while a movement beginning and ending in one state may constitute a link in a jurisdictional interstate chain of movements, a "sufficient break in the continuity of transportation" demonstrating the lack of intent by the shipper to move product interstate may remove federal jurisdiction. *See, e.g., Texaco Refining & Marketing, Inc. v. SFPP, L.P.*, 80 FERC p. 61,805. Specifically, the following factors have been found to constitute a sufficient break in the continuity of transportation and the termination of an interstate journey: (1) at the time of shipment, no specific order of a specific quantity of a given product is being filled for a particular destination beyond the terminal storage; (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated; and (3) transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from terminal storage. *Hydrocarbon Trading & Transport Co., Inc., v. Texas Eastern Transmission Corp.*, 26 FERC at p. 61,471.

Application of the Jurisdictional Test. The ALI then applied the jurisdictional test to Williams' movements of liquids on the Seminole line, finding:

Based on the instant record, it is clear that, before the tender of product at Mid-America's pipeline in Wyoming and the other origin points, Williams' product is nominated to move on Seminole's pipeline for delivery to Mont Belvieu, Texas. Exhibit No. SPL-1 at p. 4. Also, most, if not all, of Williams' shipments flow continuously onto Seminole's system through Hobbs without interruption. Exhibit Nos. WIL-54 at p. 2; SPL-1 at p. 4; Transcript at p. 3128. In addition, Williams pays only once for shipments nominated for Mont Belvieu from Wyoming, instead of making two separate payments for shipment from Wyoming to Hobbs and then from Hobbs to Mont Belvieu. Exhibit Nos. SPL-1 at p. 4; M-37 at p. 39. Moreover, Williams' shipments remain, at all times, in the custody of the pipeline companies between Wyoming and Mont Belvieu. Exhibit No. WIL-54 at p. 2; Transcript at pp. 3099, 3102, 3162-63.

Furthermore, it does not appear that Williams' shipments reflect a sufficient break in the continuity of transportation terminating Commission jurisdiction. While demethanized mix delivered from Mid-America to Seminole may be stored at Hobbs while batching, this is operational storage which does not serve to break the flowing of the product in interstate commerce.

...

The evidence clearly establishes that, while Seminole lies entirely within the State of Texas, most of the volumes that move on the Seminole System originate outside the State of Texas. Exhibit Nos. S-57 at pp. 2-3, 6; S-58; SPL-17. Commission precedent extends its jurisdiction over a pipeline that lies entirely within a single state if the pipeline forms a component of a continuous movement from one state to another. *Texaco Refining & Marketing, Inc. v. SFPP, L.P.*, 80 FERC at p. 61,805.

...

I further find that Commission jurisdiction includes every Williams joint rate shipment to Mont Belvieu which is tight-lined through the Hobbs terminal or stored at Hobbs during transition from the interstate pipeline to the Seminole System. Staff and Seminole correctly noted that operational storage does not interrupt the continuous flow of transportation of product in interstate commerce, as the shipper intends continuous transportation of its product.

**2.8 Case Study - *Interstate Energy Company* - Storage Providing a Sufficient Break in Transportation - a Close Call**

In contrast, consider the case of *Interstate Energy Company*.[[172]](#footnote-173)172 The case involved an 18-inch diameter, 84-mile pipeline running between Marcus Hook, Pennsylvania and Martins Creek, Pennsylvania and a small lateral pipeline (called the Gilbert lateral) extending from Lower Saucon Township, Pennsylvania, to Holland, New Jersey- The lateral was owned by Jersey Central Power & Light Company but operated by Interstate Energy Company ("Interstate"). FERC described the facts as follows:

The ***oil*** that is moved through IEC's main transmission line and through the Gilbert lateral originates from a number of sources, including Gulf of Mexico ports, the Virgin Islands, and the Sun ***Oil*** Company (Sun) refinery at Marcus Hook. According to information provided informally by the company, the ***oil*** enters IEC's system at Marcus Hook from a storage and terminalling facility owned by Sun. Ocean-going vessels and barges discharge the ***oil*** at dock facilities owned by Sun at Marcus Hook, into lines which carry the ***oil*** to designated storage tanks owned by Sun. Some ***oil*** is purchased directly from the Sun ***oil*** refinery at Marcus Hook and is transferred from the refinery to designated storage tanks. From there, the ***oil*** is moved through a pipe to the IEC pipeline at Marcus Hook.

Even though the ICA applies to transportation "from or to any place in the United States to or from a foreign country," the Commission held that movements through these two lines were not jurisdictional under the ICA. As is typical of all of the cases involving pipelines located entirely in one state, the Commission stated that, "[t]he fact that movements between Marcus Hook and Martins Creek all take place entirely within one state is not determinative of their intrastate character, if, in fact, those movements are simply a link in an interstate chain of movements." However, the Commission found that the continuity of transportation had been broken when the ***oil*** came to rest in the Sun storage tanks. The Commission noted:

(1) There was no through bill of lading covering both the ocean or barge transportation and the inland pipeline transportation.

(2) The specific order for a specific quantity to be moved by IEC was given after the ***oil*** reached the Marcus Hook terminal.

(3) No. 6 fuel ***oil*** was commingled with No. 2 fuel ***oil*** in the tanks and there was no designation of any particular ***oil*** for any particular place within the State beyond the storage facilities into which the ***oil*** is first delivered by the ocean-going vessels and barges.

The Commission also considered the character of the storage although it noted that, "the length of the storage is not, taken by itself, the determining element, although it may be indicative of the character of the storage."[[173]](#footnote-174)173 The Commission found the character of the storage a "close judgment-" It noted that the size of the facilities indicated that they were not used to meet daily requirements but rather to meet the inventory needs of individual shippers. Again, the Commission considered that the ***oil*** was commingled and there was no specific order for a specific destination for any particular shipment of ***oil***. The shippers on Interstate's line consumed the ***oil*** in the power plants and the Commission concluded that the storage facilities at Marcus Hook were drawn down as the seasonal demand for fuel ***oil*** dictated. The Commission was thus persuaded that "there is no through movement of ***oil***" and the shipments on the Interstate pipeline were *intrastate* in nature.[[174]](#footnote-175)174

As to the Gilbert Lateral, the Commission found that it fell within the Uncle Sam ***Oil*** Company exception. The Gilbert Lateral was owned by Jersey Central Power & Light Company (although operated by Interstate) and it was "transporting ***oil*** from its own storage facility to its own generating plant over its own line."[[175]](#footnote-176)175 The Commission noted that no other person had sought access to the Gilbert Lateral and there were not presently any shippers who could make use of the line-

**III. RECAP OF JURISDICTIONAL TESTS UNDER THE NGA AND THE ICA <para>**

**</para>**

|  |  |  |
| --- | --- | --- |
| Interstate ***Oil*** Pipeline | Interstate Gas Pipeline |  |
| Statutes | Interstate Commerce Act, Part 1, as of 1977 | Natural Gas Act of 1938 |
| Elkins Act - a criminal statute |  |  |
| Governing agency | Interstate Commerce Commission until 1978; | Federal Power Commission until 1978; |
| Federal Energy Regulatory Commission since 1978 | Federal Energy Regulatory Commission since 1978 |  |
| Certificate of Convenience and Necessity Required From FERC for construction and to initiate and terminate service | No. | Yes |
| State and local authorities may exercise siting jurisdiction over construction |  |  |
| Rates regulated | Yes | Yes |
| Same pipeline can provide both intrastate and interstate service | Yes; jurisdiction depends on the particular movement | No; jurisdiction is facility specific |
| Whether a pipeline is providing interstate service depends upon the intent of the shipper | Yes, the same pipeline can provide both intrastate and interstate service. | No. A pipeline is either an interstate pipeline or not, all of the time. |
| Fact that receipt and delivery points are located in the same state is determinative of intrastate status | No. A particular movement is intrastate only if the goods did not originate outside the state (including from a foreign country) and are not destined for another state as part of a continuous movement | No. Pipelines located solely in one state may be interstate pipelines, depending upon the primary function of the facilities. Similarly, pipelines crossing state lines may be nonjurisdictional gathering facilities depending upon the primary function of the facilities. |
| Test for interstate status | A movement of goods is in interstate commerce if it is part of a continuous movement ... insert | FERC applies the modified primary function test to determine whether a pipeline is an interstate pipeline. This test looks at the length and diameter of the line, the location of wells, the configuration of the line, the location of central facilities, and whether the pipeline is "behind" the plant. |
| Shippers can reserve space and have priority (firm) service | No. If insufficient capacity is available to meet demand, prorationing is required. | Yes. Firm shippers have reserved capacity in the pipeline and are not subject to interruption when demand exceeds capacity. |
| Limited exception for committed shippers funding expansion capacity. | Interruptible shippers can be interrupted so that firm shippers have access to their reserved capacity. |  |

The views expressed in this paper are solely those of the author (or authors).

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**Federal *Oil* and Gas Pipeline Regulation - An Overview**



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**Overview of Jurisdiction**

|  |  |  |
| --- | --- | --- |
| Gas Pipelines | ***Oil*** Pipelines (Crude ***oil***. NGLs, refined petroleum products |  |
| Located wholly within one state | Not a determining factor | Not a determining factor |
| Shippers can reserve capacity | Yes - firm service available | No - common carrier obligation |
| Intent of shipper | Not relevant | Determining factor |
| Function of facilities | Determining factor | Not relevant |
| Governing Statute | Natural Gas Act of 1938 | Interstate Commerce Act - as it existed on October 1, 1977 |

**Separating the Products**

A horizontal or cylindrical separator tank uses gravity to separate gas in solution, water and ***oil***.



**Natural Gas**

· A mixture of hydrocarbon gas

· Primarily methane

· Used as a fuel

· And in manufacture of organic compounds - plastics, fabric, fertilizer, antifreeze

**Transportation of Gas**



· Pipelines -continuously wellhead to burnertip

· Compression - to move the gas

**Types of gas pipelines**

· Low pressure **gathering** lines

· High pressure **transportation** lines - interstate or intrastate

· Low pressure **distribution** lines to the burnertip - owned by local distribution companies (LDCs)

**Gas Processing**

Removes any impurities

Removes valuable natural gas **liquids**

Raw mix of propanes, butanes and heavier liquids

What's left - **residue gas** - methane

**Federal Regulation - Natural Gas Act of 1938**

· Regulates **transportation in interstate commerce (including storage)**

· Regulates **sales in interstate commerce** for resale

· **Natural gas companies** engaged in such transportation or sale

**Regulatory Requirements Under the NGA**

· **Certificates of convenience and necessity** required for:

- Construction of facilities

- Transportation service

· **Authorization** required to abandon facilities or service

· **Blanket certificates/authorizations** available under open access regulations and tariffs

**More Regulatory Requirements**

· Rates, terms and conditions of service require FERC approval

· Rates must be just and reasonable

· No undue preferences or advantage

- But firm and interruptible service available

· Recordkeeping and reporting requirements

**Transportation not regulated under the NGA**

· **Intrastate pipeline**

- Pipeline does not meet the FERC test for either a gathering line or an interstate pipeline

- Primary business - transportation of gas to local utilities (also known as local distribution companies) and end users

· **Hinshaw pipeline**

- Engaged in transportation in interstate commerce

- Receives gas within or at the boundary of a State

- All the natural gas so received is ultimately consumed within such State

- Regulated by state commission

· **Section 311 transportation**

- Intrastate *on behalf of* interstate or LDC served by interstate

- Interstate *on behalf of* intrastate or LDC

· **Gathering - not what you think**

· **Local Distribution**

· **Plant Lines**

**Gathering or Interstate - Modified Primary Function Test**

· Length and diameter of the line

· Operating pressure

· Location of wells

· Configuration

· Central point

· Location of compressors

· Location of processing plant

**Gathering or Interstate - Other Factors**

· The purpose, location, and operation of the facility

· The general business activity of the owner of the facility

· Whether the jurisdictional determination is consistent with the NGA and the Natural Gas Policy Act of 1978.

**Gathering or Interstate - Still More Considerations**

· No one factor is determinative

· All factors do not necessarily apply to all situations

· Any and all other relevant facts and circumstances of a particular case, including non-physical criteria

**Gathering or Interstate?**

|  |  |
| --- | --- |
| Length and diameter | 20.8-mile, 20-inch diameter |
| Operating pressure | Unknown |
| Location of wells | None |
| Configuration | Single line |
| Central point | Producing region - Opal plant, and ***Kern*** River's Muddy Creek compressor station located in the same vicinity |
| Location compressors | Line delivers gas to the Muddy Creek compressor station |
| Location of processing plant | Pipeline will transport pipeline quality residue gas from the Blacks Fork processing plant to the ***Kern*** River system |
| Owners of the line | Three gathering companies owning 1,000 miles of gathering lines in the region |
| Intent of owners | Intended to transport gas gathered only by the owners as an integrated extension of their gathering systems |

**FERC Decision**

· Subject to FERC jurisdiction

· Open-access and reporting requirements should apply

· Market based rates appropriate

*Rendezvous Gas Services, L.L.C.*, 112 FERC P 61141, 2005 WL 1774087 (July 27, 2005)

**How Do You Know For Sure?**

· File petition for declaratory order with FERC

· Consider asking for limited jurisdiction certificate if held to be a jurisdictional pipeline - *Whiting I*

· Consequences of guessing wrong - potential penalties

***Oil* Pipelines**

· Transport:

- Crude ***Oil***

- Natural gas liquids - from processing

- Refined petroleum products

**Refined Petroleum Products**

· Liquefied petroleum gas

· Chemicals

· Gasoline

· Jet fuel

· Diesel fuel

· Lubricating ***oil***

· Fuel ***oil***

· ***Oil*** for roads and roofing

**Federal Regulation - Interstate Commerce Act**

· Interstate Commerce Act of 1887 (ICA) - regulation of railroads

· Hepburn Act of 1906 - added transportation by pipelines of commodities (except water and natural gas)

· ICA repealed, revised and recodified in 1978

· Part I of the ICA applicable to ***oil*** pipelines, *as it existed on October 1, 1977*, was not repealed and still applies today but only to ***oil*** pipelines

· Regulates **transportation in interstate or international commerce**

· By **common carriers**

- all pipe-line companies and all persons, natural or artificial, engaged in such transportation

**Duties Under the ICA**

· To provide and furnish *transportation* upon reasonable request therefor

- No guaranteed right to ship a specific quantity

- Prorationing required if insufficient capacity

- FERC pre-approval for limited capacity allocations to fund new construction

· To establish reasonable through routes with other carriers

· To establish just and reasonable rates, fares, charges and classifications - require FERC approval

· To establish classification of property for transportation; regulations and practices

· Recordkeeping and reporting requirements

· No undue or unreasonable preference or advantage

- **Elkins Act** provides for criminal liability for soliciting or granting rebates, concessions, or discrimination

- Seek declaratory order approving, *in advance of construction*, proposed tariffs with a priority service structure to fund new construction

**Not Regulated Under the ICA**

· Pipeline construction or the initiating and termination of service

· Transportation wholly within one State - not what you think it means

· The Uncle Sam ***Oil*** Company exception - private carriage - a very difficult test to meet

**Intrastate or Interstate Movement?**

· Depends on the **essential character of the movement**

· And the fixed and persisting **intent with which the shipment is made**

· The same pipeline can provide both intrastate and interstate movements

· Test not tied to the *function* of the line

**Indicative of Interstate Shipment**

· Through billing across different pipeline sections to the final destination

· Uninterrupted movement of product

· Continuous possession of the shipment by the carrier

· Unbroken bulk of the shipment

**Indicative of Intrastate Movement**

· **Break in the continuity of transportation**

· At the time of shipment,

- no specific order

- of a specific quantity

- of a given product

- is being filled for a particular destination beyond the terminal storage

· The **terminal storage is a distribution point or local marketing facility** from which specific amounts of the product are sold or allocated

· Transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from terminal storage

**Presumption is Interstate Movement**

· All interstate movements are jurisdictional unless the facts show a **sufficient break in the continuity of transportation** so that shippers moving product through these lines do not have a fixed intent to move product interstate

**Insufficient Facts**

· Location of line wholly within a state

· Length of the line

· Function of line as gathering

· Storage by itself not sufficient

· Construction of line under private agreement

· Existence of competitive alternatives

· Ownership of the ***oil*** not sufficient by itself

· Commingling of product not sufficient by itself

**Interstate or Intrastate Movement?**

· 21 mile pipeline located entirely within New Jersey

· From barge dock on the New Jersey shore of the Delaware River, 7.2 miles to a Jacksonville, N.J. storage facility

· From the storage facility 13.5 miles to the U.S. Government's storage facility at McGuire Air Force Base, New Jersey

· The petroleum products shipped through the pipeline were delivered to the Barge Dock by barges originating at refineries outside of the State of New Jersey

· US Government owned the docket and leased it to the pipeline; lease prohibited any use other than to receive the government's products

· Title in shipper from refinery to the Base

· Tariffs assessing a single charge from the barge dock facilities to the Base

· Arrangements for through shipments at times made prior to the arrival of fuel at the receiving dock.

· Pipeline primarily designed to serve the Base

· Length of storage

- At Jacksonville - 3 to 15 days

- At terminus of the line - up to 66 days

· Argument

- Intrastate movement only

- Sufficient break in the flow of commerce at the barge dock

**FERC Decisions**

· Interstate movement

· Storage of products was not for indefinite periods

· Ownership of the dock by the government and lease restrictions not sufficient to conclude there was a break in the flow of commerce at the barge dock

*Interstate Storage and Pipeline Corporation*, 353 I.C.C. 397 (1977); 2 FERC P 61,118 (1978); 28 FERC P 61120(1984)

**Conclusions**

· Jurisdictional test under the NGA is based on the *function* of the facilities

· Jurisdictional test under the ICA is based on the *essential character of the movement*

· Scope of regulation is not the same under the NGA and the ICA

· Legal activities under one statute may be illegal under the other statute

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**End of Document**

1. 1126 FERC P 62119, 2009 WL 381503 (2009). [↑](#footnote-ref-2)
2. 2For an introduction to the topic of state regulation of ***oil*** and gas pipelines, see Paper 7A, Poitevent and Dunbar, "State Regulation of Intrastate ***Oil*** and Gas Pipe Lines in Texas, Oklahoma and Louisiana," and Paper 7B, Bruce, "State Regulation of ***Oil*** and Gas Pipelines - Rocky Mountain States and California," ***Oil*** and Natural Gas Pipelines: Wellhead to End User (Rocky Mtn. Min. Law Fdn. 1995). [↑](#footnote-ref-3)
3. 3See, Johnson, Handbook on Gas Contracts at pp. 58-60 (The Institute for Energy Development 1980) for a discussion of some of the factors influencing whether the pipelines or producers did the gathering. [↑](#footnote-ref-4)
4. 4*West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). [↑](#footnote-ref-5)
5. 5*Public Util. Comm'n v. London*, 249 U.S. 236 (1918). [↑](#footnote-ref-6)
6. 6*Public Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). [↑](#footnote-ref-7)
7. 715 U.S.C. §717-717w. [↑](#footnote-ref-8)
8. 842 U.S.C. §§ 7172(a)(1)(C), 7293 terminated the FPC and transferred its functions to the FERC. [↑](#footnote-ref-9)
9. 9347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954). [↑](#footnote-ref-10)
10. 1015 U.S.C. §§ 3301-3432. [↑](#footnote-ref-11)
11. 11*See* discussion of section 311 transportation in section 1.4G of this paper. [↑](#footnote-ref-12)
12. 1215 U.S.C. §717a(7). [↑](#footnote-ref-13)
13. 13As explained on the Commission's website, FERC has exclusive authority under the NGA to authorize the siting of facilities for imports or exports of LNG. States have the ability to effectively "veto" an LNG facility by denying permits associated with the Clean Water Act, the Coastal Zone Management Act, and the Clean Air Act. [↑](#footnote-ref-14)
14. 14*Colorado Interstate Gas Company v. Federal Power Commission*, 185 F.2d 357 (3 Cir. 1950). [↑](#footnote-ref-15)
15. 15*United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 17 L.Ed.2d 181 87 S.Ct. 265 (1966); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 32 L.Ed.2d 367, 92 S.Ct. 1827 (1972). [↑](#footnote-ref-16)
16. 16*California v. Lo-Vaca Gathering Co.*, 85 S.Ct. 486, 488 (1965) (regarding sales of gas for resale). [↑](#footnote-ref-17)
17. 17*Williams Natural Gas Company and Kansas Gas Supply Corporation*, 67 FERC ¶61,252 at p. 61,830 (1994). [↑](#footnote-ref-18)
18. 18*Northwest Pipeline Corporation v. FERC*, 905 F.2d 1403 (10 Cir. 1990). [↑](#footnote-ref-19)
19. 19Id. at 1410-1411. [↑](#footnote-ref-20)
20. 2018 CFR § 284.1(a). [↑](#footnote-ref-21)
21. 21*In re BP Energy Co.*, 121 FERC ¶61,088 (2007). FERC Order No. 636 adopted detailed rules regarding the release of firm pipeline capacity by shippers and shippers may not release capacity outside the requirements of those rules. Shippers who have violated those rules, for example by allowing affiliates or third parties to ship on the shipper's capacity, are violating the "shipper must have title" rule and are subject to significant penalties, See the civil penalty actions at http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp. FERC applied the buy/sell prohibition to intrastate and Hinshaw pipelines in *Arizona Public Service Co.*, 132 FERC ¶61,064 (2010). However, on October 21, 2010, FERC issued a Notice of Inquiry regarding capacity release on intrastate and Hinshaw pipelines. 132 FERC ¶61,064 (2010). In that NOI, FERC stated that there would be no enforcement for buy/sell transactions on intrastate and Hinshaw pipelines until it reaches a decision. This does not affect the prohibited status of buy/sell transactions on interstate pipelines. [↑](#footnote-ref-22)
22. 22347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954). [↑](#footnote-ref-23)
23. 23*Northern Natural Gas Co. v. State Corp. Com.*, 372 U.S. 84, 9 L.Ed.2d 601, 83 S.Ct. 646 (1963), reh'g denied, 372 U.S. 960, 10 L.Ed. 2d 14, 83 S.Ct. 1011. [↑](#footnote-ref-24)
24. 2415 U.S.C. §3301-3432. [↑](#footnote-ref-25)
25. 25Id. at §3431. [↑](#footnote-ref-26)
26. 26The Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) (the "Decontrol Act"). [↑](#footnote-ref-27)
27. 2718 CFR §284.402(a). [↑](#footnote-ref-28)
28. 2818 CFR §284.402(d). [↑](#footnote-ref-29)
29. 2918 CFR §284.403. [↑](#footnote-ref-30)
30. 30NGA §2(6); 15 U.S.C. §717a(6). "Person" includes an individual or a corporation but does not include municipalities, defined as a city, county, or other political subdivision or agency of a State. NGA §2(1) - (3); 15 U.S.C. §717a(1) - (3). See *Tennessee Gas Pipeline Company*, 69 FERC ¶61,239 (November 18, 1994) for an excellent summary of the municipality exemption. [↑](#footnote-ref-31)
31. 31NGA §7(c), 15 U.S.C. §717f(c). [↑](#footnote-ref-32)
32. 32NGA §7(b), 15 U.S.C. §717f(b). [↑](#footnote-ref-33)
33. 33See 18 CFR Part 157, Subpart F. [↑](#footnote-ref-34)
34. 34No certificate is required because 18 CFR Section 284.3(c) provides that the NGA "shall not apply to facilities utilized solely for transportation authorized by section 311(a) of the NGPA." [↑](#footnote-ref-35)
35. 3518 CFR §284.11(b). [↑](#footnote-ref-36)
36. 3618 CFR §284.11(a). The environmental regulations are at 18 CFR 206(b). [↑](#footnote-ref-37)
37. 37*See, Columbia Gas Transmission Corporation*, 9 FERC P 61363, 1979 WL 19508 (1979). [↑](#footnote-ref-38)
38. 38Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, III F.E.R.C. Stats. & Regs. [Regs. Preambles] ¶ 30,939, 57 FR 13267-02, 1992 WL 75263 (F.R. April 16, 1992). For an overview of Order 636, see Thomas G. Johnson, "The Mega-NOPR - Competition or Ruin?" 38 Rocky Mt. Min. L. Inst. (1992); Matlock, "New Roles of Wellhead, Gathering System and Gas Plant Operators After Order No. 636," 40 rocky Mt. Min. L. Inst. (1994). [↑](#footnote-ref-39)
39. 3918 CFR §284.221 and 223. [↑](#footnote-ref-40)
40. 40*See* 18 CFR §284.221(a) and (d). [↑](#footnote-ref-41)
41. 4118 CFR §284.102(a). [↑](#footnote-ref-42)
42. 42See 18 CFR §284.102(b) and (c). [↑](#footnote-ref-43)
43. 43See *Whiting I* in section 1.8 of this paper; *Straight Creek Gathering, L.P.*, 117 FERC P 61005, 2006 WL 2805174 (2006). [↑](#footnote-ref-44)
44. 44*Clear Creek Storage Company, L.L.C.*, 84 FERC P 61,210 (1998); *Trans-Union Interstate Pipeline, L.P.*, 92 FERC P 61066, 2000 WL 1100283 (2000). [↑](#footnote-ref-45)
45. 45NGA §4(a), 15 U.S.C. §717c(a). [↑](#footnote-ref-46)
46. 46NGA §5, 15 U.S.C. §717d. See, Smead, "Fundamentals of Pipeline Ratemaking," Part 7, Practical Natural Gas Marketing Short Course (Rocky Mt. Min. L. Fdn. 1994). [↑](#footnote-ref-47)
47. 47FERC Order 636, adopted in 1992, requires interstate pipelines to develop rates based on the throughput and cost of service. Order No. 636, *FERC Stats. & Regs., Regulations Preambles 1991-1996* ¶30,939 (1992). See 18 CFR §284.10 for details regarding rates for firm and interruptible transportation on interstate pipelines. [↑](#footnote-ref-48)
48. 48*Alternatives to Traditional Cost-of-service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶61,076 (1996); *Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC P 61194, 1996 WL 78596 (1996). [↑](#footnote-ref-49)
49. 49Transportation under section 311 is discussed in section 1.4G of this paper. [↑](#footnote-ref-50)
50. 50NGA §4(b), 15 U.S.C. §717c(b). [↑](#footnote-ref-51)
51. 5118 CFR §284.7(b) and §284.9(b). [↑](#footnote-ref-52)
52. 5218 CFR §284.7. [↑](#footnote-ref-53)
53. 5318 CFR §284.9. [↑](#footnote-ref-54)
54. 5418 CFR §284.10. [↑](#footnote-ref-55)
55. 55NGA §4(c), 15 U.S.C. §717c(c). See, for example, 18 C.F.R. Part 160; Parts 201-225, and Parts 250-260. [↑](#footnote-ref-56)
56. 5618 CFR Part 201. [↑](#footnote-ref-57)
57. 57Order No. 735, 131 FERC ¶61,150 (2010). [↑](#footnote-ref-58)
58. 58*El Paso Natural Gas Company*, 116 FERC P 62081 (2006) (application for abandonment authority by sale to WTG granted; proposed service intrastate in character). [↑](#footnote-ref-59)
59. 59Transcontinental Gas Pipe Line Corporation and Crosstex CCNG Transmission, Ltd, 110 FERC P 61337 (2005). [↑](#footnote-ref-60)
60. 60See the discussion in section 1.1B of this paper. [↑](#footnote-ref-61)
61. 61*Colorado Interstate Gas Co. v. FPC*, 185 F.2d 357 (3rd Cir. 1950). [↑](#footnote-ref-62)
62. 62*Federal Power Commission v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961). [↑](#footnote-ref-63)
63. 63See, for example, *Re Marathon* ***Oil*** *Co.*, 10 PUR4th 198 (1975). [↑](#footnote-ref-64)
64. 6494 FERC 61,189, 2001 WL 275418 (2001). [↑](#footnote-ref-65)
65. 6581 FERC 61,167 (1997); rehearing denied 83 FERC 61,006 (1998). [↑](#footnote-ref-66)
66. 6690 FERC 61,321 (2000); rehearing denied 93 FERC 61,041 (2000). [↑](#footnote-ref-67)
67. 6790 FERC 61,321 at \*\*5. [↑](#footnote-ref-68)
68. 68483 F.2d 623 (5th Cir. 1973). [↑](#footnote-ref-69)
69. 6981 FERC P 61,005 (1997). [↑](#footnote-ref-70)
70. 70See also, Section 311(b) of the NGPA which provides that the Commission, by rule or order, authorize any *intrastate* pipeline to sell natural gas to any interstate pipeline and local distribution company served by any interstate pipeline. This provision was intended to address natural gas supply shortages in the interstate market existing in the late 1970's. [↑](#footnote-ref-71)
71. 71899 F.2d 1250 (D.C.Cir. 1990). [↑](#footnote-ref-72)
72. 72Order No. 537, *FERC Stats. & Regs., Regulations Preambles 1991-1996* ¶30,927 (1991). [↑](#footnote-ref-73)
73. 73*Northwest Pipeline Corporation v. FERC*, 905 F.2d 1403 (10 Cir. 1990). See, however, subsection E below which describes the Commission's current jurisdictional test as including a consideration of the general business activity of the owner of the facility. The general business activity of the owner has been a factor in recent decisions finding some facilities owned by producers to be non-jurisdictional gathering facilities or granting limited jurisdiction certificates for facilities owned by producers. See Sections 1.5 and 1.11 of this paper. [↑](#footnote-ref-74)
74. 74*See, Black Marlin Pipeline Company*, 15 FERC ¶ 63,021 (1981) in which Black Marlin was found to have violated the NGA by transporting gas without certificate authority. The Commission rejected criminal prosecution in favor of a remand to the ALI for determination regarding repayments. In settlement, Black Marlin agreed, among other things, to pay $2,520,000 to the U.S. Treasury which represented the revenues it had received from the unlawful transportation of gas. [↑](#footnote-ref-75)
75. 75331 U.S. 682, 67 S.Ct. 1482, 91 L.Ed. 1742 (1947). [↑](#footnote-ref-76)
76. 76Id. at 690, 67 S.Ct. at 1487, 91 LEd. at 1748 (emphasis added) (footnote omitted). [↑](#footnote-ref-77)
77. 77372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963). [↑](#footnote-ref-78)
78. 78Id. at 90-91, 83 S.Ct. at 649-50, 9 L.Ed.2d at 606. [↑](#footnote-ref-79)
79. 79In re Barnes Transp. Co., 18 FPC 369 (1957). [↑](#footnote-ref-80)
80. 80Phillips Petroleum Co., 10 FPC 246 (1951), rev'donothergrounds, Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). [↑](#footnote-ref-81)
81. 81Ben Bolt Gathering Co., 26 FPC 825 (1961), aff'd 323 F.2d 610 (5th Cir. 1963); Farmland Industries, 23 FERC 61063 (1983). [↑](#footnote-ref-82)
82. 82*Amerada Hess Corporation, et al.*, 52 FERC ¶61,268 at p. 61,987 (1990), citing *Gulf* ***Oil*** *Corp. v. FERC*, 1 FERC ¶61,089, at p. 61,188, aff'dmem, 723 F.2d 97 (D.C. Cir. 1983). [↑](#footnote-ref-83)
83. 83Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1982-1985] ¶ 30,665 (1985); Order No. 436-A, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1982-1985] ¶ 30,675 (1986). [↑](#footnote-ref-84)
84. 84876 F.2d 46 (5th Cir. 1989). [↑](#footnote-ref-85)
85. 85Id. at 49. [↑](#footnote-ref-86)
86. 86*Amerada Hess Corporation, et al.*, 52 FERC 61,268 (1990). [↑](#footnote-ref-87)
87. 87*Columbia Gas Transmission, LLC*, 133 FERC P 62269, 2010 WL 5134838 (2010). [↑](#footnote-ref-88)
88. 88See section 1.8 of this paper for a modified version of this test applicable to OCS facilities. [↑](#footnote-ref-89)
89. 89*Phillips Petroleum Co.*, 10 FPC 246 (1951), rev'donother grounds, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). See discussion of the behind-the-plant test in *Black Marlin Pipeline Company*, 15 FERC ¶63,021 (1981). [↑](#footnote-ref-90)
90. 90*Amerada Hess Corp.*, 57 FERC ¶61,063 (1991), reh'gdenied, 59 FERC ¶61,117 (1992), remanded, *Williston Basin Interstate Pipeline Company*, No. 92-1207 (D.C. Cir., August 26, 1993). [↑](#footnote-ref-91)
91. 9158 FERC ¶61,089 (1992). [↑](#footnote-ref-92)
92. 92*Amerada Hess*, 67 FERC ¶61,254 at p. 61,846 (May 27, 1994). [↑](#footnote-ref-93)
93. 93Id. at 61,847. [↑](#footnote-ref-94)
94. 94Id. at p. 61,847. [↑](#footnote-ref-95)
95. 95The Commission also considered the open access protections afforded by the anti-discrimination regulations adopted by the BLM and published at 43 C.F.R. §2883.1-5 (1992). The downstream facilities crossed lands administered by the BLM. Id. at p. 61,848. [↑](#footnote-ref-96)
96. 96*Superior Offshore Pipeline Company*, 67 FERC ¶61,253 at p. 61,836 (1994). [↑](#footnote-ref-97)
97. 97*Trunkline Gas Company*, 67 FERC ¶61,256 at p. 61,87 (1994) (the facilities were already certificated as transmission facilities but had been functionalized for rate and accounting purposes as gathering). [↑](#footnote-ref-98)
98. 98See Section 1.10 of this paper for a situation in which a longer "stub line" was held not to be jurisdictional because the gas flowing in that line was only partially processed and would require further processing to meet pipeline specifications. [↑](#footnote-ref-99)
99. 99*Williams Natural Gas Company*, 67 FERC ¶61,252 at p. 61,829 (May 27, 1994). [↑](#footnote-ref-100)
100. 100*Arkla Gathering Services Company*, 67 FERC ¶61,257 at p. 61,867 (1994) and cases cited in fn. 23 therein. [↑](#footnote-ref-101)
101. 101Williams, supra n. 99 at p. 61,828 [↑](#footnote-ref-102)
102. 102Arkla, supra n. 99 at p. 61,867-68. [↑](#footnote-ref-103)
103. 103*Superior Offshore Pipeline Company*, supra 96 at p. 61,835. [↑](#footnote-ref-104)
104. 104See section 1.8 of this paper. [↑](#footnote-ref-105)
105. 105351 P.2d 241 (CO. Sup. Ct. 1960). [↑](#footnote-ref-106)
106. 106*Sid Richardson Energy Services Ltd.*, 104 FERC ¶ 61,024 (2003); *Loser Marcellus Gathering Company, LLC*, 130 FERC ¶ 61,162, at P 16 (2010). [↑](#footnote-ref-107)
107. 107*Norten Pipeline Company*, 94 FERC ¶ 61,022 (2001) (natural gas facilities consisting of metering and tap facilities and three pipelines totaling approximately three miles in length held to be an interstate pipeline). [↑](#footnote-ref-108)
108. 108*See, for example, Western Transmission Corporation*, 80 F.E.R.C. ¶ 61,194 (Aug. 5, 1997) which reclassified as a gathering line, a Wyoming pipeline which had been classified as an interstate pipeline since the mid 1960's. At the same time, F.E.R.C. has refunctionalized other pipeline systems in Wyoming and other states from gathering to interstate pipeline status. *See Colorado Interstate Gas Company*, 75 F.E.R.C. ¶ 61,325 (June 26, 1996) (refunctionalization from gathering to transmission of certain facilities). [↑](#footnote-ref-109)
109. 10963 FERC P 61,005 (April 1, 1993). [↑](#footnote-ref-110)
110. 11097 FERC P 61239, 2001 WL 1478632 (2001). [↑](#footnote-ref-111)
111. 111*See Amerada Hess Corporation*, 52 FERC ¶ 61,268, at 62,012-13 (1990). [↑](#footnote-ref-112)
112. 112The Commission described KN Gas Gathering's lines as not only cover many more miles than KN Wattenberg's in Adams and Weld Counties, but also reaching into the adjacent Arapahoe, Boulder, and Jefferson Counties. [↑](#footnote-ref-113)
113. 11387 FERC P 61384, 1999 WL 444654 (1999), *rehearing denied*, 92 FERC P 61072, 2000 WL 1100267 (2000), *petition for review denied*, 297 F.3d 1071 2002), *rehearing and rehearing en banc denied* (2002), *cert. den.* 540 U.S. 937 (2003) and 540 U.S. 937 (2003). [↑](#footnote-ref-114)
114. 114130 FERC ¶ 61,162 (2010). [↑](#footnote-ref-115)
115. 115126 FERC P 61015, 2009 WL 54278 (2009) [↑](#footnote-ref-116)
116. 116126 FERC P 62119, 2009 WL 381503 (2009). [↑](#footnote-ref-117)
117. 117126 FERC P 62119, 2009 WL 381503 (2009). [↑](#footnote-ref-118)
118. 118See the Case Study in Section 1.10 of this paper. [↑](#footnote-ref-119)
119. 119*Whiting II*, 130 FERC P 62199, 2010 WL 785182 (2010). [↑](#footnote-ref-120)
120. 12049 U.S.C. App. § 1 *et seq.* (1988). The ICA also incorporates by reference the common law of common carriers. Id. §1(22). [↑](#footnote-ref-121)
121. 121Chap. 3591, 34 Stat. at L. 584 (1906). [↑](#footnote-ref-122)
122. 122A pdf version of Title 49 from the 1988 United States Code can be found on FERC's website at http://www.ferc.gov/legal/fed-sta.asp?new=sc4. While the statutes regulating railroads and other forms of transportation have continued to evolve, the statute regulating ***oil*** pipelines is fixed. [↑](#footnote-ref-123)
123. 123Five years later, FERC wrote the following regarding this transfer of jurisdiction: "When this Commission inherited the ICC's ***oil*** pipeline rate jurisdiction, it found that way of doing or not doing things strange. It was diametrically opposed to the Federal Power Commission's activist tradition. It was scathingly denounced by the Department of Justice and by others as a policy of 'See no evil, hear no evil.' And it was out of tune with contemporary regulatory thought." *Williams Pipe Line Company*, 21 FERC P 61260, 1982 WL 39144 (1982). [↑](#footnote-ref-124)
124. 124Title 49, Chapter 1, Part 1, section 1(4)(1977). [↑](#footnote-ref-125)
125. 125In contrast, under the FERC's open access regulations for natural gas pipelines, interstate pipelines are required to offer both firm and interruptible service. [↑](#footnote-ref-126)
126. 126*Texaco Pipeline Inc.*, 74 FERC P 61071, at fn., 1996 WL 38475 (1996). [↑](#footnote-ref-127)
127. 12774 FERC P 61071, 1996 WL 38475 (F.E.R.C.), Order Rejecting Tariff (1996). [↑](#footnote-ref-128)
128. 128*Express Pipeline Partnership*, 76 FERC ¶ 61,245, at p. 62,253 (1996). Further, CCPS states that the Commission added on rehearing that "issuing a declaratory order [is] procedurally appropriate for a new ***oil*** pipeline entrant, such as Express, because it needs to acquire and guarantee financing in order to begin construction." *Express Pipeline Partnership*, 77 FERC ¶ 61,188, at p. 61,766 (1996). [↑](#footnote-ref-129)
129. 129116 FERC 61040 (2006), ORDER ACCEPTING TARIFFS (2006). [↑](#footnote-ref-130)
130. 130See section 2.7 of this paper for an example of a joint tariff between MAPL and Seminole. [↑](#footnote-ref-131)
131. 13118 CFR § 342.3. A carrier must compute the ceiling level for each index year by multiplying the previous index year's ceiling level by the most recent index published by the Commission. The index will be published by the Commission prior to June 1 of each year. A rate charged by a carrier may be changed, at any time, to a level which does not exceed the ceiling level established by paragraph (d) of this section, upon compliance with the applicable filing and notice requirements and with paragraph (b) of this section. [↑](#footnote-ref-132)
132. 13218 CFR § 342.4(a) (A carrier may change a rate pursuant to this section if it shows that there is a substantial divergence between the actual costs experienced by the carrier and the rate resulting from application of the index such that the rate at the ceiling level would preclude the carrier from being able to charge a just and reasonable rate within the meaning of the Interstate Commerce Act.) [↑](#footnote-ref-133)
133. 13318 CFR § 342.4(b) (A carrier may attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates. Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under §342.3.) [↑](#footnote-ref-134)
134. 13418 CFR § 342.4(c) (A carrier may change a rate without regard to the ceiling level under §342.3 if the proposed change has been agreed to, in writing, by each person who, on the day of the filing of the proposed rate change, is using the service covered by the rate. A filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.) [↑](#footnote-ref-135)
135. 135373 U.S. 405, 83 S.Ct. 1370, 10 L.Ed.2d 44 (Sup. Ct. 1963). [↑](#footnote-ref-136)
136. 136*Total Petroleum, Inc. V. Citgo Products Pipeline*, 76 FERC P 61164, 1996 WL 439404 (1996) (The Petroleum Products nominated by each shipper will be transported between such locations in such quantities, at such times and to the limit of Carrier's operating capacity so as to avoid discrimination (unreasonable preference or prejudice) among Shippers and so as not to adversely affect the reasonable operation of carrier's facilities. The details of Carrier's method of proration are contained in a document entitled *Citgo's Products Pipeline Proration Policy*, a copy of which will be made available, upon request, to any Shipper or prospective Shipper.); *SFPP, L.P.*, 86 F.E.R.C. P 61,022 (1999), order on reh'g, 91 F.E.R.C. P 61,135 (2000). [↑](#footnote-ref-137)
137. 137Compare, *Mid-America Pipeline Company, LLC et al.*, 124 FERC P 63016 (September 3, 2008) concluding that the Seminole pipeline located wholly within the State of Texas is subject to the ICC for certain movements, with *Interstate Energy Company*, 32 FERC P 61294, 1985 WL 67320 (1985) concluding that a pipeline running between two points located in Pennsylvania is not providing service under the ICC. These cases are discussed in section 2.5 of this paper. [↑](#footnote-ref-138)
138. 138234 U.S. 548 (1914). "So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers in everything but form. They carry everybody's ***oil*** to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, *the statute practically means no more than they must give up requiring a sale to themselves before carrying the* ***oil*** *that they now receive*. The whole case is that the appellees, if they carry, must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view." Id. at 561. [↑](#footnote-ref-139)
139. 139"That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the ***oils*** transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce." Id. at 560. [↑](#footnote-ref-140)
140. 140Id. at 562. The Court used the analogy of a person pumping a pail of water from his well to his house and stated that would be a perversion of language to say that the man was engaged in the transportation of water. [↑](#footnote-ref-141)
141. 141See, *Valvoline* ***Oil*** *co.*, 308 U.S. 141, 60 S.Ct. 160, 84 L.Ed. 151 (1939) (pipeline which transported ***oil*** from the wells in one state to refineries in another was subject to the ICC, notwithstanding amendments to the ICC in 1920, because the ***oil*** in the pipeline was purchase from producers at the well. [↑](#footnote-ref-142)
142. 142329 U.S. 29, 67 S.Ct. 1, 91 L.Ed. 22 (1946) (*"Champlin I"*). [↑](#footnote-ref-143)
143. 143Id. at 33. [↑](#footnote-ref-144)
144. 144Id. at 33. This description of the differential comes from the *Champlin II* decision cited in the next footnote because it is a somewhat clearer description than in *Champlin I*. [↑](#footnote-ref-145)
145. 145*United States v. Champlin Refining Co.*, 341 U.S. 290, 71 S.Ct. 715, 95 L.Ed. 949 (1951) (*"Champlin II"*). [↑](#footnote-ref-146)
146. 146Id. at 341 U.S. 298 (emphasis added). [↑](#footnote-ref-147)
147. 147Id. 341 U.S. 301. FERC has subsequently characterized *Champlin II* as an exception distinct from the Uncle Sam ***Oil*** Company exception because Champlin was subject to the ICA for some informational and record keeping purposes but not for the purpose of providing jurisdictional service. See, *Interstate Energy Company*, 32 FERC P 61294, 1985 WL 67320 (1985). [↑](#footnote-ref-148)
148. 14870 FERC P 61,035, 1995 WL 22153 (1995) ("Hunt"). [↑](#footnote-ref-149)
149. 149Id. at \*\*2. [↑](#footnote-ref-150)
150. 150Id. at \*\*3. [↑](#footnote-ref-151)
151. 151See Section 2.7 of this paper for a case study involving such a dispute. [↑](#footnote-ref-152)
152. 152*Baltimore and Ohio Southwestern R.R.Co. v. Settle*, 260 U.S. 166 (1922) ("Baltimore"); *Atlantic Coast R.R. v. Standard* ***Oil*** *Co.*, 275 U.S. 257, 268 (1927); *Interstate Energy Company*, 32 FERC P 61294, 1985 WL 67320 (1985); *Mid-America Pipeline Company, LLC et al.*, 124 FERC P 63016 (September 3, 2008) ("MAPL decision"). [↑](#footnote-ref-153)
153. 153Under the NGA, intent of the shipper is not relevant. [↑](#footnote-ref-154)
154. 154MAPL Decision, supra n. 153, citing *Baltimore*, supra n. 153 at 171. [↑](#footnote-ref-155)
155. 155MAPL Decision, supra n. 153, citing *Texaco Refining & Marketing, Inc. v. SFPP, L.P.*, 80 FERC p. 61,805. [↑](#footnote-ref-156)
156. 156MAPL Decision, supra n. 153, citing *Hydrocarbon Trading & Transport Co., Inc., v. Texas Eastern Transmission Corp.*, 26 FERC at p. 61,471. [↑](#footnote-ref-157)
157. 15780 FERC 61200, 1997 WL 438894 (1997). [↑](#footnote-ref-158)
158. 158Texaco, supra n. 157 at \*3. [↑](#footnote-ref-159)
159. 159See section 2.4C.1. of this paper. [↑](#footnote-ref-160)
160. 160Texaco, supra n. 157 at \*4, citing *Baltimore*, supra n. \_\_\_. [↑](#footnote-ref-161)
161. 161Id. at \*4, citing *Hydrocarbon Trading and Transport Company, Inc. v. Texas Eastern Transmission Corporation*, 26 FERC P 61,201 (1984). [↑](#footnote-ref-162)
162. 162Texaco, supra n. 157 at at \*5. [↑](#footnote-ref-163)
163. 163Id. [↑](#footnote-ref-164)
164. 164Id. [↑](#footnote-ref-165)
165. 165Texaco, supra n. 157 at \*7. [↑](#footnote-ref-166)
166. 166Id. [↑](#footnote-ref-167)
167. 167Id. [↑](#footnote-ref-168)
168. 168Id., citing *Sadderochit Pipeline Company*, 76 FERC P 61, 125 (1996) (interstate movements along a line only 1,400 feet long held to be jurisdictional). [↑](#footnote-ref-169)
169. 169Id. at \*6, distinguishing cases that dealt with services such as tracking title prior to shipment of ***oil***, use of stock scales for weighing cattle but without connection to transportation service, feeding of livestock, storage of produce after delivery, and warehousing and auctioning services. [↑](#footnote-ref-170)
170. 170Id. In rejecting this argument, the Commission found that SFPP facilitated transportation service over the line with personnel who repaired and maintained it and received and handled the product upon receipt. [↑](#footnote-ref-171)
171. 171124 FERC P 63016, 2008 WL 4065647 (Sept. 3, 2008). [↑](#footnote-ref-172)
172. 17232 FERC P 61,294, 1985 WL 67320 (1985) ("Interstate"). [↑](#footnote-ref-173)
173. 173Id. at \*4. [↑](#footnote-ref-174)
174. 174Id. at \*6. [↑](#footnote-ref-175)
175. 175Id. at \*7. [↑](#footnote-ref-176)