

# Jurisdictional Jeopardy!

WHAT IS AND (ISN'T) SUBJECT  
TO FERC JURISDICTION

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**September 2012 AOPL Conference**

# DISCLAIMER

THE ISSUES DISCUSSED IN THIS PRESENTATION ARE COMPLEX AND IN MANY CASES THERE IS NOT A BRIGHT LINE TEST THAT CAN BE APPLIED TO A GENERIC SET OF CIRCUMSTANCES WHEN EVALUATING WHETHER A SERVICE OR A FACILITY IS GOVERNED BY FERC'S JURISDICTION.

CONSEQUENTLY, PROPER REVIEW OF THE SPECIFIC FACTS BY QUALIFIED PROFESSIONALS IS NECESSARY BEFORE MAKING A DETERMINATION.

# Introduction

THE HEPBURN ACT OF 1906 FIRST MADE OIL PIPELINES SUBJECT TO REGULATION UNDER THE INTERSTATE COMMERCE ACT (“ICA”).

OIL PIPELINE RATES AND PRACTICES WERE REGULATED BY THE INTERSTATE COMMERCE COMMISSION (“ICC”) FROM 1906 UNTIL 1977 WHEN JURISDICTION OVER OIL PIPELINE RATES AND PRACTICES WAS TRANSFERRED FROM THE ICC TO THE FEDERAL ENERGY REGULATORY COMMISSION (“FERC”)

# Introduction

SECTION 1 OF THE ICA PROVIDES THAT IT “SHALL APPLY TO COMMON CARRIERS ENGAGED IN...[T]HE TRANSPORTATION OF OIL OR OTHER COMMODITY, EXCEPT WATER AND EXCEPT NATURAL OR ARTIFICIAL GAS BY PIPELINE...” BETWEEN DIFFERENT STATES.



# Key Concepts

- WHAT IS OIL?
- WHAT IS “TRANSPORTATION BY PIPELINE”?
- WHAT IS “INTERSTATE” TRANSPORTATION?
- WHO IS A “COMMON CARRIER”?

# What Oil Is....

- In order to be considered “oil” for purposes of FERC regulation, the product must be:
  - Liquid
  - Hydrocarbon
  - Predominantly used as an energy source
- Crude oil, gasoline, diesel, jet fuel, distillate, and natural gas liquids are regulated by the Federal Energy Regulatory Commission (FERC).

# What Oil Isn't....

- Anhydrous ammonia, carbon dioxide and phosphate slurry are regulated by the Surface Transportation Board (STB).
- State regulatory agencies regulate water.
- Transmix?
- What about ethanol?

## What Is Oil?

# PROCESS FOR DETERMINING WHETHER A COMMODITY IS OIL

- Typically, pipeline files to cancel tariff for that commodity (e.g., ethylene, propylene).
- FERC suspends tariff cancellation for up to 7 months.
- Commission solicits comments, including from STB, and requires pipeline to file information confirming lack of energy use.
- If so, FERC will allow cancellation of tariff
- Note: STB does not require tariff filings

# What Is Pipeline Transportation?

## As Defined by the ICA

- The ICA governs “transportation of oil... by pipe line.”
- The ICA defines “transportation” as “all instrumentalities and facilities of shipment ... irrespective of ownership or of any contract express or implied for the use thereof, and all services in connection with the receipt, delivery... storage, and handling of property transported.” ICA §1(3).

## What Is Pipeline Transportation?

# Short Distances & Storage Facilities

- Within a plant?
- From a well to a gathering point?
- From a refinery to a terminal?
- Breakout Tankage?
  - Is shipper-provided tankage a transportation service regulated by the FERC?
  - Can the pipeline provide a tariff credit to shippers that provide their own breakout tankage?
- Other Storage Facilities?
- Destination Terminals? Origination Facilities?

## What Is Pipeline Transportation?

# Ancillary Services

- A pipeline offers to handle a function ordinarily performed by the shipper – e.g., generating invoices between the shipper and jobber using the bills of lading generated at the terminal. Is this a FERC jurisdictional service?
- What about a pipeline that offers to track in-line transfers of oil moving through its pipeline?
- What if the charge for the service is published in the pipeline's tariff – does that make the service jurisdictional?



# What Is Interstate Transportation?

## As Defined in the ICA

- The ICA applies to movements 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 ....”



# What Is Interstate Transportation?

## Examples

- A pipeline moves product from point A in Texas through point B to point C in Oklahoma. The overall movement from point A to point C is continuous and uninterrupted.
  - The pipeline has two separate tariffs on file; one from point A to point B, and another from point B to point C. Are either of these movements considered interstate?
  - Would it matter if the movement from B to C is performed by a different carrier?

## What Is Interstate Transportation?

# Examples, Cont'd.

- What if the product comes to rest in storage located at Point B?
- What if the product changes form at Point B?
- What if the interstate and intrastate movements are commingled in transit?
- What if the product is transported from the outer continental shelf?
- What about a pipeline that connects to another pipeline at the international boundary?

# What Is Interstate Transportation?

## Conclusion

Whether or not a pipeline is engaged in interstate transportation primarily depends upon the “fixed and persisting transportation intent” with which the shipment was made.

# What is a Common Carrier?

## As Defined by the ICA

- ICA §1
- Integrated Companies
  - Is a pipeline that moves crude oil from an affiliate's production well to an affiliate's refinery engaged in common carrier service?
- Undivided Joint Interest Pipelines
  - Each of the owners of a pipeline moves its own oil to its own refinery solely using its own capacity interest. Is this line engaged in common carrier service?
- Buy-Sell Agreements
  - *Standard Oil, Western Refining, Bridger, ConocoPhillips v. Enterprise TEPPCO*

What is a Common Carrier?

# One-Time Accommodations

Pipeline A operates a private line. Pipeline B has had an unexpected mechanical problem on its proprietary pipeline and is running out of inventory. As a one-time accommodation, Pipeline A buys some oil from Pipeline B, moves it on its pipeline and sells it back to Pipeline B at the other end. Does this one time movement make Pipeline A a common carrier?

# Conclusion

- The determination of whether a service is jurisdictional is complex.
- The specific factual circumstances can make a difference.
- Seek assistance from qualified professionals when in doubt.
- Some issues have never been fully examined by the FERC or the courts.



# What is Oil?

## - Relevant Cases

- Anhydrous Ammonia: Gulf Central Pipeline Co., 50 FERC ¶ 61,381 (1990), *aff'd sub nom. CF Industries, Inc. v. FERC*, 925 F.2d 476 (D.C. Cir. 1991)
- Anhydrous Ammonia: Gulf Central Pipeline Co., 7 I.C.C.2d 52 (1990)
- Transmix: Texaco Refining and Marketing, Inc. v. SFPP, L.P., 80 F.E.R.C. ¶ 61,200 (1997)
- NGL's: Lakehead Pipe Line Co., L.P., 71 F.E.R.C. ¶ 61,338 (1995)
- Natural gas: 15 U.S.C. §§ 717-717w.
- Phosphate slurry: Ashley Creek v. Chevron, 5 I.C.C.2d 303 (1989)
- CO2: Cortez Pipeline Co., 45 Fed. Reg, 85177 (1980), 46 Fed. Reg. 18805 (1981)
- Ethylene: Texaco Petrochemical Pipeline LLC, 107 F.E.R.C. ¶ 61,151 (2004)
- Polymer Grade Propylene: Sabine Propylene Pipeline L.P., 109 FERC ¶ 61,025 (2004)
- Chemical Grade Propylene: Enterprise Lou-Tex Propylene Pipeline L.P., 111 FERC ¶ 61,068 (2005)

# What is Transportation?

## - Relevant Cases

- 49 U.S.C. § 1(3)
- Gathering: Texaco Refining and Marketing, Inc. v. SFPP, L.P., 80 F.E.R.C. ¶61,200 (1997)
- Breakout: Lakehead Pipe Line Co., L.P., 71 F.E.R.C. ¶ 61,338, at 62,325 (1995), *aff'd*, Lakehead Pipe Line Co., L.P., 75 F.E.R.C. ¶ 61,181 (1996)
- Storage: Kerr-McGee Refining Corp. v. Williams Pipe Line Co., 72 F.E.R.C. ¶61,274, at 62,199 n.18 (1995); Tipco Crude Oil Co. v. Shell Pipe Line Corp., 19 F.E.R.C. ¶ 61,105, at 61,198 (1982)
- Transportation function generally: Burkley Produce Co. v. Pennsylvania R.R., 277 I.C.C. 319, 322 (1950)
- Origination facilities: SFPP, L.P., 86 F.E.R.C., Opinion No. 435, ¶ 61,022 at 61,073-74 (1999)
- Transfer orders: Kerr-McGee Refining Corp. v. Williams Pipe Line Co., 72 F.E.R.C. (CCH) ¶ 61,274 (1995), *aff'd*, Texaco Refining and Marketing Inc. v. FERC, 107 F.3d 923 (D.C. Cir. 1996)
- Barge docks: Chevron Pipe Line Co., 64 F.E.R.C. ¶ 61,213, at 62,216 (1993)
- Terminal Facilities and Services: TE Products Pipeline Co., LLC, 130 FERC ¶ 61,257, *reh'g denied*, 131 FERC ¶ 61,277 (2010); Tesoro Refining and Marketing Co., 135 FERC ¶ 61,116 (2011); Kenai Pipe Line Co., 138 FERC ¶ 61,034 (2012); Thrifty Propane, Inc. v. Enterprise TE Products Pipeline Company, LLC, 149 FERC ¶ 61,017 (2012).
- Exchanges: ConocoPhillips v. Enterprise TE Products Pipeline Co., 134 FERC ¶ 61,174 (2011); Western Refining Pipeline Co., 122 FERC ¶ 61,210 (2008), *reh'g denied*, 123 FERC ¶ 61,271 (2008); Bridger Pipeline LLC, 126 FERC ¶ 61,182 (2009)



# What is Interstate?

## - Relevant Cases

- 49 U.S.C. § 1
- *Interstate Energy Company*, 32 F.E.R.C. ¶ 61,294, at 61,690 (1985)
- *Northville Dock Pipe Line Corp.*, 14 F.E.R.C. ¶ 61,111, at 61,206 (1981)
- *Department of Defense v. Interstate Storage and Pipeline Co.*, 353 I.C.C. 397, 407 (1977)
- Commingled Movements: *Amoco Pipeline Co.*, 62 F.E.R.C. ¶ 61,119, at 61,803 (1993); compare *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) (natural gas regulation)
- OCS: *Bonito Pipe Line Co.*, 61 F.E.R.C. ¶ 61,050, at 61,221 (1992), *aff'd on other grounds*, *Shell Oil Co. v. FERC*, 47 F.3d 1186 (D.C. Cir. 1995)
- OCS: *Amberjack Pipeline Co.*, 97 F.E.R.C. ¶ 61,381 (2001)
- OCS into a state: *Ultramar, Inc. v. Gaviota Terminal Co.*, 80 F.E.R.C. ¶ 61,201 (1997)
- OCS into a State: *Mars Oil Pipeline Co.*, Letter Order (March 31, 2004)
- OCS into a State: *Ursa Oil Pipeline Co., LLC*, Letter Order (April 21, 2004)

# What is Common Carrier?

## - Relevant Cases

- *The Pipe Line Cases*, 234 U.S. 548, 562 (1914)
- *Interstate Energy Co.*, 32 F.E.R.C. ¶ 61,294, at 61,692-93 (1985)
- *Hunt Refining Co.*, 70 F.E.R.C. ¶ 61,035 (1995)
- *Valvoline Oil Co. v. United States*, 308 U.S. 141, 144-46 (1939)
- *Enbridge Pipelines (NE Texas Liquids) L.P.*, 110 FERC ¶ 61,159 (2005)
- *Lion Oil Trading & Transportation, Inc.*, 140 FERC ¶ 61,118 (2012)