

JURISDICTIONAL JEOPARDY!

**WHAT IS AND (ISN'T) SUBJECT TO
FERC JURISDICTION UNDER
THE INTERSTATE COMMERCE ACT**

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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 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,” FERC considers whether the product is:
 - Liquid
 - Hydrocarbon
 - 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).
- Ethane?

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?

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
- A pipeline may also file a petition for declaratory

What is Pipeline Transportation?

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?

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 blending?
- What if the charge for the service is published in the pipeline's tariff – does that make the service jurisdictional?

What is Interstate Transportation?

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”

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?

INTERSTATE VS INTRASTATE

- In general, interstate transportation subject to FERC's jurisdiction occurs when oil is transported by common carrier pipeline from one State or Territory of the United States to any other State or Territory of the United States, or across an international boundary of the United States.
- If the overall movement involves multiple transportation carriers or segments, some of which are wholly within a single state, then determination of whether the pipeline movement is interstate or intrastate turns on the "essential character of the commerce".

What Is Interstate Transportation?

“ESSENTIAL CHARACTER OF THE COMMERCE”

- (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 from storage.

“These things, it is believed, are basically sufficient to establish that the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased.” Interstate

OTHER FACTORS CONSIDERED

In analyzing whether a particular movement is interstate or intrastate, the Commission may evaluate the following factors:

- whether the various components of transportation (ocean and inland) are arranged for separately,
- the character of the billing (whether local or through),
- whether the owner of the product has the power to divert the shipment after the initial movement has begun,
- the passing of title during transportation,
- the breaking of bulk,
- commingling of the commodity shipped with other shipments of the same commodity,

What Is Interstate Transportation?

- The Commission has previously found that “[n]o single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character of the shipment.” Hence it is the overall weight of these factors that ultimately determine intent and the “essential character of the commerce.”

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 TEPSCO*

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.

Relevant Cases

RELEVANT CASES

Oil

- 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)
- Ethane: *Williams Olefins Feedstock Pipelines, L.L.C.*, 145 FERC ¶ 61,303 (2013)
- Denatured Ethanol: *Palmetto Products Pipe Line LLC*, 151 FERC ¶ 61,090 (2015)

RELEVANT CASES

Transportation

- 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)

RELEVANT CASES

Transportation (cont'd)

- 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)
- Blending: *Colonial Pipeline Company*, 162 FERC ¶ 61,158 (2018)

RELEVANT CASES

Interstate

- 49 U.S.C. § 1
- *Interstate Energy Company*, 32 FERC ¶ 61,294, at 61,690 (1985)
- *Northville Dock Pipe Line Corp.*, 14 FERC ¶ 61,111, at 61,206 (1981)
- *Department of Defense v. Interstate Storage and Pipeline Co.*, 353 I.C.C. 397, 407 (1977)
- *Guttman Energy, Inc. v. Buckeye Pipe Line Company, L.P.*, 147 FERC ¶ 61,088 (2014), *order on reh'g*, 149 FERC ¶ 61,103 (2014), *order on Initial Decision*, 161 FERC ¶ 61,180 (2017)
- *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)

RELEVANT CASES

Common Carrier

- *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)