

[www.capitolconnection.org](http://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](mailto: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](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](mailto: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.<sup>1</sup> Nevertheless,

<sup>1</sup> 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."<sup>2</sup> 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."<sup>3</sup> 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."<sup>4</sup> 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.<sup>5</sup> In

<sup>2</sup> *Lomak 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)).

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

<sup>4</sup> *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).

<sup>5</sup> 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