

DETERMINING THE JURISDICTIONAL STATUS OF NGL PIPELINE TRANSPORTATION SERVICE

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As the production of natural gas liquids (“NGLs”) has increased during the last five years – rising almost 40 percent from 2006 to 2012 – existing pipeline transportation infrastructure has proven inadequate to handle these increased volumes of NGLs. The industry has responded to the need for NGL infrastructure investment in a variety of ways: by expanding existing NGL pipelines, repurposing pipelines that currently are idled or being used to transport other commodities, reversing existing lines, and constructing new greenfield pipelines. As the investment required for these NGL pipeline projects is significant and the demand for NGL transportation service is high, understanding the jurisdictional status of NGL pipeline transportation service and the regulatory implications of that status is imperative to pipeline owners and NGL producers alike. This article provides an overview of the jurisdictional question and examines the factors that are used in determining whether a NGL pipeline’s transportation service will be subject to federal jurisdiction.

The statute relevant to the federal jurisdictional analysis is the Interstate Commerce Act of 1887 (“ICA”), which is administered by the Federal Energy Regulatory Commission (“FERC” or “Commission”). Broadly, the ICA applies to common carriers engaged in the transportation of oil by pipeline from one state or territory of the United States to any other state or territory or through the United States to or from a foreign country. Thus, whether NGL pipeline transportation service is subject to regulation by the FERC pursuant to the ICA (rather than subject to regulation by the Surface Transportation Board or a state commission or subject to common law principles of common carriage) hinges predominantly on the following three factors: (1) whether the product being transported is a commodity covered by the ICA;

(2) whether the pipeline transportation service is “common carriage” transportation service; and
(3) whether the pipeline transportation service is in interstate commerce. Together, these factors provide an analytical framework for determining whether a particular pipeline’s transportation service is subject to regulation by the FERC. However, while these factors serve as the skeletal structure for a jurisdictional analysis, the process of determining whether a pipeline’s transportation service is subject to the FERC’s jurisdiction is a complex inquiry that can be impacted by many factors that are outside the scope of this article.

A. Is the commodity being transported covered by the ICA?

By its terms, the ICA applies to common carriers engaged in the transportation of “oil” by pipeline. While the ICA’s statement of its scope appears clear, the exercise of FERC’s jurisdiction over a particular pipeline’s transportation service turns on whether a particular commodity is considered “oil.” The latent ambiguity in the term “oil” is evidenced by the FERC’s issuance of several decisions addressing what “oil” is under the ICA. In analyzing the question of whether a particular commodity qualifies as “oil” under the ICA, FERC’s fundamental point of inquiry is whether the commodity may be used for fuel or energy purposes and/or may impact energy markets. FERC has determined that if the energy markets are not impacted by the sale or pipeline transportation of the commodity, and the commodity neither competes with gas or oil for heating use nor competes with oil or gas for capacity in the same pipeline facilities, then it should not fall under FERC’s jurisdiction.

While the FERC periodically has taken other factors into consideration in its analysis, it has consistently applied this “energy purpose” framework in cases addressing whether a particular commodity falls within the ICA’s definition of “oil.” To date, the FERC has ruled that anhydrous ammonia, ethylene, polymer grade propylene and chemical grade propylene are not used for energy purposes, resulting in the transportation of these commodities by pipeline not

being subject to regulation by FERC under the ICA. Conversely, the FERC has found that oil, certain NGLs, and refined petroleum products are “oil” within the meaning of the ICA.

While it is well-established that liquid-state raw mix NGLs (typically consisting primarily of methane, ethane, propane, and butane) are “oil” within the meaning of the ICA, there is a pending question at FERC as to the jurisdictional status of the transportation of purity ethane by pipeline. Williams Olefins Feedstock Pipelines, L.L.C. (“Williams”) recently filed a Petition for Declaratory Order (“PDO”) seeking a determination from FERC that its proposed Williams Bayou Ethane Pipeline project is not subject to FERC’s ICA jurisdiction.¹ In its PDO, Williams argues that the purity ethane that will be transported by the pipeline will not serve any fuel or energy purpose, and its only commercial application is as a petrochemical feedstock. Williams further claims that ethane’s naturally-occurring high Btu content makes it unsuitable for fuel purposes without cost-prohibitive processing, and the Williams’ distribution systems used to deliver purity ethane are configured in such a manner as to deliver ethane feedstock to petrochemical plants, not to “enterprises where the product could be utilized as fuel.”²

The FERC has not yet ruled on the Williams PDO, and it is not clear how FERC will rule. In addition to considering the facts and analyses raised by Williams, the FERC will likely consider other seemingly contradictory factors—*i.e.*, despite its high Btu content, ethane can be used for energy purposes; ethane could, under the appropriate circumstances, be used as fuel and thus compete with gas or oil; the transportation options for ethane could affect energy markets (for example, ethane transported with methane in natural gas pipelines, ethane transported in ethane-propane mix, ethane transported as part of liquid-state raw mix NGLs, etc.); the FERC

¹ See *Petition for Declaratory Order of Williams Olefins Feedstock Pipelines, L.L.C.*, Docket No. OR13-29 (Aug. 6, 2013).

² PDO at 3.

has issued several orders implying that the transportation of ethane by pipeline is within its jurisdiction.

B. Is the NGL pipeline offering common carrier service?

By its terms, the ICA applies only to “common carriers,” *i.e.*, not contract or private carriers, but carriers that hold themselves out to provide liquids transportation service upon reasonable request. Subject to a very limited exception for private carriers, interstate liquids pipelines are mandated by the ICA to provide common carriage service upon reasonable request.³ As the FERC has explained, “‘Common Carrier’ for the purpose of the [ICA] is not limited only to common carrier[s] for hire but rather encompasses all pipeline carriers.”⁴ Thus, the analysis of whether an interstate NGL pipeline is providing common carrier service typically is limited to a determination of whether the narrow exception, known as the “Uncle Sam” exception, applies.

Under the “Uncle Sam” exception, a pipeline that draws production from its own wells across a state line to its own refinery for its own use is a private pipeline that is not providing FERC jurisdictional service under the ICA.⁵ While the federal courts and the FERC have broadly defined “common carrier” as it relates to liquids pipelines, they have narrowly construed the “Uncle Sam” exception. The Supreme Court has held that a pipeline may not qualify for the “Uncle Sam” exception even if the pipeline owns all of the oil flowing through its pipeline, ruling that the ICA was intended to cover “those [oil pipelines] who were common carriers in substance even if not in technical form.”⁶ The Supreme Court similarly held in another case that

³ See *United States v. Ohio Oil Co.*, 234 U.S. 548 (1914); *United States v. Champlin Ref’g Co.*, 341 U.S. 290, 295 (1951) (“*Champlin II*”).

⁴ *Sinclair Oil Corp.*, 4 FERC ¶ 62,026, at 63,032 (1978).

⁵ *The Pipeline Cases*, 324 U.S. 548, at 562 (1914).

⁶ See *Valvoline Oil Co. v. United States*, 308 U.S. 141, 145 (1939) (quoting *The Pipeline Cases*, 324 U.S. at 560).

a pipeline transporting its own oil from its refinery to its storage tanks was a common carrier because the pipeline's ultimate goal was to move its product to market, rather than to use the oil for its own manufacturing purposes.⁷ The FERC subsequently followed the Supreme Court's rationale, finding that a pipeline was a common carrier because other producers were connected to the pipeline system, and the oil was delivered through facilities owned by other companies.⁸ In summary, pipelines that provide interstate transportation service generally are considered to be common carriers under the ICA, and exemptions from jurisdiction are rare and have been construed narrowly.

However, even if a pipeline does not qualify for the "Uncle Sam" exemption, the FERC may decline to exercise jurisdiction over the pipeline and grant a temporary waiver of the ICA's reporting and filing requirements to the pipeline's owner. While these waivers do not exempt these pipelines from FERC jurisdiction, they are designed to lessen the regulatory burden on interstate liquids pipelines when there appears to be little threat of monopolistic behavior because no third parties wish to use the pipeline. The FERC repeatedly has granted requests for temporary waivers of the filing and reporting requirements of Sections 6 and 20 of the ICA (49 U.S.C. app. §§ 6, 20) when (1) the pipeline or its affiliates own 100 percent of the throughput on the line; (2) there is no demonstrated third-party interest in gaining access to or shipping upon the line; (3) no such third-party interest is likely to materialize; and (4) there is no opposition to granting the waivers.⁹

Like most analyses under the ICA, the determination of whether to grant a waiver is a fact-driven inquiry, based on the unique circumstances of the pipeline at issue. For example, in

⁷ *Champlin Ref'g Co. v. United States*, 329 U.S. 29, 33-34 (1946).

⁸ *Hunt Refining Co. & East Mississippi Pipeline Co.*, 70 FERC ¶ 61,035, at 61,112 (1995).

⁹ *See, e.g., Whiting Oil and Gas Corp.*, 131 FERC ¶ 61,263 (2010).

Jayhawk, the FERC granted a waiver from the ICA’s filing and reporting requirements, noting that the pipeline was physically located entirely within a single state, had no intermediate connections, and currently carried only oil owned by the pipeline or its affiliates.¹⁰ Similarly, FERC granted a waiver to *Enbridge*, noting several unique physical characteristics of the line, including its (1) short length; (2) relatively small diameter; (3) lack of intermediate interconnections; and (4) location within the boundaries of a single state.¹¹ In granting the requested waiver, FERC also discussed the pipeline owner’s intentions, noting that the line was “constructed for the express purpose of moving the output of an Enbridge-owned processing plant to market” and carried only products owned by Enbridge’s affiliate. Finally, FERC looked at the intentions of potential third-party shippers and found that no one had requested to use the line and no one else was likely to request to use the line.

Even if a temporary waiver is granted, it does not change the regulated status of the line or eliminate the pipeline’s obligation to comply with other FERC requirements.¹² Indeed, the FERC has made clear that it will revoke a temporary waiver if the circumstances underlying the waiver change.¹³ When granting waiver requests, FERC has universally directed the pipeline companies immediately to report any such changes. For example, in *Sinclair Pipeline Company, LLC*, Sinclair was ordered to report “(1) increased accessibility of other pipelines or refiners to

¹⁰ *Jayhawk Pipeline, L.L.C.*, 128 FERC ¶ 61,079 (2009) (“*Jayhawk*”).

¹¹ *Enbridge Pipelines (NE Texas Liquids) L.P.*, 110 FERC ¶ 61,159 (2005) (“*Enbridge*”).

¹² *See, e.g., Sinclair Pipeline Co., L.L.C.*, 134 FERC ¶ 61,077, at PP 9-10 (2011) (“*Sinclair*”) (“[The pipeline] must maintain all books and records in a manner consistent with the Uniform System of Accounts for Oil Pipelines, 18 C.F.R. Part 352 (2010), and make such books and records available to the Commission or its duly authorized agents upon request.”)

¹³ *See id.*

its facilities; (2) changes in ownership of the facilities; (3) changes in the ownership of the crude oil shipped; and (4) shipment tenders or requests for service by any person.”¹⁴

C. When is pipeline transportation in “interstate commerce”?

By its terms, the ICA applies only to the transportation of products by pipeline from “one state or territory of the United States to any other state or territory or through the United States to or from a foreign country”—*e.g.*, interstate commerce. While at first glance this prong of the jurisdictional analysis would seem to be straightforward, it is often surprisingly complex and fraught with the potential for confusion and error.

In determining the jurisdictional nature of the transportation of liquids by pipeline, the crucial inquiry is whether the “essential character of the commerce” is interstate or intrastate.¹⁵ This analysis looks at the continuous movement of liquids product, which begins where actual product is tendered for shipment and ends where the product is finally delivered and thus comes to rest. Thus, unlike under the Natural Gas Act, the ICA does not have a jurisdictional exemption for gathering pipelines. The nature of this product movement as interstate or intrastate is determined not by the route the product travels through the pipeline, as one might expect, but by the “fixed and persisting intent” of the shipper as to the oil product’s final destination (absent a break in the interstate movement, as discussed below).

The determination of the “fixed and persisting intent” of the shipper is a fact-intensive inquiry that evaluates the evidence likely to demonstrate the shipper’s intent, including the final destination point for which a shipper has contracted—even if that point is beyond the terminus of the pipeline. Importantly, it is not by itself relevant to the jurisdictional analysis that the “continuous interstate movement” of the product may require multiple pipelines or even other

¹⁴ *Id.*

¹⁵ *Atlantic Coast Line R.R. Co. v. Standard Oil Co. of Kentucky*, 257 U.S. 257, 268 (1927).

modes of transportation, such as rail or barge. Further, that the movement in question may begin and end in one state is not determinative of the jurisdictional issue; if transportation by a pipeline that is located entirely within one state acts as a link in a larger interstate chain of movements, then it may still be subject to FERC's jurisdiction. The focus on the "fixed and persisting intent of the shipper" frequently confounds and frustrates pipeline owners, as it effectively places the determination of the jurisdictional status of a pipeline within the hands of shippers, rather than on the physical nature of the pipeline itself.¹⁶ In addition, this focus on the shipper may result in pipelines being required to file both interstate and intrastate tariffs for the transportation service between the same origin and destination pairs.

Despite its uniformly broad interpretation of "continuous interstate movement," the FERC has recognized that there can be a "break" in the interstate transportation sufficient to impact the jurisdictional analysis. Both the FERC and its predecessor, the Interstate Commerce Commission ("ICC"), have held that the act of processing oil product constitutes such a significant interruption in the flow of interstate commerce that it creates two distinct movements: (1) a movement of product to the place of processing and (2) a separate movement of product from the point of processing. Each movement must be separately analyzed to determine if either or both movements are interstate or intrastate in nature. Thus, although commingling of liquids in the pipeline during transportation does not alter the jurisdictional nature of the shipments, refining and processing can change the quality of the product enough to break the continuity of the movement in interstate commerce.

A similar "break" in the interstate transportation movement can occur when the oil product is placed in storage and blended such that the commercial value of the transported

¹⁶ See, e.g., *Northville Dock Pipe Line Corp.*, 14 FERC ¶ 61,111, at 61,206-09 (1981).

product is more or less than it was before the blending occurred. The ICC developed a three-part test to be applied in the storage context, and the FERC has adopted this test. The test involves an analysis of the following factors:(1) whether at the time of shipment there is a 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) whether the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) whether transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage. This test makes clear that the fact that the transportation may begin and end in one state is not dispositive of the jurisdictional issue.

D. What pipeline “services” are subject to the ICA?

Even after the fundamental question of whether the NGL pipeline’s primary transportation service is subject to FERC jurisdiction has been answered in the affirmative, further questions may arise regarding the scope of the regulated service—where does the pipeline’s ICA-jurisdictional transportation service begin and end? This question is of particular significance to pipelines that offer terminalling or storage services in addition to transportation services.

Under the ICA, a service is considered jurisdictional if that service is integral or necessary to the pipeline’s transportation function.¹⁷ This test is often framed as whether the carrier has a duty to provide the service or is providing the service merely as a matter of convenience to shippers, without which adequate transportation service could still be provided. This test is frequently used to analyze the jurisdictional status of storage or terminalling services. It considers a variety of factors, including whether the service occurs during or after the pipeline

¹⁷ See *Lakehead Pipe Line Co.*, 71 FERC ¶ 61,338, at 62,325 (1995) (“*Lakehead*”).

transportation, whether non-pipeline companies provide the same type of service, and whether the service is physically necessary for pipeline transportation.

The Commission has found breakout tankage service to be integral to the transportation function and thus subject to FERC's jurisdiction.¹⁸ For example, the storage service found to be jurisdictional in *Lakehead* was necessary and integral to the pipeline transportation service because it was breakout storage used at the point where the pipeline changed from a larger diameter system to a smaller diameter system, and the pipeline could not continue the movement of product between the different diameter lines without the use of the breakout tankage; thus, the storage was physically necessary for pipeline transportation.¹⁹ In *Mid-America Pipeline Co., LLC*, a FERC administrative law judge found storage service to be jurisdictional when it was used "to reduce the impact of periods where demand for pipeline transportation exceeds pipeline capacity ... by maximizing throughput and pumping capacity and allowing customers to have access to additional barrels during periods of high demand."²⁰

The FERC recently addressed the jurisdictional status of storage facilities at the end of a liquids pipeline system, finding that: (1) "jurisdictional transportation is completed when the product enters the terminal facilities" and (2) such facilities "are not integral or necessary to the transportation function."²¹ In making this ruling, FERC also noted: (1) that there were third-party terminalling facilities available at the end of the system and (2) that the industry norm is to

¹⁸ See, e.g., *Lakehead*, 71 FERC at 62,325 (distinguishing between particular ancillary services, which are not jurisdictional, and breakout services essential to complete a transportation system, which are jurisdictional); *Tipco Crude Oil Co. v. Shell Pipe Line Corp.*, 19 FERC ¶ 61,105, at 61,198 (1982) (finding storage service must be necessarily related to transportation before the pipeline can be required to include it in its FERC tariff).

¹⁹ *Lakehead*, 71 FERC at 62,325.

²⁰ *Mid-America Pipeline Co., LLC*, 124 FERC ¶ 63,016, at P 925 (2008) ("*Mid-America*"). The Commission did not rule on the initial decision and approved a settlement in the *Mid-America* proceeding on October 23, 2009. 129 FERC ¶ 61,061 (2009).

²¹ *TE Products Pipeline Co., L.L.C.*, 131 FERC ¶ 61,277, at P 12 (2010).

treat such facilities as non-jurisdictional.²² The FERC reiterated these rulings in *Tesoro Refining and Marketing Company*, declaring as non-jurisdictional Tesoro's proprietary spur lines and terminalling facilities located between Tesoro's refinery and third-party terminalling facilities at the end of an interstate pipeline system.²³ In both cases, FERC determined that the service was not physically necessary for pipeline transportation, occurred after pipeline transportation was complete, was also provided by non-pipeline companies, and was treated as non-jurisdictional by the industry.

E. Conclusion

In summary, the FERC and the federal courts have established guidelines for analyzing the issue of whether a particular NGL pipeline movement falls within the ambit of the ICA. However, the complexity of the required analyses makes the jurisdictional inquiry anything but a rote application of law to facts. Undertaking a comprehensive analysis to determine how these guidelines will be applied to a particular NGL pipeline movement—and the resulting regulatory implications—is essential before committing to a significant NGL infrastructure investment.

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²² *Id.*

²³ 135 FERC ¶ 61,116, at P 17 (2011).