

www.capitolconnection.org and click on "FERC."

For more information about the conference, please contact Sarah McKinley at (202) 502-8004 or sarah.mckinley@ferc.gov.

Magalie R. Salas,
Secretary.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM01-12-000 and RT01-95-000]

Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, New York Independent System Operator, Inc.; Notice of Technical Conference

August 15, 2003.

Take notice that a technical conference for the New York Independent System Operator, Inc. will be held on October 20, 2003, from approximately 1 p.m. to 5 p.m. Eastern Daylight Time at the offices of Consolidated Edison Company, 4 Irving Place, 19th floor auditorium, New York City, New York. Members of the Commission will attend and participate in the discussion. An agenda will be issued at a later time.

This conference is one in a series of regional technical conferences announced in the White Paper issued in Docket No. RM01-12-000 on April 28, 2003. The Commission intends to use these conferences to discuss with states and market participants in each region reasonable timetables for addressing wholesale market design issues and ways to tailor the final rule in this proceeding to benefit customers within the region.

The Commission is inviting selected panelists to participate in this conference; it is not entertaining requests to make presentations. Further details of the conference, including the agenda, will be specified in a subsequent notice. All interested persons may attend the conference, and registration is not required. However, in-person attendees are encouraged to register on-line at http://www.ferc.gov/whats-new/registration/smd_1020-form.asp

Transcripts of the conference will be immediately available from Ace Reporting Company (202-347-3700 or 1-800-336-6646) for a fee. They will be

available for the public on the Commission's eLibrary system seven calendar days after FERC receives the transcript. Additionally, Capitol Connection offers the opportunity to remotely listen to the conference via the Internet or a Phone Bridge Connection for a fee. Persons interested in making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703-993-3100) as soon as possible or visit the Capitol Connection Web site at <http://www.capitolconnection.gmu.edu> and clicking on "FERC."

For more information about the conference, please contact Sarah McKinley at (202) 502-8004 or sarah.mckinley@ferc.gov.

Magalie R. Salas,
Secretary.

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD03-13-000]

Application of the Primary Function Test for Gathering on the Outer Continental Shelf; Notice of Public Conference

August 14, 2003.

Take notice that on September 23, 2003, the Commission will convene a public conference in the above captioned proceeding. The purpose of the conference will be to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be.

The Commission has considered its offshore gathering policy a number of times in the past decade.¹ Nevertheless,

¹ See generally Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates—Issues Related to Rates and Terms and Conditions of Service, Docket No. RM94-4-000, Notice of Public Conference, 65 FERC ¶ 61,136 (1993); 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) (1996 Policy Statement); Chevron U.S.A., Inc. v. FERC, 193 F. Supp. 2d 54 (D.D.C., January 11, 2002), appeal pending sub nom. Williams Companies, et al. v. FERC, No. 02-5056 (DC Cir.) (appeal of district court ruling on motion that FERC did not have authority under the Outer Continental Shelf Lands Act (OCSLA) to issue regulations requiring gas service providers on the Outer Continental Shelf (OCS) to submit quarterly reports of services provided).

a satisfactory definition of gathering under the Natural Gas Act has remained elusive. A clear, consistent approach to offshore gathering is needed to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function.

Background

A. Evolution of the Primary Function Test

Although section 1(b) of the Natural Gas Act states that the provisions of that act do not apply "to the production or gathering of natural gas," the act itself does not define those terms. The Commission has defined gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line."² The Supreme Court has added that "production" and "gathering" are terms "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."³ These definitions have been useful in describing gathering as a concept. Nevertheless, as the courts have recognized, "the line between gathering and transportation is inherently elusive."⁴ Attempts to establish a functional test, useful in the context of specific proceedings, resemble the pursuit of a desert mirage. Historically, the tendency has been to announce a particular physical characteristic that could be used to identify nonjurisdictional gathering, only to substitute other criteria later to reflect changes in the industry or in the evolution of Commission policy.⁵ In

² *Lomax Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (DC Cir. 2000), quoting from *Barnes Transportation Company*, 18 FPC at 372 (1957). See also *Conoco, Inc. v. FERC*, 90 F.3d 536, 539 n.2 (DC Cir. 1996) ("Gathering is the process of taking natural gas from the wells and moving it to a collection point for further movement through the pipeline's principal transmission system.") (quoting *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)).

³ *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

⁴ *Exxon Mobil Gas Marketing Company v. FERC (Exxon)*, No. 00-1355 (DC Cir. August 6, 2002) (Judge Edwards dissenting) slip op. at 18, citing *Conoco, Inc. v. FERC* 90 F. 3d 536 at 542 (DC Cir. 1996).

⁵ For many years, the Commission employed two principal tests to differentiate (primarily onshore) transportation from gathering facilities. The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are non-jurisdictional gathering lines, while facilities downstream of the processing plant are presumptively transportation facilities. See *Phillips Petroleum Co.*, 10 FPC 246 (1951), rev'd in part on other grounds sub nom. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). For gas that

Farmland Industries, Inc.,⁶ the Commission identified a number of factors for consideration in analyzing the section 1(b) gathering test, and stated that “the ultimate test is whether the primary function can be classified as transportation or gathering.” The primary function test factors included:

- The length and diameter of a pipeline (longer and wider pipe indicating transportation);
- The central point in a field;
- The pipeline’s geographic configuration (a web-like pattern, for example, suggesting a gathering function)
- Location of compressors and processing plants (*i.e.*, the “behind the plant” test);
- The location of wells along all or part of the facilities (typically indicating gathering); and
- Operating pressure of a line, with higher pressure generally associated with the need to propel gas in a transportation function.

The primary function test has been relatively satisfactory for analyzing onshore facilities. Offshore, however, the test has proven more difficult to apply.⁷ Thus, in *EP Operating Co. v. FERC*, 876 F.2d 46, 48–49 (5th Cir. 1989), the Commission initially ruled that under the primary function test the offshore platform where initial gas treatment took place constituted a “central point in the field” where the gathering function was complete, and

required no processing, the “central-point-in-the-field” test applied, under which lateral lines that collect gas from separate wells before converging into a larger single line—typically at the point where the gas is compressed for transportation by the pipeline—were classified as gathering facilities. *E.g.*, *Barnes*, *supra*

⁶ 23 FERC ¶ 61,063 at 61,143 (1983). The Commission later added a number of “non-physical” criteria, including (1) the purpose, location and operation of a facility; (2) the business of the owner; (3) whether the jurisdictional determination is consistent with the objectives of the NGA and other legislation; and (4) the changing technical and geographic nature of exploration and production. *Amerada Hess Corp.*, 52 FERC ¶ 61,268 at 61,844–45 (1990). Under the primary function test, no one factor is determinative, nor do all factors apply in every situation. *See e.g.*, *Williams Field Services*, 194 F.3d at 116; *Farmland*, 23 FERC at 61,143.

⁷ As more new facilities were constructed offshore on the OCS, where the pattern of gathering and distribution differs, the applicability of the factors was questioned. Specifically, it is often not feasible to process raw gas on open water. As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a producing field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS, they construct relatively long lines to carry the raw gas from offshore platforms, where after production only rudimentary gas treatment takes place (primarily to remove water), to the shore or a point closer to shore where it can be processed into “pipeline quality” gas that can be transported by an interstate pipeline.

therefore the 51-mile long, 16-inch diameter OCS pipeline downstream of the platform at issue in that case was a jurisdictional transportation facility. The court reversed that finding, holding that while the length and diameter of pipeline facilities might indicate a transportation function onshore, those factors had less weight in the offshore context because of the longer distances between the point of production in deep water and the nearest connection with an interstate pipeline. The court further questioned the validity of a central-point-in-the-field analysis applied to unitary OCS structures.

In response, the Commission modified its primary function test for the OCS, stating that as drilling operations pushed further offshore from existing interstate pipeline connections, it would apply a sliding scale to allow for the increasing length and diameter appropriate for gathering lines in correlation to the distance from shore and the water depth of the offshore production area.⁸ Later, following a conference on offshore gathering in Docket No. RM96–5–000, the Commission issued a policy statement announcing that it would “presume facilities located in deep water [more than 200 meters] are primarily engaged in gathering or production.”⁹

As with onshore facilities, the use of the primary function test, as modified by the policy statement for deepwater facilities, seems to be workable, and there has been relatively little controversy concerning its application in recent years. Efforts to apply the primary function test to offshore facilities in the shallow OCS, however, have been contentious.

B. The Sea Robin Pipeline

Difficulties applying the primary function test to offshore facilities were highlighted by the Commission’s decision in *Sea Robin Pipeline Company (Sea Robin)*.¹⁰ *Sea Robin’s* offshore pipeline facilities were certificated as jurisdictional transmission facilities by the Commission in 1969. The system consists of 438 miles of pipeline that transports unprocessed gas from shallow water on the OCS to a processing plant onshore. The system is configured in the form of a “Y”. Along the two arms of the “Y”, 45 lateral lines with diameters ranging from 4.5 to 30 inches are connected to 67 receipt points located on production platforms,

or at subsea taps. Through those upstream arms, *Sea Robin* moves the gas to a manned platform with two turbine compressor units at the fork of the “Y” closer to shore. The bottom line of the “Y”, from the platform to shore, consists of 66.3 miles of 36-inch pipeline. Along this segment the gas is mingled with additional gas from four platforms.

In response to a request to reclassify the *Sea Robin* facilities from transmission to gathering, the Commission found that the primary function of *Sea Robin’s* entire system was and continued to be jurisdictional transportation. In reaching that conclusion, the Commission emphasized the length and size of *Sea Robin’s* pipeline, and also certain non-physical factors, such as the reliance of shippers in the original jurisdictional determination. The U.S. Court of Appeals for the Fifth Circuit remanded that decision.¹¹ In doing so the court said the Commission had relied too heavily on the size of *Sea Robin’s* system as a determinative factor and did not give enough consideration to the different nature of gathering on the OCS. The court also faulted the Commission for reliance on non-physical considerations, such as *Sea Robin’s* ownership and shipper expectations. The court specifically found that the Commission’s consideration of a “regulatory gap” in the absence of Natural Gas Act jurisdiction was inappropriate: “Need for regulation cannot alone create authority to regulate.”¹²

In its decision, the court suggested that the primary function test could be adapted to the operational characteristics of the OCS, so that portions of its system could be considered to be predominantly gathering and other parts predominantly transportation. On remand, then, the Commission adopted this suggestion and reformulated the primary function test to draw the jurisdictional line at an internal point on the *Sea Robin* system, at the junction of the “Y”.¹³ The Commission concluded that the part of *Sea Robin’s* pipeline facilities from the platform to shore was a jurisdictional transportation system. Upstream of that point the two legs of the “Y” formed a non-jurisdictional gathering system.

In reformulating its primary function test, the Commission concluded that the “behind-the-plant” factor is not

¹¹ *Sea Robin Pipeline Company v. FERC*, 127 F.3d 365 (5th Cir. 1997).

¹² *Id.* at 371.

¹³ *Sea Robin Pipeline Company*, Order on Remand, 87 FERC ¶ 61,384 (1999) (Comm. Bailey dissenting), rehearing denied, 92 FERC ¶ 61,072 (2000).

⁸ *See Amerada Hess*, 52 FERC at 61,988 (1990).

⁹ *See* 1996 Policy Statement, note 1 *supra*.

¹⁰ 71 FERC ¶ 61,351 (1995), reh’g denied, 75 FERC ¶ 61,332 (1996).

necessarily determinative of where gathering ends when applied to offshore facilities. In addition, the Commission announced that where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation on OCS systems.¹⁴

Although not all OCS pipeline systems exhibit such a centralized aggregation point, e.g., facilities with a straight-line or spine-and-lateral type configuration, the presence of such a location would be considered the offshore analogue of the onshore "central-point-in-the-field" criterion.

The Commission's decision on remand, based on its reformulated test that included the central point of aggregation as a factor offshore, was upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *Exxon* (note 4 supra).¹⁵

C. The "Reformulated, Modified Primary Function Test"

Despite the several modifications of the primary function test described above, its utility in identifying nonjurisdictional gathering facilities remains uneven. As mentioned, the rule seems to work fairly well onshore, possibly because where other factors are not conclusive, there is usually a processing plant located at the end of a gathering system that serves as a logical demarcation point between jurisdictional and nonjurisdictional systems. Also, after an initial round of decisions interpreting the 1996 Policy Statement applying the primary function test to facilities located in deep water beyond the OCS, there has been relatively little controversy. In the shallow areas on the OCS, on the other hand, the status of facilities remains unsettled. The Commission continues to receive requests to reclassify jurisdictional transmission facilities as gathering, over the objection of customers who have been served through the facilities. In these types of cases, the correct interpretation of the primary function test is usually the main issue.

Based on the number of contested cases presented to us, we are concerned about the high degree of uncertainty that

seems built into the primary function test as applied offshore. The primary function test lists numerous factors for consideration, with no one factor having priority. Thus, for example, the size of a particular system may suggest that it is transmission, but the configuration may suggest gathering. The primary function test does not indicate how such inconsistencies should be resolved. The result, over time, has been the gradual reclassification of more and larger systems as gathering, even in cases where systems had been regulated for many years under the Natural Gas Act. Systems with generally similar physical characteristic may have a different regulatory status because of relatively minor physical differences. This result can produce different regulatory results for competitors who perform essentially the same economic function. It is also seems unfair to customers who may have made investments relying on the regulated status of a transporter, only to find themselves subject to the market power of that transporter in its new deregulated form. The "need for regulation" may not create authority to regulate; on the other hand, inconsistent classification and regulatory treatment cannot be what Congress intended when it established a comprehensive scheme of federal regulation that included transportation from the OCS.

Public Conference

The Commission is convening a public conference to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the regulatory goals of the Natural Gas Act. (The conference will not include the policy adopted for deepwater facilities in Docket No. RM96-5-000.) A new test should ensure that similar facilities are subject to similar regulatory treatment. It should also provide incentives for investment in production, gathering, and transportation infrastructure offshore, without subjecting producers to the unregulated market power of third party transporters. Persons who appear at the conference should be prepared to indicate how the Commission's definition of gathering can be changed to achieve these goals. Persons seeking to make formal statements at the public conference should be prepared to address questions set forth below. Other questions may arise during the course of the proceedings.

Questions

1. To what extent should a gathering test that be based on the length and diameter of the pipeline, the extent the

facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?

2. To what extent should the location of processing plants, the central point of aggregation, the operating pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?

3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?

4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas act before the facilities may be transferred to another company?

Procedures

The public conference convened by this notice will be held on September 23, 2003 at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All interested persons are invited to attend. Persons interested in speaking or making a presentation should indicate their interest no later than September 3, 2003 by a letter addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, and should refer to Docket No. AD03-13-000. Each request to participate must include the name of a contact person, their telephone number and e-mail address. There is no need to provide advance notice to the Commission simply to attend the conference.

Comments addressing the questions set out in this notice may also be filed by September 3, 2003. Every effort will be made to accommodate requests to make presentations, but depending on the number of requests received, a limit may have to be placed on the number of presenters and the time allowed for presentations.

Members of the Commission intend to participate in the public conference and will reserve time for questions and answers. In a subsequent notice, we will provide further details on the conference, including the agenda and a list of participants, as plans evolve. For additional information, please contact Gordon Wagner, Office of General

¹⁴ 87 FERC at 62,248.

¹⁵ See also *Williams Gas Processing—Gulf Coast Company, L.P. et al. v. FERC*, No. 01-1327 (DC Cir. June 20, 2003).

Counsel, phone 202-502-8947, e-mail: gordon.wagner@ferc.gov.

Magalie R. Salas,
Secretary.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-7547-2]

Protection of Stratospheric Ozone: Notice 18 for Significant New Alternatives Policy Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of acceptability.

SUMMARY: This Notice of Acceptability expands the list of acceptable substitutes for ozone-depleting substances (ODS) under the U.S. Environmental Protection Agency's (EPA) Significant New Alternatives Policy (SNAP) program. The substitutes are for use in the following sectors: refrigeration and air conditioning, solvents cleaning, foam blowing, fire suppression and explosion protection, and aerosols.

EFFECTIVE DATE: August 21, 2003.

ADDRESSES: Information relevant to this notice is contained in Air Docket A-91-42, 1301 Constitution Avenue, NW.; U.S. Environmental Protection Agency, Mail Code 6102T; Washington, DC 20460. The docket reading room is located at the address above in room B102 in the basement. Reading room telephone: (202) 566-1744, facsimile: (202) 566-1749, Air docket staff telephone: (202) 566-1742 and facsimile: (202) 566-1741 You may inspect the docket between 8:30 a.m. and 4:30 p.m. weekdays. As provided in 40 CFR part 2, a reasonable fee may be charged for photocopying.

FOR FURTHER INFORMATION CONTACT: Margaret Sheppard by telephone at (202) 564-9163, by fax at (202) 565-2155, by e-mail at sheppard.margaret@epa.gov, or by mail at U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Mail Code 6205J, Washington, DC 20460. Overnight or courier deliveries should be sent to 501 3rd Street, NW., Washington, DC 20001.

For more information on the Agency's process for administering the SNAP program or criteria for evaluation of substitutes, refer to the original SNAP rulemaking published in the Federal Register on March 18, 1994 (59 FR 13044). Notices and rulemakings under

the SNAP program, as well as other EPA publications on protection of stratospheric ozone, are available from EPA's Ozone Depletion World Wide Web site at <http://www.epa.gov/ozone/> including the SNAP portion at <http://www.epa.gov/ozone/snap/>.

EPA has established an official public docket for this action under Docket ID No. OAR-2003-0118 (continuation Docket A-91-42). The official public docket consists of the documents specifically referenced in this action and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1742.

An electronic version of the public docket is available through EPA's electronic public docket and comment system. EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in the previous paragraph. Once in the system, select "search," then key in the appropriate docket identification number (OAR-2003-0118).

SUPPLEMENTARY INFORMATION:

- I. Listing of Acceptable Substitutes
 - A. Refrigeration
 - B. Solvents Cleaning
 - C. Foam Blowing
 - D. Fire Suppression and Explosion Protection
 - E. Aerosols
 - II. Section 612 Program
 - A. Statutory Requirements
 - B. Regulatory History
- Appendix A—Summary of Acceptable Decisions

I. Listing of Acceptable Substitutes

This section presents EPA's most recent acceptable listing decisions for

substitutes in the following industrial sectors: refrigeration and air conditioning, solvents, cleaning, foam blowing, fire suppression and explosion protection, and aerosols. For copies of the full lists of SNAP decisions in all industrial sectors, visit EPA's Ozone Depletion Web site at <http://www.epa.gov/ozone/snap/lists/index.html>.

The sections below discuss each substitute listing in detail. Appendix A contains a table summarizing today's listing decisions. The statements in the "Further Information" column in the table provide additional information, but are not legally binding under section 612 of the Clean Air Act. In addition, the "further information" may not be a comprehensive list of other legal obligations you may need to meet when using the substitute. Although you are not required to follow recommendations in the "further information" column of the table to use a substitute, EPA strongly encourages you to apply the information when using these substitutes. In many instances, the information simply refers to standard operating practices in existing industry and/or building-code standards. Thus, many of these statements, if adopted, would not require significant changes to existing operating practices.

Submissions to EPA for the use of the substitutes listed in this document may be found under category VI-D of EPA air docket A-91-42 at the address described above under **ADDRESSES**. You can find other material supporting the decisions in this action under category IX-B of EPA docket A-91-42 and in e-docket OAR-2003-0118 at <http://www.epa.gov/edocket/>.

A. Refrigeration

1. R-407C

EPA's decision. R-407C is acceptable for use in new and retrofit equipment as a substitute for R-502 in:

- retail food refrigeration
- cold storage warehouses
- commercial ice machines
- refrigerated transport
- ice skating rinks
- water coolers
- residential dehumidifiers
- vending machines
- industrial process air conditioning
- reciprocating chillers
- screw chillers
- industrial process refrigeration
- non-mechanical heat transfer systems
- household refrigerators and freezers
- household and light commercial air conditioning

R-407C is a blend of 23% by weight HFC-32 (difluoromethane, Chemical