

Presented:
6th Annual Gas and Power Institute

September 27 - 28, 2007
Houston, TX

The Gathering Exemption Under the Natural Gas Act

Michelle T. Boudreaux

Author contact information:
Michelle T. Boudreaux¹
Vinson & Elkins L.L.P.
Houston, TX

mboudreaux@velaw.com
713-758-4774

¹ This article is provided for general information purposes only, does not constitute legal advice, and expresses the views only of the author and not any other person or entity.

I. Introduction

Pursuant to the Natural Gas Act (“NGA”), the Federal Energy Regulatory Commission (“FERC” or “Commission”) has authority to regulate natural gas companies that provide natural gas pipeline transportation or storage services in interstate commerce.² The NGA also applies to natural gas companies engaging in interstate sales of “natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use” and to “the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.”³ However, Section 1(b) of the NGA exempts from FERC jurisdiction entities that perform a primary function of gathering.⁴ Although the concept of “gathering” is not defined in the NGA, entities that perform gathering service are generally pipelines that collect gas from wells and deliver such gas into interstate pipelines.⁵

Federal regulation of natural gas companies extends to such matters as: (1) rates, services, and terms and conditions of service; (2) the types of services the company may offer to its customers; (3) the certification and construction of new facilities; (4) the acquisition, extension, disposition or abandonment of facilities; (5) the maintenance of accounts and records; (6) the relationships with affiliated companies involved in certain aspects of the natural gas business; (7) the initiation and discontinuation of services; and (8) market manipulation in connection with interstate sales, purchases or transportation of natural gas.⁶ FERC-regulated natural gas companies are subject to a burdensome regulatory regime, and the FERC’s penalty authority pursuant to the Energy Policy Act of 2005 is significant.⁷ Accordingly, the distinction between FERC-regulated transportation and non-jurisdictional gathering is of vital importance.

Part I of this paper discusses the FERC’s tests for determining whether a facility’s primary function is gathering. In Part II, this paper addresses the circumstances under which the Commission might exercise jurisdiction over a gatherer affiliate of a FERC-regulated natural gas pipeline. Part III provides a discussion regarding the authority of the FERC and the Department of the Interior pursuant to the Outer Continental Shelf Lands Act (“OCSLA”) and addresses the recent rules proposed by the Minerals Management Service (“MMS”) with respect to open and non-discriminatory access to pipeline facilities on the Outer Continental Shelf (“OCS”).

² 15 U.S.C. § 717(b) (2000).

³ *Id.*

⁴ *Id.*

⁵ *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1076 (D.C. Cir. 2002).

⁶ 15 U.S.C. § 717 *et seq.*

⁷ Energy Policy Act of 2005, P.L. No. 109-58, 119 Stat. 594 (2005). The Energy Policy Act of 2005 amended the NGA and the Natural Gas Policy Act (“NGPA”) to give FERC authority to impose civil penalties for violations of these statutes of up to \$1,000,000 per day per violation for violations occurring after August 8, 2005.

II. Evolution of FERC's Gathering Tests

A. The Primary Function Test

Because the NGA does not define gathering and does not provide guidance as to how gathering and transmission facilities are to be distinguished, the FERC has struggled to create a clear standard for drawing distinctions between non-jurisdictional gathering and jurisdictional transmission facilities.⁸ The Commission currently uses the modified “primary function test” to determine whether facilities meet the criteria for gathering. In 1983, in *Farmland Industries, Inc.*, the Commission articulated the primary function test pursuant to which the Commission assesses several physical factors to determine whether a facility’s primary function is gathering.⁹ These physical factors, still considered today, are: (1) the diameter and length of the facility; (2) the location of compressors and processing plants; (3) the extension of the facility beyond the central point of the field; (4) the location of wells along the facility; (5) the geographic configuration of the facility; and (6) the operating pressure of the line.¹⁰

Under the modified primary function test, articulated in *Amerada Hess*, the Commission assesses certain non-physical factors in addition to the physical factors identified in *Farmland*.¹¹ Such non-physical factors include the “purpose, location and operation of the facilities, the general business activities of the owner of the facility, and whether the jurisdictional determination is consistent with the NGA and the NGPA”.¹²

The Commission has stated that a facility need not meet all of the listed criteria in order to be considered a non-jurisdictional gathering facility, and no single factor is determinative.¹³ In addition to the factors analyzed under the modified primary function test, the Commission will weigh “any and all other relevant facts and circumstances of a particular case, including non-physical criteria.”¹⁴ However, in making a gathering assessment, the Commission will give primary weight to the physical factors.¹⁵

⁸ *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 323 (D.C. Cir. 2006) (“[S]ince on any given route between the wells (upstream) and the final destination (downstream), various pipeline segments may be owned by different companies, it is no mean feat for the agency to determine which segments serve a gathering function and which do not. Faced with this reality and inundated with requests for jurisdictional clarification . . . , FERC has had trouble finding its footing.” (internal citations omitted)).

⁹ 23 FERC ¶ 61,063, at 61,143 (1983); *CenterPoint Energy Gas Transmission Co.*, 116 FERC ¶ 61,293, at P 20 (2006).

¹⁰ *Farmland*, 23 FERC at 61,143; *Jupiter Energy Corp. v. FERC*, 407 F.3d 346, 348 (5th Cir. 2005).

¹¹ *Amerada Hess Corp.*, 52 FERC ¶ 61,268, at 61,988 (1990).

¹² *Jupiter Energy*, 407 F.3d at 349; *CenterPoint Energy*, 116 FERC at P 21; *El Paso Natural Gas Co.*, 97 FERC ¶ 61,217, at 61,958 (2001).

¹³ *Jupiter Energy*, 407 F.3d at 349; *CenterPoint Energy*, 116 FERC at P 21.

¹⁴ *Colorado Interstate Gas Co.*, 101 FERC ¶ 61,377, at P 17 (2002).

¹⁵ *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997); *Straight Creek Gathering, L.P.*, 117 FERC ¶ 61,005, at P 12 (2006).

1. Length and Diameter of the Facility

The FERC will consider the length and diameter of the facility in determining whether the facility performs a gathering function. However, the FERC has found relatively long and large-diameter pipelines to be gathering facilities.¹⁶ For example, the Commission recently identified as a gathering facility a system consisting of 103.4 miles of pipeline, including 84.43 miles of 20-inch pipe.¹⁷ The Commission also recently determined that a 60-mile, 20-inch diameter backbone pipeline served a gathering function.¹⁸ Accordingly, pipelines that are long and large-diameter can nonetheless be considered gathering facilities depending on the FERC's assessment of the other factors that comprise the primary function test.

2. Processing Plants

Recent orders have found that wet, non-pipeline quality gas to be delivered for downstream processing is another factor that suggests a gathering function.¹⁹ Indeed, the Commission has consistently held that facilities located upstream of processing plants are non-jurisdictional gathering facilities,²⁰ and the processing of gas prior to its being delivered into an interstate system is indicative of gathering rather than transmission.²¹

However, the Commission generally views facilities located downstream of processing plants to be transmission facilities. For example, in 2005, Rendezvous Gas Services, L.L.C. ("Rendezvous"), proposing to construct and operate a 20.8 mile, 20-inch diameter natural gas pipeline, argued that the pipeline could reasonably be considered a non-jurisdictional gathering facility.²² The proposed pipeline would transport natural gas from the outlet of a natural gas processing plant to an interconnection with the facilities of an interstate natural gas pipeline.²³ Rendezvous had approximately 105 miles of gathering operations that extended to the processing

¹⁶ See, e.g., *CenterPoint Energy*, 116 FERC at P 22 (noting that "there are gathering lines . . . that have diameters as large as these facilities' 16-inch and 20-inch segments"); *Colorado Interstate Gas Co.*, 101 FERC at P 2 n.2 (granting gathering status to 102 miles of certificated pipeline facilities ranging in size up to 24 inches); *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,115, at 61,441 (2001) (stating in an offshore context that "[e]ven the 30-inch line does not necessarily denote a transmission function" where large amounts of raw gas are collected from numerous wells), *on reh'g*, 97 FERC ¶ 61,296 (2001); *Tennessee Gas Pipeline Co.*, 89 FERC ¶ 62,040, at 64,055-57 (1999) (finding a gathering function respecting 61 miles of 12-inch diameter pipe and 46 miles of 16-inch diameter pipe); *Williams Natural Gas Co.*, 75 FERC ¶ 61,128, at 61,433 (1996) (classifying as gathering a pipeline segment up to 26 inches in diameter).

¹⁷ *El Paso Natural Gas Co.*, 116 FERC ¶ 62,081, at 64,274 (2006).

¹⁸ *Straight Creek*, 117 FERC at P 13.

¹⁹ See *Southern Star Central Gas Pipeline, Inc.*, 116 FERC ¶ 61,288, at P 37 (2006) ("We do not find it dispositive of the jurisdictional status of the Mulhall Line that the gas entering the line will have been processed in the field since the processing is not sufficient to bring the gas to pipeline quality. The gas must be further processed before it is delivered to Southern Star's system."); *El Paso Natural Gas Co.*, 116 FERC at 64,274.

²⁰ *Transwestern Pipeline Co.*, 115 FERC ¶ 62,189, at 64,860 (2006); *Ozark Gas Transmission, LLC*, 101 FERC ¶ 61,205, at P 20 (2002).

²¹ *Straight Creek*, 117 FERC at P 20.

²² *Rendezvous Gas Servs., L.L.C.*, 113 FERC ¶ 61,169, at P 1 (2005).

²³ *Id.*

plant.²⁴ According to Rendezvous, the proposed line was designed “to connect the gathering systems of Rendezvous and its owners with the Kern River pipeline system as a new delivery point to increase the competitiveness of their gathering services by increasing market options for their gathering customers.”²⁵

The Commission, discounting the stated purpose of the proposed line and the status of the owner, found that the line would be a jurisdictional transmission facility. The Commission stated:

[T]he critical and overriding factors in our determination of the line’s primary function are the location of the proposed line downstream of the processing plant, the configuration of the proposed line as a single line from the plant to a jurisdictional interstate pipeline, and the absence of any specific plans for the construction of feeder gathering lines to interconnect with the proposed pipeline. Further, the record contains no evidence of untapped production along the proposed line.²⁶

In an order issued this summer, the Commission found that a 10.9-mile natural gas pipeline served a jurisdictional transportation function, despite the fact that the Commission had issued a determination in 1990 that the line served a non-jurisdictional gathering function.²⁷ According to the Commission, when the Commission issued its jurisdictional determination in 1990, the pipeline facilities were used to transport gas upstream of a processing plant.²⁸ However, subsequently, the company changed the direction of flow on a portion of the line in order to connect the processing plant to an interstate natural gas pipeline.²⁹ From that time, the line was used to deliver residue gas from the plant tailgate to an interconnection with an interstate pipeline.

In finding the line to be a jurisdictional transmission facility, the Commission discounted the argument that the flow direction change occurred prior to the Commission instituting a more restrictive policy toward treating facilities downstream from processing plants as non-jurisdictional gathering lines.³⁰ The FERC noted that, once the more restrictive policy had been issued, the owner of the line “could no longer reasonably rely on the Commission’s prior determination of non-jurisdictional gathering status When the direction of gas flow on those facilities was reversed so that gas started being transported downstream of the . . . [p]lant,

²⁴ *Id.* at P 8.

²⁵ *Id.* at P 9.

²⁶ *Id.* at P 18.

²⁷ *Western Gas Resources, Inc.*, 119 FERC ¶ 61,308, at PP 1, 5 (2007).

²⁸ *Id.* at P 5.

²⁹ *Id.*

³⁰ *Id.* at P 12.

there was a material change in the facts upon which the Commission's prior findings had been based."³¹

In *Rendezvous*, the Commission noted that, when facilities downstream of a processing plant are "incidental to a plant's operations," such facilities may be considered non-jurisdictional gathering facilities.³² Facilities that qualify for this exception are generally short stub lines located at the tailgate of a processing plant that function to connect the plant tailgate with a transmission system.³³

While the location of processing plants relative to the facilities at issue is an important factor with respect to onshore facilities, this factor is given less weight with respect to offshore facilities, as discussed below.

3. Operating Pressure

The Commission also assesses the operating pressure on the line in determining whether a facility serves a gathering function, and the lack of compression on a system is also indicative of a gathering function.³⁴ In *ANR Pipeline Company*, for example, the Commission assessed in an onshore context whether facilities with operating pressures from 780 psig to 1050 psig could still indicate a gathering function.³⁵ According to the Commission "While these pressures are higher, they are a consequence of the higher wellhead pressures common to these fields. These pressures are indicative of a gathering function."³⁶ The FERC also addressed operating pressure in *Rendezvous*. Specifically, the FERC noted that the maximum operating pressure of the proposed line, 1440 psia, was unusually high, but would not preclude a gathering designation because the pressure would be a function of the outlet pressure of the plant necessary to deliver gas to the interconnecting pipelines.³⁷ However, the FERC further noted that this high pressure "would not be conducive to connecting feeder lines to wells along the route."³⁸ Accordingly, in *Rendezvous*, the facts surrounding the operating pressure of the proposed line also aided the FERC in determining that the facility in *Rendezvous* served a transmission function.

³¹ *Id.* at P 13.

³² *Rendezvous Gas Servs., L.L.C.*, 113 FERC ¶ 61,169, at P 9 (2005).

³³ *Id.*

³⁴ *See, e.g., Mardi Gras Pipeline, L.L.C.*, 116 FERC ¶ 62,152, at 64,481 (2006).

³⁵ 76 FERC ¶ 61,153, at 61,914 (1996).

³⁶ *ANR Pipeline*, 76 FERC at 61,914. *See also El Paso Natural Gas Co.*, 116 FERC ¶ 62,081, at 64,274 (2006) ("The operating pressure of the system-approximately 850 psig-will be driven by production pressures in the area and, as such, is not inconsistent with a gathering function."); *El Paso Natural Gas Co.*, 72 FERC ¶ 61,220, at 62,012 (1995) ("The six gathering systems in the Anadarko Basin range anywhere from 300 to 1,000 psig because of the higher gathering system pressures resulting from the high pressure reservoirs underlying the Anadarko Basin. Under these circumstances, the high operating pressures are not inconsistent with a gathering determination.").

³⁷ *Rendezvous*, 113 FERC at P 18.

³⁸ *Id.*

4. Central Point in the Field

The central point in the field test:

considers the location of the facilities in relation to the point where gas is delivered into a single pipeline for transportation. Any facilities located upstream of the central point are generally considered to be nonjurisdictional gathering facilities, while those facilities located downstream of this point are generally considered transmission facilities subject to Commission jurisdiction.³⁹

The “central point in the field” analysis “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.”⁴⁰

However, the Commission has clearly stated that “The primary function test’s ‘central point in the field’ factor has little significance where . . . processing plants exist, and the subject facilities are located upstream of the processing plant in a single production area.”⁴¹ Instead, where there are upstream processing plants, it is the processing plant that serves as the central point.⁴² Moreover, the Commission has held that “the central point in the field test will not generally apply” to a “backbone-type structure.”⁴³ As discussed in more detail below, the FERC has found the “central point in the field test” to be a key factor in determining whether an offshore facility serves a gathering function.

5. Location of Wells Along the Facility

According to the Commission the location of wells along the length of a line is indicative of gathering,⁴⁴ Further, the Commission has held that the location of a facility in a production area that is surrounded by other gathering lines supports a non-jurisdictional finding.⁴⁵ However, the “Commission has found the absence of wells directly connected to a pipeline would not necessarily prohibit a gathering determination where the facilities are located in a production area and operated along existing gathering sub-systems.”⁴⁶

³⁹ *El Paso Natural Gas Co.*, 57 FERC ¶ 61,186, at 61,648 (1991).

⁴⁰ *Straight Creek Gathering, L.P.*, 117 FERC ¶ 61,005, at P 14 (2006).

⁴¹ *CenterPoint Energy*, 116 FERC ¶ 61,293, at P 22 (2006).

⁴² *Straight Creek*, 117 FERC at P 14.

⁴³ *Florida Gas Transmission*, 75 FERC ¶ 61,289, at 61,931 (1996) (citing *Arkla Gathering Services Co.*, 67 FERC ¶ 61,257, at 61,867 (1994)).

⁴⁴ *Ozark Gas Transmission, LLC*, 101 FERC ¶ 61,205, at P 21 (2002); *ANR Pipeline*, 76 FERC at 61,913-14.

⁴⁵ *See, e.g., El Paso Natural Gas Co.*, 116 FERC ¶ 62,081, at 64,275 (2006); *Southern Star Central Gas Pipeline, Inc.*, 116 FERC ¶ 61,288, at P 33 (2006).

⁴⁶ *Southern Star Central Gas Pipeline, Inc.*, 116 FERC at P 41.

6. Geographic Configuration of the Facility

The Commission has described two geographic configurations that are characteristic of a gathering function: a web-like configuration and a spine-type (or backbone-type) configuration.⁴⁷ Recently, in *Straight Creek*, the Commission reiterated its general policy that larger, longer pipelines connected to smaller feeder lines can be indicative of a gathering function.⁴⁸ Further, the Commission has stated that the location of a system within a single state may sometimes be a geographic factor considered relevant by the Commission to a gathering determination,⁴⁹ although it is clear that the location of a facility in a single state is not determinative.⁵⁰

7. Additional Criteria

As noted above, in making its gathering determination, the Commission will consider on a secondary basis the general business activity of the facility owner.⁵¹ The Commission also assesses whether a jurisdictional determination as gathering is consistent with the objectives of the NGA and the NGPA.⁵² The Commission has considered improving infrastructure, enhancing competition, and providing additional supplies of gas to be consistent with the NGA and the NGPA.⁵³ In *Columbia Gas Transmission Corporation*, the Commission found that the company purchasing the facilities at issue in that case intended to invest in the facilities to improve their ability to accept additional local production. The Commission found the enhancement of the facilities to provide for increased natural gas receipts to be in the public interest. As noted above, assessment of these additional criteria is secondary to the physical factors articulated in *Farmland*.

B. The Primary Function Test as Applied to Offshore Facilities

The Commission's approach to determining whether a facility performs primarily a gathering function is somewhat different for offshore pipelines. Specifically, in *Amerada Hess*, the FERC stated that it would consider, "especially for offshore facilities, the changing technical and geographic nature of exploration and production."⁵⁴ According to the FERC:

[I]n applying the modified "primary function" test to OCS pipeline facilities the Commission will apply, in effect, a sliding scale which will allow the use of

⁴⁷ *ANR Pipeline Co.*, 76 FERC at 61,913. A "short, small diameter pipe that connects a few wells directly into the transmission system" has also been recognized as a gathering configuration. *Mardi Gras Pipeline, L.L.C.*, 116 FERC ¶ 62,152, at 64,481 (2006).

⁴⁸ *Straight Creek*, 117 FERC at P 13.

⁴⁹ *See, e.g., Mahue Construction Co.*, 94 FERC ¶ 61,118, at 61,449 (2001).

⁵⁰ *E.g., Western Gas Resources, Inc.*, 119 FERC ¶ 61,308 (2007).

⁵¹ *El Paso Natural Gas Co.*, 97 FERC ¶ 61,217, at 61,958 (2001).

⁵² *Columbia Gas Transmission Corp.*, 116 FERC ¶ 61,191, at P 44 (2006).

⁵³ *Straight Creek*, 117 FERC at P 18.

⁵⁴ *Amerada Hess Corp.*, 52 FERC ¶ 61,268, at 61,988 (1990).

gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area.⁵⁵

In *Sea Robin*,⁵⁶ the Commission reformulated the primary function test as applied to offshore facilities by “(1) adopting an additional analytical element applicable to systems that contain a centralized aggregation point; (2) adjusting the weight to be afforded the ‘behind-the-plant’ criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors, and; (3) focusing primarily on physical factors.”⁵⁷

Under the current test for offshore facilities, facilities located in deep water (a depth of 200 meters or more) are “presumed to be gathering facilities up to the point where they reach proximity to, or the point or points of interconnection with, the existing interstate pipeline grid.”⁵⁸ Downstream from that point (*i.e.*, as the facilities approach the shore), the facilities’ primary function is to be determined under the modified primary function test, as articulated in *Amerada Hess*, 52 FERC ¶ 61,268 (1990).⁵⁹ Under the modified offshore test, the Commission no longer looks to the “behind-the-plant” concept as determinative of the gathering question.⁶⁰ Instead, the Commission looks to the offshore system’s configuration to locate a central point where gas is aggregated for transportation onshore to determine the demarcation between gathering and transportation.⁶¹

III. FERC’s Regulation Over Natural Gas Gathering Affiliates of FERC-Regulated Natural Gas Companies

Although natural gas gathering facilities are generally exempt from FERC jurisdiction, there are some circumstances under which the FERC has nonetheless asserted its jurisdiction over gathering entities that would otherwise be considered non-jurisdictional. In *Arkla*, while stating that gathering affiliates of interstate pipelines are generally exempt from FERC jurisdiction pursuant to the NGA, the Commission found that:

if an affiliated gatherer acts in concert with its pipeline affiliate in connection with the transportation of gas in interstate commerce and in a manner that frustrates the

⁵⁵ *Id.*

⁵⁶ *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384 (1999), *aff’d*, *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002).

⁵⁷ *Jupiter Energy*, 407 F.3d at 349; *Transcontinental Gas Pipeline Corp.*, 97 FERC ¶ 61,296, 62,380 (2001).

⁵⁸ *Sea Robin*, 87 FERC at 62,427 (citing *Gas Pipeline Facilities and Services on the Outer Continental Shelf – Issues Related to the Commission’s Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, Docket No. RM96-5-000, Policy Statement, 74 FERC ¶ 61,222 (1996)).

⁵⁹ *Sea Robin*, 87 FERC at 62,248.

⁶⁰ *Id.* According to the Commission, “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.” *Id.*

⁶¹ *Id.*

Commission's effective regulation of the interstate pipeline, then the Commission may look through, or disregard, the separate corporate structures and treat the pipeline and gatherer as a single entity, i.e., a single natural gas company. In so doing, the Commission would regulate the gathering activities as it would if the gathering facilities were owned directly by an interstate pipeline.⁶²

In *Arkla*, the Commission provided several examples of actions that might result in the assertion of jurisdiction over an interstate natural gas pipeline's gathering affiliate, including: (1) tying gathering service to the jurisdictional transmission service of the pipeline; (2) providing transportation discounts only to customers that utilize the affiliate's gathering service; and (3) taking actions that result in cross-subsidization between the pipeline's transportation rates and the affiliate's gathering rates.⁶³

On appeal, the D.C. Circuit affirmed the Commission's view that it generally lacks jurisdiction over natural gas gathering affiliates of NGA-jurisdictional pipelines but stated that it would not speculate as to the circumstances under which the Commission could justifiably assert such jurisdiction.⁶⁴ The court did conclude that, "as a conceptual matter, the Commission's position is not internally contradictory."⁶⁵

However, in 2004, the D.C. Circuit evaluated the FERC's attempt to assert jurisdiction over an interstate natural gas pipeline's gathering affiliate and set aside the FERC's decision.⁶⁶ The court found that the *Arkla* test was not met by a finding that the gatherer had charged "an exorbitant gathering rate . . . and . . . attached anti-competitive conditions to its gathering service"⁶⁷ The court reasoned that the gatherer was able to engage in these practices "because it was a recently deregulated monopolist" and not because of its status as an affiliate of an interstate pipeline.⁶⁸ Indeed, the court found that the gatherer's ability to charge high gathering rates and to attach anti-competitive conditions to its gathering service would exist regardless of the gatherer's relationship with the interstate pipeline.⁶⁹

In response to the court's decision in *Williams Gas Processing*, the Commission issued a Notice of Inquiry in September of 2005 to determine whether to modify the criteria articulated in *Arkla*.⁷⁰ In February of 2007, the FERC declined to modify its current policy with respect to affiliated gatherers, but clarified the criteria it will use for determining whether to assert jurisdiction over gathering affiliates of interstate natural gas pipelines. In its February Order, the

⁶² *Arkla Gathering Services Co.*, 67 FERC ¶ 61,257, at 61,871 (1994).

⁶³ *Id.*

⁶⁴ *Conoco*, 90 F.3d at 547-49.

⁶⁵ *Id.* at 549.

⁶⁶ *Williams Gas Processing – Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1343 (D.C. Cir. 2004).

⁶⁷ *Id.* at 1342.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1342-43.

⁷⁰ *Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, 118 FERC ¶ 61,114, at P 1 (2007) ("February Order").

FERC, finding authority in Sections 4(a) and 5(a) of the NGA,⁷¹ reiterated that it reserves the right to exert jurisdiction over an interstate natural gas pipeline's gathering affiliate to the extent necessary to preserve the Commission's mandates under the NGA.⁷²

According to the Commission, it can assert jurisdiction over gathering affiliates of NGA-regulated pipelines "when (1) the gatherer has used its market power over gathering to benefit the pipeline in its performance of jurisdictional transportation or sales service and (2) that benefit is contrary to the Commission's policies concerning jurisdictional services adopted pursuant to the NGA."⁷³ However, it is clear that an affiliated gatherer's abuse of its market power over gathering to its own benefit is not alone sufficient to justify an assertion of jurisdiction.⁷⁴ In order to justify an assertion of jurisdiction over an affiliated gatherer, the Commission need not find that the gatherer acted in concert with the pipeline's gathering affiliate.⁷⁵ Similarly, even if a gatherer and its affiliated FERC-jurisdictional pipeline engage in "concerted action," if that concerted action does not frustrate the purposes of the NGA, an assertion of jurisdiction over the affiliated gatherer would not be appropriate.⁷⁶

The Commission has provided examples of the type of conduct by an affiliated gatherer that could justify the assertion of jurisdiction.⁷⁷ Specifically, the assertion of jurisdiction over an affiliated gatherer would be appropriate if the gatherer refuses to provide gathering service or charges higher rates, unless the shipper enters into a long-term firm transportation contract with the gatherer's affiliated pipeline.⁷⁸ The Commission also found that it could assert jurisdiction

⁷¹ Section 4(a) of the NGA provides that "[a]ll rates and charges made, demanded, or received by any natural gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable. 15 U.S.C. § 717c (emphasis added). Section 5(a) of the NGA provides: "Whenever the Commission . . . find[s] that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . ." *Id.* at § 717d (emphasis added).

⁷² February Order at P 36.

⁷³ February Order at P 51.

⁷⁴ February Order at PP 51, 54-56. *See also Williams Gas Processing – Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1342 (2004). The Commission has recognized that remedies for such abuses of market power, if any, lie with the states (for gathering service performed onshore or in state waters) and with the Department of the Interior (for gathering service performed on the OCS). February Order at P 59.

⁷⁵ February Order at P 63. A finding of concerted action may provide additional support for the need for the assertion of jurisdiction over the activities of a pipeline's gathering affiliate. *Id.*

⁷⁶ February Order at P 68.

⁷⁷ The Commission has characterized these examples as anti-competitive tying arrangements, which the United States Court of Appeals for the District of Columbia Circuit has described as "conditioning the sale of a good or service on the purchase of another different (or tied) good or service." *Williams Gas Processing*, 373 F.3d at 1342. *See also Arkla*, 67 FERC ¶ 61,257, at 61,871 (1994).

⁷⁸ February Order at P 52. The Commission reasons that the criteria for the reassertion of jurisdiction is met in such a case because the Commission requires that pipelines accept a maximum bid for short-term service, absent a higher net present value bid for longer-term service. *Id.*

over an affiliated gatherer if the gatherer refuses service or charges a higher rate unless the shipper enters “into a long-haul transportation contract with the gatherer’s affiliated pipeline for the entire haul to the market area, rather than using an unaffiliated interconnecting pipeline to reach the market area.”⁷⁹

IV. Natural Gas Gathering Service on the Outer Continental Shelf

The open access requirements of the OCSLA apply even if a pipeline is not subject to the FERC’s jurisdiction under the Interstate Commerce Act (“ICA”) or the NGA and regardless of whether the service provider is operating under the authority of any permit or certificate issued by the FERC.⁸⁰ Accordingly, the OCSLA’s open access requirements apply to companies providing natural gas gathering services on the OCS.

A. The Power of the FERC and the Department of the Interior Under the Outer Continental Shelf Lands Act

Pursuant to Section 1334(e) of the OCSLA,

Rights-of-way through the submerged lands of the [OCS], whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary [of the Interior] for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary [of the Interior] . . . upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable⁸¹

While Section 1334(e) gives the Secretary of the Interior the power to impose open-access conditions with respect to the issuance of rights-of-way through the submerged lands of the OCSLA, to help achieve the OCSLA’s open access goal, Section 1334(e) grants FERC the “power to determine the proportions of oil, gas, or other minerals that each member of any relevant group of pipelines may be required to transport or purchase pursuant to those

⁷⁹ *Id.* The Commission reasons that this situation would “enable the pipeline to obtain a more profitable contract than it otherwise could, because, under the Commission’s open access requirements, pipelines must accept maximum rate bids for short-haul service, absent a higher net present value bid for long-haul service.” *Id.*

⁸⁰ *Shell Deepwater Development Inc.*, 97 FERC ¶ 61,216, at 61,943 (2001). See also *Alternative Methods for Regulating Natural Gas Pipeline Facilities on the Outer Continental Shelf*, 83 FERC ¶ 61,235 (1998) (noting that “these statutory provisions give the Commission certain responsibilities and authorization to ensure that natural gas pipelines on the OCS will be operated . . . in a nondiscriminatory manner,” that the FERC’s authority “is not restricted to interstate pipelines,” and that “[t]he only pipelines that may be exempt” are the feeder lines).

⁸¹ 43 U.S.C. § 1334(e) (2006).

conditions.”⁸² Section 1334(f) states that permits, easements, rights-of-way, licenses or other grants of authority for the transportation by pipeline of oil or gas on or across the OCS must require that the pipeline “provide open and nondiscriminatory access to both owner and nonowner shippers.”

The appellate courts have interpreted FERC’s authority under the OCSLA narrowly.⁸³ For example, in *Williams Gas Processing*, the D.C. Circuit found that the plain language of the OCSLA limits FERC’s authority under the OCSLA and does not give FERC general enforcement power with respect to the OCSLA’s open access provisions.⁸⁴ In *Williams*, the court found that the FERC exceeded its authority under the OCSLA by promulgating reporting regulations aimed at ensuring that OCS transportation of natural gas by pipeline would occur on an open and nondiscriminatory basis.⁸⁵ The *Williams* court further noted that neither Section 1334(e) nor Section 1334(f) of the OCSLA gives FERC “the authority . . . to constitute itself a general regulator of open access for oil and gas on the OCS”⁸⁶ The court concludes that FERC has a power to issue orders similar to “ratable take orders.”⁸⁷

There is very little precedent regarding the FERC’s power pursuant to the OCSLA. Moreover, it is not clear what precedential authority remains with respect to OCSLA-related cases decided by FERC before *Williams*, when the D.C. Circuit clarified the scope of FERC’s power. Indeed, some of the issues decided by the FERC in OCSLA-related cases prior to *Williams* appear to now be under the jurisdiction of the MMS, as discussed in more detail below.⁸⁸ However, a discussion regarding the FERC’s exercise of its authority pursuant to the OCSLA may nonetheless be instructive.

In 1988, in addressing Section 1334(e)’s “in such proportionate amounts” language in an order dealing with NGA jurisdictional pipelines on the OCS, the Commission stated:

Accordingly, based on the record before us, the Commission has concluded that it can and should implement the nondiscriminatory access mandate in section 5 of the OCSLA without generically imposing, by rule, a *pro rata* allocation scheme on all OCS pipelines. We believe that it may well be possible to remedy the problems of access on the OCS through less sweeping regulatory actions, as discussed below. If, however, access problems on the OCS continue to exist as OCS pipelines implement the requirements of this rule, the Commission will not

⁸² *The Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003) (“*Williams*”).

⁸³ *See, e.g., Williams Gas Processing – Gulf Coast Co. v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004).

⁸⁴ *Id.*

⁸⁵ *Williams*, 345 F.3d at 914-16.

⁸⁶ *Id.* at 914.

⁸⁷ *Id.* at 913-14. (citing Howard Williams & Charles J. Meyers, *Manual of Oil and Gas Terms* 613-14 (1981)).

⁸⁸ Indeed, in a recent Notice of Proposed Rulemaking, discussed below, the MMS noted that it “does not intend to necessarily base its determinations of reasonableness” on previous FERC decisions when deciding complaints alleging violations of the OCSLA’s open and non-discriminatory access requirements. *Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer continental Shelf Lands Act*, 72 Fed. Reg. 17,047 (April 6, 2007) (“MMS NOPR”).

hesitate to consider *pro rata* allocation of capacity on a case-specific basis, taking into account the specific factual context in which such problems arise.”⁸⁹

Thus, in Order No. 509, the Commission stated that it believed it had the legal authority under the OCSLA either (1) to require prorationing on the OCS or (2) to allow any allocation scheme that is acceptable for open access transportation onshore to be used on the OCS.⁹⁰ The Commission also required interstate gas pipelines operating on the OCS to accept open access certificates and to conduct open seasons to solicit users of any available capacity.⁹¹

In a crude oil context, the Commission has stated that the non-discrimination provision of the OCSLA “require[s] an allocation remedy only when demand exceeds capacity on an individual pipeline.”⁹² With respect to natural gas pipelines on the OCS that are not NGA jurisdictional, the Commission stated that it would consider appropriate measures for remedying discriminatory access on a case by case basis.⁹³

Although appellate court opinions addressing the FERC’s power under the OCSLA have interpreted FERC’s authority narrowly, certain exercises of OCSLA jurisdiction by the FERC have been upheld on appeal. For example, in 1995, the court upheld the FERC’s decision pursuant to its authority under the OCSLA to order an OCS pipeline to connect to a shipper’s facilities and to transport the shipper’s volumes over its system.⁹⁴ Further, also in 1995, the FERC stated that “[a]ny perceived violation of the OCSLA may be pursued through the submission of a complaint to the Commission describing the alleged violation.”⁹⁵

In 2000 and 2001, the FERC noted that the OCSLA’s ban on discrimination does not prohibit different rates or conditions of service for different customers.⁹⁶ While the NGA prohibits undue discrimination and the OCSLA merely requires “nondiscriminatory access,” the FERC found that the non-discrimination requirement of the OCSLA is not a higher standard than

⁸⁹ Order No. 509, Regulations Preambles, ¶ 30,842, at 31,272-73, 31,279, 31,283 (1988) (“Order No. 509”).

⁹⁰ Order No. 509 at 31,272, 31,279, 31,281-83. See also Order No. 509-A, Regulations Preambles, ¶ 30,848, at 31,334 (1989) (“Order No. 509-A”).

⁹¹ Order No. 509 at 31,274; Order No. 509-A at 31,343.

⁹² *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1198-99 (D.C. Cir. 1995).

⁹³ *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 328 (D.C. Cir. 1992).

⁹⁴ *Shell Oil Co. v. FERC*, 47 F.3d at 1190. The shipper had developed a new OCS production facility and had constructed a 70-mile pipeline from the wellhead to an interconnection point with the pipeline. *Id.*

⁹⁵ *Enron Gulf Coast Gathering Ltd. P’ship*, 95 FERC ¶ 61,318, at 62,099 (2001).

⁹⁶ *Murphy Exploration & Production Co.*, 93 FERC ¶ 61,079, at 61,215 (2000), *reh’g denied*, 94 FERC ¶ 61,174 (2001). In the MMS NOPR, the MMS noted that, while it may include comparability as an element in determining reasonableness when assessing whether certain conduct constitutes a violation of the OCSLA’s open and non-discriminatory access requirements, the MMS implied that the “comparability” standard would not be dispositive and may not be considered under all circumstances. MMS NOPR at p. 17,048.

that set forth in the NGA.⁹⁷ Indeed, “although the statutes use different terminology, as a practical matter, compliance with NGA regulations will satisfy the OCSLA standards.”⁹⁸

In 2003 and 2006, the Commission granted petitions for declaratory orders to proposed oil pipelines located solely on the OCS, stating that each such pipeline would be allowed to function as a contract carrier, hold an open season, enter into long-term transportation contracts reflecting contract carriage principles, give those contracts precedence in allocating capacity, and contract for capacity that remains available after the open season closes on a first-come, first-served basis.⁹⁹ The FERC’s decisions in these orders were based solely on the FERC’s authority under the OCSLA because the FERC found that these pipelines would not be subject to the FERC’s jurisdiction pursuant to the ICA.

While the scope of the FERC’s authority is not certain, it is clear that the FERC retains authority over NGA and ICA-jurisdictional facilities that provide service on the OCS. Moreover, the plain language of the OCSLA states that “oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable”¹⁰⁰ Thus, even with respect to non-jurisdictional natural gas gatherers, it is likely that the FERC has some authority with respect to the allocation of capacity.¹⁰¹ Finally, especially while the MMS’s proposed regulations, discussed below, regarding complaint proceedings are pending, it is likely that the FERC would view itself as having the authority to consider and decide complaints filed by OCS natural gas gathering customers that allege violations of the OCSLA’s open and non-discriminatory access requirements.

B. MMS’s Notice of Proposed Rulemaking Regarding Open and Non-Discriminatory Access to OCS Pipelines

In response to the D.C. Circuit’s decision in *Williams*, the MMS issued an Advance Notice of Proposed Rulemaking and Announcement of Public Meetings “to give the public and interested parties an opportunity to provide input to the MMS regarding what actions or processes the public and interested parties believe the Secretary [of the Interior] should initiate to

⁹⁷ *Murphy Exploration*, 93 FERC at 61,216.

⁹⁸ *Id.* As discussed below, the MMS appears to concur, presuming that FERC-regulated OCS pipelines provide open and non-discriminatory access. MMS NOPR at p. 17,050.

⁹⁹ *Enbridge Offshore Facilities, LLC*, 116 FERC ¶ 61,001 (2006); *Proteus Oil Pipeline Co.*, 102 FERC ¶ 61,333 (2003); *Caesar Oil Pipeline Co.*, 102 FERC ¶ 61,339 (2003).

¹⁰⁰ 43 U.S.C. § 1334(e) (2006).

¹⁰¹ *Caesar Oil Pipeline Co.*, 102 FERC at P 34 (quoting the OCSLA’s “proportionate amounts” provision). The Commission cites favorably to *Caesar* in *Enbridge Offshore Facilities*, 116 FERC at P 18, an order issued after the D.C. Circuit’s decision in *Williams*. The *Enbridge*, *Caesar*, and *Proteus* orders are especially instructive since non-jurisdictional OCS gatherers, like non-jurisdictional OCS oil pipelines, are subject to the FERC’s authority only pursuant to the OCSLA.

ensure that pipelines provide open and non-discriminatory access.”¹⁰² The MMS held public meetings to hear oral comments regarding this issue and received written comments as well.

According to the MMS, the D.C. Circuit’s decision in *Williams* made clear that it is the Secretary of the Interior who holds the authority to issue and enforce rules assuring open and non-discriminatory access with respect to OCS pipelines.¹⁰³ Thus, in April of 2007, the MMS proposed new regulations that would establish procedures for shippers transporting gas or oil production from Federal leases on the OCS to follow if such shippers believe they have been denied open and non-discriminatory access to OCS pipelines.

In crafting its NOPR, the MMS assumed that FERC-regulated pipelines provide open and non-discriminatory access; accordingly, the NOPR states that the MMS will defer to FERC with respect to pipelines regulated by the FERC under the NGA and the ICA.¹⁰⁴ Accordingly, the regulations that are ultimately adopted by the MMS will be of singular importance to companies that provide service that is not subject to the FERC’s jurisdiction, such as non-jurisdictional natural gas gatherers.

In the MMS NOPR, the agency proposed to make complaint procedures and informal alternative dispute resolution processes available to shippers alleging denial of open and non-discriminatory access to OCS pipelines in violation of the OCSLA.¹⁰⁵ The proposed rule would implement a non-refundable \$7,500 complaint processing fee¹⁰⁶ and would require complainants to quantify the financial burden or impact, if any, resulting from the pipeline’s action or inaction.¹⁰⁷ The MMS also proposed to establish a hotline that shippers can call to report the denial of open and non-discriminatory access.¹⁰⁸ According to the MMS NOPR, the hotline staff would gather information regarding the access dispute and would attempt to resolve the dispute without resort to formal complaint proceedings.¹⁰⁹ Alternative dispute resolution could also be requested through the hotline.¹¹⁰

Although the MMS expressly declined to adopt the type of reporting requirements that the FERC attempted to implement in Order Nos. 639 and 639-A, the proposed regulation would allow the MMS “to require any lessee, operator of a lease or unit, shipper, grantee, or transporter (whether it is a shipper or not) to provide additional information that MMS believes is necessary to make a decision on whether open access or nondiscriminatory access was denied.”¹¹¹ With

¹⁰² *The Open and Non-Discriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act*, 69 Fed. Reg. 19137-01, 19137-39 (April 12, 2004).

¹⁰³ MMS NOPR at p. 17,047.

¹⁰⁴ MMS NOPR at pp. 17,048, 17,050.

¹⁰⁵ MMS NOPR at pp. 17,047-48, 17,050-54.

¹⁰⁶ MMS NOPR at p. 17,051-54.

¹⁰⁷ MMS NOPR at p. 17,051.

¹⁰⁸ MMS NOPR at p. 17,049.

¹⁰⁹ MMS NOPR at p. 17,050.

¹¹⁰ *Id.*

¹¹¹ MMS NOPR at p. 17,054.

respect to pipelines constructed as part of a deepwater port, the MMS proposal makes clear that the provisions of the proposed rule “apply to all segments of the OCS pipeline, including those downstream of the interconnect point.”¹¹² However, the rules would not apply to pipelines that connect the deepwater port with the OCS pipeline.¹¹³

Proposed remedies for violations of the OCSLA’s open and non-discriminatory access requirement include ordering transporters and grantees to provide open and non-discriminatory access and assessing civil penalties up to \$10,000 per day (with penalties accruing 60 days after issuance of an order by the MMS ordering the violating pipeline to provide open and non-discriminatory access).¹¹⁴

In June of 2007, a number of entities filed comments in response to the MMS NOPR. Some commenters argued that the formal complaint process contemplated in the NOPR is contrary to the OCSLA, which expressly and exclusively confers such adjudication authority on the courts.¹¹⁵ Commenters generally supported the MMS’s decision to avoid expanding its approach to cover pipelines regulated by the FERC under the ICA or the NGA.¹¹⁶ Many commenters supported the MMS’s proposal to deal with complaints on a case-by-case basis and to use a fact-based, reasonableness standard in evaluating complaints.¹¹⁷ Some commenters urged that the non-discriminatory standard of the OCSLA should not be considered stricter than the undue discrimination standard set forth in the NGA.¹¹⁸ The Indicated Producers noted that pipelines should not be allowed to condition access to transportation service “on the potential shipper’s agreement to unreasonable rates, terms, and conditions of service.”¹¹⁹ Arena Energy, LLC (“Arena”) also expressed concern that the MMS did not attempt to define the circumstances under which a pipeline would be considered to have failed to provide open or non-discriminatory access.¹²⁰

A number of commenters requested that the MMS impose a time limit on the filing of complaints.¹²¹ The comments evidenced broad support for the MMS’s proposal to require

¹¹² MMS NOPR at p. 17,056.

¹¹³ *Id.*

¹¹⁴ MMS NOPR at p. 17,055.

¹¹⁵ Comments of the Williams Companies, Docket No. RIN 1010-AD17 at pp. 1-10 (June 5, 2007); Comments of DCP Midstream, LP to Notice of Proposed Rulemaking, Docket No. RIN 010-AD17 at pp. 3-4 (June 5, 2007) (“DCP Comments”).

¹¹⁶ *E.g.*, Comments of Enbridge Energy Partners, L.P. and Enbridge, Inc. Supporting the Proposed Rules, Docket No. RIN 1010-AD17 at pp. 4-6 (June 5, 2007); Comments of Shell Pipeline Company LP, Docket No. RIN 1010-AD17 at pp. 2-3 (June 5, 2007) (“Shell Comments”); Comments of Enterprise Products Partners L.P., Docket No. RIN 1010-AD17 at p. 12 (June 5, 2007) (“Enterprise Comments”); Comments of Indicated Producers, Docket No. RIN 1010-AD17 at pp. 17-18 (June 5, 2007) (“Indicated Producer Comments”).

¹¹⁷ *E.g.*, Enbridge Comments at pp. 4-6; Shell Comments at pp. 2-3; Enterprise Comments at pp. 2-3.

¹¹⁸ Indicated Producer Comments at pp. 22-23.

¹¹⁹ Indicated Producer Comments at p. 23.

¹²⁰ Comments of Arena Energy, LLC, Docket No. RIN 1010-AD17 at p. 5 (June 5, 2007).

¹²¹ Shell Comments at p. 4; Comments of Marathon Oil Company, Docket No. RIN 1010-AD17 at p. 2 (“Marathon Comments”); Enterprise Comments at p. 12; Indicated Producer Comments at pp. 10-11.

complaint filing fees, while some also rejected the need for the availability of fee waivers and reduction.¹²² However, the Producer Coalition argued that the filing fee should be eliminated altogether.¹²³

Of the many issues presented in the MMS NOPR, the issue of access to information generated significant interest. The Producer Coalition urged that the MMS institute procedures for discovery, for evidentiary hearings with the right of cross-examination, and for expedited consideration of complaints.¹²⁴ However, Enterprise Products Partners L.P. (“Enterprise”) argued that the MMS should provide parties to a complaint proceeding with the opportunity to challenge information requests on grounds of relevance, privilege, commercial sensitivity and/or burden.¹²⁵ According to Enterprise, in evaluating disputes regarding the provision of information, the MMS should balance the need for such information against the associated burden of production and the commercial risk of disclosure.¹²⁶ Shell noted that the MMS should use its authority to compel non-parties to provide information sparingly, while several commenters wholly opposed the MMS’s proposal to obtain information from non-parties.¹²⁷ Other commenters expressed support for the MMS’s authority to compel the production of information from non-parties.¹²⁸ One group of commenters urged the MMS to establish procedures for public notice of all complaints, for the opportunity for interested parties to intervene in complaint proceedings, and for the MMS to publish all orders issued in its formal complaint proceedings.¹²⁹ The Producer Coalition requested that the MMS require OCS pipelines to file periodic reports regarding rates and other terms of service to enable the detection and prosecution of discriminatory behavior contrary to the OCSLA.¹³⁰

Some commenters expressed reservations about the MMS’s proposal that a pipeline have only 60 days to remedy OCSLA access violations. Specifically, such commenters stated that 60 days may not be sufficient, especially if the MMS orders a remedy that requires the modification of facilities.¹³¹ DCP Midstream argued that the MMS should revise its regulations so that penalties for violations of the open and non-discriminatory access requirements of the OCSLA would begin to accrue 60 days after the MMS’s order “or 10 days after the facilities necessary for Shipper to deliver gas are in service, whichever is later, provided the transporter exercises reasonable diligence in the construction of any necessary facilities.”¹³² The Producer Coalition

¹²² *E.g.*, Shell Comments at p. 5-6; Marathon Comments at p. 2.

¹²³ Initial Comments of the Producer Coalition, Docket No. RIN 1010-AD17 at p. 2 (June 5, 2007) (“Producer Coalition Comments”).

¹²⁴ Producer Coalition Comments at pp. 1-2.

¹²⁵ Enterprise Comments at p. 3.

¹²⁶ Enterprise Comments at p. 10.

¹²⁷ *E.g.*, Shell Comments at p. 6; Marathon Comments at p. 3; Enterprise Comments at pp. 2-3.

¹²⁸ Indicated Producer Comments at p. 7.

¹²⁹ Indicated Producer Comments at p. 4.

¹³⁰ Producer Coalition Comments at p. 1.

¹³¹ Enterprise Comments at p. 11.

¹³² DCP Comments at pp. 5-6.

sought remedies more expansive than those proposed in the MMS NOPR, stating that a shipper should be eligible for monetary relief when there is a finding that the shipper has been denied open and non-discriminatory access to an OCS pipeline.

Some commenters also expressed concern regarding the scope of facilities to which the proposed regulation would apply. Specifically, the Indicated Producers requested clarification that the proposed rules would not apply to gathering lines operated in connection with FERC-regulated interstate natural gas pipelines.¹³³ One group of commenters supported the MMS's determination to limit the scope of the proposed rule to pipeline facilities providing transportation services and requested clarification that the proposed rules would not apply to producer facilities constructed under authority of such producers' oil and gas leases, including lease pipelines and production platforms.¹³⁴ Arena urged the Commission to "clarify that smaller-diameter lateral or 'feeder' pipelines that move gas only on behalf of their owners are exempt from the final open-access regulations issued by the MMS"¹³⁵ Arena reasoned that, under the proposed rules, any OCS pipeline moving gas or oil would be subject to the proposed rules, even if the pipeline only moves gas or oil on behalf of its producer owners with no fee charged and even if such movement is prior to the gas or oil entering a larger-diameter, third-party pipeline.¹³⁶

The MMS has not yet issued a final rule regarding open and non-discriminatory access to OCS pipelines. The FERC generally lacks jurisdiction over onshore natural gas gatherers and has not chosen to exercise its OCSLA authority over OCS gatherers.¹³⁷ Accordingly, although natural gas gatherers that are operating onshore or in state waters are subject to state regulation, OCS gatherers have largely been free of regulatory oversight. If the MMS adopts the regulations proposed in the NOPR, OCS gatherers will then be subject to MMS complaint procedures, which, though light-handed, could result in a greater regulatory burden for OCS gathering companies.

¹³³ Indicated Producer Comments at p. 17.

¹³⁴ Indicated Producer Comments at pp. 4-5, 13-14.

¹³⁵ Arena Comments at p. 1.

¹³⁶ Arena Comments at p. 4.

¹³⁷ Although the FERC has not been inclined to exercise its authority over natural gas OCS gatherers thus far, it is likely that the FERC would view itself as having the power to entertain complaints regarding open and non-discriminatory access with respect to OCS gatherers, especially prior to the MMS's implementation of its formal and informal complaint procedures.