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Jana L. Grauberger

Joshua P. Downer

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# Third Party Access to Infrastructure in the United States

Jana L. Grauberger\*

Joshua P. Downer\*

## INTRODUCTION

Offshore oil production in the Gulf of Mexico began in 1938 with the construction of a platform located one and a half miles from the shore in fourteen feet of water.<sup>1</sup> That platform, located off the coast of Cameron, Louisiana, in an area dubbed the Creole field, produced an estimated four million barrels of oil in the first twenty-five years. Oil was shipped to shore via a small diameter pipeline. The greatest access challenge was the lengthy, and sometimes difficult, daily commute of workers to and from the platform on shrimp boats already tasked with carrying supplies and equipment for the platform's operation.

Fast-forward almost eight decades to the present, and approximately 6,000 active federal leases span thirty-two million acres on the Outer Continental Shelf (OCS).<sup>2</sup> In 2014, the OCS accounted for eighteen percent of oil production and five percent of natural gas production in the United States. The vast majority of OCS production comes from deepwater leases.<sup>3</sup> Unlike other mature production areas in the United Kingdom and Norway, the Gulf of Mexico still promises large future discoveries.<sup>4</sup>

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\* Ms. Grauberger, a 1997 graduate of Tulane University Law School, is a Shareholder at Liskow & Lewis, APLC. Mr. Downer is an Associate at Liskow & Lewis and a 2012 graduate of the Paul M. Hebert Law Center, Louisiana State University. Ms. Grauberger and Mr. Downer would like to recognize the contributions of Lauren N. Randle, an Associate at Liskow & Lewis, to this Article.

1. Joseph A. Pratt, *Offshore at 60: Remembering the Creole field*, Offshore Magazine (Apr. 9, 2014), <http://www.offshore-mag.com/articles/print/volume-74/issue-4/60-years-of-offshore/offshore-at-60-remembering-the-creole-field-p1.html>, archived at [perma.cc/6MBA-KPFN].

2. Enerknol Research, *Gulf of Mexico Poised for Oil and Gas Production Growth*, Breaking Energy (Mar. 23, 2015), <http://breakingenergy.com/2015/03/23/gulf-of-mexico-poised-for-oil-and-gas-production-growth/> [perma.cc/WR43-D2X9].

3. *See Deepwater Production Summary by Year*, Bureau of Safety and Emtl Enforcement, [http://www.data.bsee.gov/homepg/data\\_center/production/production/summary.asp](http://www.data.bsee.gov/homepg/data_center/production/production/summary.asp) [perma.cc/W9BD-J7ZB] (last visited Aug. 23, 2015). "Deepwater" refers to water depths extending beyond 1,000 feet.

4. "[T]here could be as much as three to four times more oil—potentially 48 billion barrels of undiscovered oil are believed to be in the Gulf of Mexico, compared to just 13 billion onshore." Nick Cunningham, *Big Oil Going Big in the Gulf of Mexico*, OilPrice.Com (Nov. 27, 2014), <http://oilprice.com/Energy/Crude-Oil/Big->

Yet for deepwater and ultra-deepwater<sup>5</sup> prospects, significant challenges impede economical production of discovered reserves, including the extremely high costs associated with operating deepwater production facilities and pipelines and the limited or nonexistent production and pipeline infrastructure in certain OCS areas. Subsea tiebacks of production from multiple prospects to a single production facility and export pipeline system are often the only economical option, and tiebacks may require access to facilities owned by someone else.<sup>6</sup> While there is no shortage of infrastructure in shallow water, competing interests drive the prompt decommissioning of older pipelines and facilities and the preservation of those structures for prospective third-party use. That tension has been resolved in favor of decommissioning in the absence of an immediate third-party need and bargained-for private agreement.

With this backdrop in mind, this article explores the landscape of obtaining access to existing third-party offshore infrastructure in the United States. Part I outlines the statutory and regulatory authorities governing access to Gulf pipelines. Part II contrasts pipeline regulation with third-party access to other various structures on the OCS, such as platforms, concluding that a vast area of OCS development and production goes unregulated as to third party access, necessitating private contractual agreements to fill the void. Part III addresses deepwater ports, which are an exception to this general rule and do impose common carrier access requirements.

## I. PIPELINES—PRIMARILY FEDERAL STATUTES

When it comes to regulating third party access to active infrastructure, the amount of regulation differs significantly between pipelines and associated facilities and all other structures on the OCS. No fewer than three federal statutes govern the movement of oil and gas through OCS pipelines: the Natural Gas Act (NGA),<sup>7</sup> the Interstate Commerce Act

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Oil-Going-Big-in-the-Gulf-of-Mexico.html [perma.cc/XE2N-JYEE]; *See also Reserves Inventory Program - Gulf of Mexico OCS Region*, Bureau of Ocean Energy Mgmt., <http://www.boem.gov/2013-GOMR-Reserves-History/> [perma.cc/AX2X-4TRD] (last visited Aug. 25, 2015) (The following fields are examples of relatively recent Gulf of Mexico discoveries of significant reserves: DC004 (2010) 24.6 MMBOE; KC875 (2010) 112.6 MMBOE; KC964 (2008) 80.3 MMBOE; WR759 (2004) 76.9 MMBOE; WR678 (2003) 92.9 MMBOE; WR508 (2005) 44.9 MMBOE; WR029 (2005) 89.2 MMBOE).

5. Ultra-deepwater refers to water depths greater than 5,000 feet.

6. An estimated fifty percent of projects scheduled to come online in 2015 and 2016 involve subsea tiebacks. Enerknol Research, *supra* note 3.

7. 15 U.S.C. §§ 717-17z (2014).

(ICA),<sup>8</sup> and the Outer Continental Shelf Lands Act (OCSLA).<sup>9</sup> While the first two apply to pipelines both on and off the OCS, all three contain provisions affecting third party access to pipelines. The precise mechanisms, standards, and covered facilities, however, differ from statute to statute.

#### *A. Gas Pipelines—The Natural Gas Act*

Enacted at roughly the same time that the first Gulf of Mexico platforms were popping up in the Creole field, the NGA was part of Congress's response to the perceived pipeline monopolies that arose in the United States during the onshore oil boom of the 1920s. Originally administered by the Federal Power Commission, the NGA now vests in the Federal Energy Regulatory Commission (FERC) the authority to regulate a wide range of activities associated with the interstate transportation of natural gas by pipeline.

At its core, the NGA governs the transportation of natural gas in interstate commerce, the sale of natural gas “for resale,” and the “natural-gas companies” involved in these processes.<sup>10</sup> The statute defines “interstate commerce” broadly to include transportation between a state or United States territory and “any point outside thereof,” thus, encompassing many pipelines that ship from the OCS to shore within its jurisdictional reach.<sup>11</sup>

The NGA touches on almost all aspects of a jurisdictional natural gas company's business, from commencement of service to abandonment of the pipeline. The Act requires pipeline companies to acquire a certificate of public convenience and necessity from FERC prior to beginning service, and the company must demonstrate that the proposed facility or service will serve the public interest.<sup>12</sup> Similarly, a jurisdictional pipeline cannot abandon any facilities or discontinue any service without approval from FERC following a determination by FERC that such abandonment will not impair the public interest.<sup>13</sup>

The NGA's focus on the public interest also manifests in provisions designed to promote competition and open access for all shippers. For example, the statute requires that natural gas companies charge only “just and reasonable” rates.<sup>14</sup> The NGA further prohibits any “undue preferences” or

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8. 49 U.S.C. app. §§ 10101-16106 (1988).

9. 43 U.S.C. § 1331-1356b (2014).

10. 15 U.S.C. § 717(b). “Natural-gas companies” are defined as “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” *Id.* § 717a(6).

11. *See id.* § 717a(7).

12. *See id.* § 717f(c)(1).

13. *Id.* § 717f(b).

14. *Id.* § 717c(a).

any “unreasonable difference” between services offered in different localities or to different classes of shippers.<sup>15</sup> FERC’s regulations expand on these requirements to bar undue discrimination or preferences as to rates, volumes to be transported, or the quality or duration of service offered.<sup>16</sup>

FERC employs a two-part test to determine whether rates or practices are unduly discriminatory, which considers (1) whether two classes of customers are treated differently, and (2) whether the two classes of customers are similarly situated.<sup>17</sup> To constitute undue discrimination, disparate treatment must be substantial and without a reasonable basis (i.e., differences in economic treatment, quality of service, or pipeline or gas usage).<sup>18</sup> A mere discrepancy in rates, standing alone, is not enough to amount to undue discrimination under the NGA.<sup>19</sup>

In practice, the rate and service requirements of the NGA are primarily administered through a tariff system. A jurisdictional facility will have a tariff on file and in effect with FERC detailing the different rates and service terms.<sup>20</sup> Any changes in the rates, forms of service agreements, or the general terms and conditions of service will typically require a separate filing, notice to the public, and approval by FERC.<sup>21</sup>

FERC has a broad range of tools at its disposal to remedy and prevent undue discrimination and ensure open access for shippers, including the authority to force a jurisdictional pipeline to provide service in certain circumstances. FERC has also established a policy of requiring pipelines to allow a shipper to interconnect with their facilities under certain conditions. Interconnects may be mandated when: (1) the party seeking the interconnect is willing to pay the costs of construction, (2) the interconnect does not “adversely affect” the pipeline’s operations, (3) the interconnect would not “diminish service” to existing customers, (4) the interconnect would not violate any other laws or regulations, and (5) the interconnect would not violate the pipeline’s right-of-way agreements or other contractual obligations with respect to the interconnection facilities.<sup>22</sup> If these five conditions are met, an interstate natural gas pipeline may have no choice but to allow an interconnect and provide transportation. However, FERC does not have the

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15. *Id.* § 717c(b).

16. *See* 18 C.F.R. § 284.7(b) (2015).

17. *Energy Transfer Partners, L.P.*, 120 F.E.R.C. ¶ 61,086, at 61,585 (2007).

18. *See ANR Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*, 91 F.E.R.C. 61,066 (2000); *PG&E Transmission*, 82 F.E.R.C. ¶ 61,289 (1998).

19. *Wisconsin v. Federal Power Comm’n*, 373 U.S. 294, 302 (1963).

20. 18 C.F.R. § 154.1 (2015). *See also id.* § 284.303 (providing blanket transportation certificates for OCS pipelines subject to NGA jurisdiction).

21. *See id.* § 154.204.

22. *Panhandle Eastern Pipe Line Co.*, 91 F.E.R.C. ¶ 61,037, at 61,141 (2000).

power to order a natural gas pipeline to expand its facilities due to prohibitions in other sections of the NGA.<sup>23</sup>

While access to many natural gas transportation lines on the OCS will be regulated by FERC under the NGA, the Act's reach is somewhat limited by its gathering facilities exception. The NGA only applies to "natural-gas companies," meaning companies engaged in transporting gas in interstate commerce.<sup>24</sup> Further, "the production or gathering of natural gas" is specifically excluded from FERC's jurisdiction under the NGA.<sup>25</sup> While the statute does not define these terms, courts have applied a common sense meaning, ruling that "production" and "gathering" refer to the "physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."<sup>26</sup> Therefore, for the purposes of the NGA, gathering refers to the process of moving gas from multiple production facilities to a central collection point for further transportation down a transmission system.<sup>27</sup> When discussing the reach of the NGA offshore, determining where this process ends and where transportation begins often becomes a critical inquiry.

FERC uses a "modified primary function" test to determine whether a facility is engaged in the gathering of natural gas and thus beyond the scope of FERC's NGA jurisdiction and the associated open access requirements.<sup>28</sup> This test examines physical and non-physical criteria of the facility, with the non-physical considered secondary to the physical.<sup>29</sup> The physical criteria include: the length and diameter of the pipeline, whether the facility extends beyond the central point in the relevant field, the geographic configuration, the location of compression and processing plants, the location of wells along part or all of the facility, the operating pressure of the line, and whether the facilities are located behind a processing plant.<sup>30</sup> The non-physical criteria include: the intended purpose, location and operation of the facility, the general business activity

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23. See 15 U.S.C. § 717f (2014).

24. *Id.* § 717a(6).

25. *Id.* § 717(b).

26. *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90-91 (1963).

27. See *Nw. Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990).

28. See, e.g., *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 62,001 (1990); *Farmland Industries Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,063 (1983).

29. See *EXCO Res. Inc., TGG Pipeline, Ltd.*, 119 F.E.R.C. ¶ 61,121, at 61,805 (2007) (citing *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 271 (5th Cir. 1997)).

30. FERC has noted, however, that the location of the processing plant is of limited utility when discussing offshore facilities. See *Sea Robin Pipeline Co.*, 87 F.E.R.C. ¶ 61,384, at 62,432 (1999), *reh'g denied*, 92 F.E.R.C. ¶ 61,072 (2000).

of the owner of the facility, and whether jurisdictional determination is consistent with objectives of the NGA and the Natural Gas Policy Act.<sup>31</sup>

In the offshore context, FERC has indicated that if a pipeline system contains a facility where gas is delivered by several smaller lines for aggregation and transportation through a singular larger line, the location of that central facility will carry “considerable weight” in application of the modified primary function test; the central facility will generally serve as the dividing line between non-jurisdictional gathering and jurisdictional transportation.<sup>32</sup> In addition, natural gas facilities located in water depths of 200 meters or more are presumed to be gathering facilities up to the point of potential connection with the interstate pipeline grid.<sup>33</sup> After the application of all these factors, pipeline facilities upstream of the line are generally considered gathering facilities outside of FERC’s regulatory purview under the NGA.

Even if a facility primarily serves a gathering function, that fact may not, in every instance, be enough to remove it from FERC’s NGA jurisdiction. While the NGA does not grant FERC the authority to regulate gathering facilities, FERC has interpreted the NGA as permitting it to regulate gathering by jurisdictional “natural-gas companies” that occurs “in connection with” interstate transportation service. Thus, FERC has historically regulated the natural gas gathering services offered by the interstate pipelines that otherwise fall under its NGA jurisdiction.<sup>34</sup>

For this and other reasons, many pipeline companies have increasingly sought to transfer their offshore gathering facilities to companies specializing in offshore systems.<sup>35</sup> Frequently, this goal is accomplished by either “spinning down” or “spinning off” the portion of the pipeline’s system that would qualify as a gathering facility under the modified primary function test. A “spin off” is the transfer of a gathering facility to

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31. *S. Natural Gas Co., L.L.C. v. Amp Gathering I, LP*, 150 F.E.R.C. ¶ 61,196, at 62,329 (2015).

32. *Sea Robin Pipeline Co.*, 87 F.E.R.C. ¶ 61,384, at 62,427.

33. *See Statement of Policy, 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*, 74 F.E.R.C. ¶ 61,222, at 61,753 (1996).

34. *BP America Inc.*, 147 F.E.R.C. ¶ 61,130, at 61804 (2014).

35. In addition to this regulatory incentive, there are often economic reasons for a company with significant onshore assets to abandon its offshore systems. Many companies simply view offshore facilities as more risky and expensive than their onshore counterparts. The separation of offshore gathering facilities from larger transportation systems is also driven by the national trend of unbundling services, as pipeline companies have moved from a primarily merchant to a transporter role. *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 57 Fed. Reg. 13,267 (April 16, 1992).

an unrelated entity, while a “spin down” is the transfer of a facility to a subsidiary or affiliate. To accomplish a spin down, the jurisdictional pipeline company seeks to abandon its facility to the affiliate by petitioning FERC, and the affiliate simultaneously petitions FERC for an order declaring that the facility will no longer be subject to FERC jurisdiction after the abandonment.<sup>36</sup> FERC has generally allowed spin downs and spin offs despite the concerns of natural gas shippers that the lack of NGA regulation will expose them to discriminatory rates and monopolistic practices.<sup>37</sup> However, FERC has cautioned that it will attempt to reassert NGA jurisdiction over facilities owned by a gathering affiliate under certain conditions.<sup>38</sup>

### *B. Oil And Liquids Pipelines—The Interstate Commerce Act*

Congress has also charged FERC with regulating interstate oil pipelines under the ICA, a statute with a unique and complex regulatory history.<sup>39</sup> The relevant statutory text underlying FERC’s power in this area does not exist in any federal reporter. Instead, one must look to the statute as it existed on October 1, 1977. Originally governing activities such as transportation by railroads and telegraph companies, the ICA was amended to include transportation of oil through pipeline in 1906, as

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36. David V. Bryce, *Pipeline Gathering in an Unbundled World: How FERC’s Response to ‘Spin Down’ Threatens Competition in the Natural Gas Industry*, 89 Minn. L. Rev. 537, 552 (Dec. 2004).

37. See, e.g., *Trunkline Gas Co., LLC; Sea Robin Pipeline Co., LLC*, 139 F.E.R.C. ¶ 61,239 (2012) (reviewing a Trunkline Gas application to abandon all of its offshore facilities to an affiliate and noting *sua sponte* that some of the facilities performed a gathering function and would not be subject to FERC’s jurisdiction under the NGA after the transfer to the affiliate); *Mid Louisiana Gas Co.*, 67 F.E.R.C. ¶ 61,255, at 61,851 (1994), *order on reh’g*, 69 F.E.R.C. ¶ 61,303 (1994) (finding that despite the fact that many customers are “captive to a single gatherer” and that there was often “no competition for gathering services,” FERC could not simply choose to regulate gathering not performed by an interstate natural gas company in connection with a jurisdictional service).

38. *Arkla Gathering Service Co.*, 67 F.E.R.C. ¶ 61,257 (1994), *order on reh’g*, 69 F.E.R.C. ¶ 61,280, *reh’g denied*, 70 F.E.R.C. ¶ 61,079 (1995), *reconsideration denied*, 71 FERC ¶ 61,297 (1995), *aff’d in part and reversed in part*, *Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996); *Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, 118 F.E.R.C. ¶ 61,114 (2007).

39. While this paper refers to FERC’s regulation of “pipelines” under the ICA, jurisdiction under the ICA is individual-shipment-based. The same pipeline may provide both jurisdictional and non-jurisdictional transportation through the same segment, depending on the shipper’s intent and whether the individual shipment moves in interstate commerce.



America's oil industry began to bloom.<sup>40</sup> In 1977, regulatory responsibility for interstate oil pipelines was transferred from the Interstate Commerce Commission (ICC) to FERC. The ICA as it applies to railroads and other industries was subsequently amended and re-codified, and the ICC was eventually abolished.<sup>41</sup> However, FERC remains responsible for enforcing the ICA when regulating oil pipelines, under the language as it existed when FERC received its authority in 1977.<sup>42</sup>

FERC's authority under the ICA is far narrower than its NGA jurisdiction. For example, FERC has no power to regulate the "entry or exit into the oil pipeline business as it does with natural gas pipelines" and therefore generally lacks authority to approve or disapprove the construction or abandonment of an oil pipeline.<sup>43</sup> Still, the power that FERC does wield under the ICA directly bears on the issue of third party access to oil pipelines.

Like the NGA, the ICA requires that all rates and charges be "just and reasonable,"<sup>44</sup> and the ICA also prohibits the granting of "undue" or "unreasonable" preferences or advantages to one party over another.<sup>45</sup> Similar to claims under the NGA, FERC requires a current or prospective shipper, in order to establish a violation of these requirements, to show: (1) disparate treatment, and (2) occurrence of that treatment among similarly situated parties.<sup>46</sup> All rates, fares, and charges for interstate transportation service are filed with and approved by FERC,<sup>47</sup> and a pipeline that charges a rate higher than the published tariff may face civil penalties,<sup>48</sup> damages, attorneys' fees,<sup>49</sup> and even criminal penalties in some circumstances.<sup>50</sup>

As far as third party access goes, the primary difference between the NGA and the ICA is that the ICA makes jurisdictional oil pipelines

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40. William F. Demarest, Jr. & Elisabeth Meyers, *Construction of New Midstream Infrastructure: Perils and Pitfalls of Federal Regulatory Jurisdiction*, 56 Rocky Mt. Min. L. Inst. § 28.04 (2010).

41. 4 David J. Muchow & William A. Mogel, *Energy Law and Transactions* § 85.03 (LexisNexis Matthew Bender 2015).

42. See Pub. L. No. 95-473, § 4(c), 92 Stat. 1337 (1979) (stating portions of the ICA that were repealed and codified in 1978, to the extent that they apply to the transportation of oil by pipeline, remain in effect as they existed on October 1, 1977). A copy of the ICA as it existed in 1977 is available at <http://www.ferc.gov/legal/majord-reg/ica.pdf> [perma.cc/EP6W-3LAB] (last visited Aug. 31, 2015).

43. *North Dakota Pipeline Co. LLC*, 147 F.E.R.C. ¶ 61,121, at 61,519 (2014).

44. 49 U.S.C. app. § 1(5) (1988).

45. *Id.* § 3(1).

46. *Enbridge Energy, Ltd. P'ship*, 152 F.E.R.C. ¶ 61,047 (2015).

47. 49 U.S.C. app. § 6; 18 C.F.R. §§ 341.0-14 (2015).

48. 49 U.S.C. app. § 6(10).

49. *Id.* § 8.

50. *Id.* § 10.

“common carriers.” Adopted from the English common law, the term “common carrier” connotes the inability of the carrier to refuse service to any person that pays the published fee.<sup>51</sup> The ICA declares that all pipeline companies accepting interstate shipments of oil are “common carriers” and have the duty to “provide and furnish transportation upon reasonable request.”<sup>52</sup> Thus, the “common carrier” obligation places significant limits on a pipeline’s ability to reject or refuse transportation service.

What precisely constitutes a “reasonable request” is a question of fact. Generally, an oil pipeline subject to the ICA must provide service even to late coming shippers, and FERC requires some method of allocation if there is a request for access to a full line.<sup>53</sup> FERC does not demand use of any particular allocation methodology, instead preferring to let oil pipelines develop their own methods of handling oversubscribed capacity. Traditionally, oil pipeline companies have used a *pro rata* approach to satisfy this requirement. If capacity on the line is constrained, each shipper receives its proportionate share of the available capacity compared to its share of the overall nominations.<sup>54</sup>

FERC has approved a variety of methods for allocating capacity, particularly in recent years as pipelines have struggled to find ways to provide capacity assurance to shippers and encourage investment in new pipeline projects.<sup>55</sup> As part of a new project, a company will typically petition FERC for a declaratory order approving its rates and prorating policy in advance.<sup>56</sup> FERC has approved the grant of firm capacity rights to shippers that commit to a certain level of throughput and agree to pay premium rates, provided that there remains some capacity open to both new and uncommitted shippers that can be allocated on a more traditional, prorating basis.<sup>57</sup>

However, the common carrier obligation still imposes significant restrictions, and an oil company’s ability to develop its own allocation process is not without limits. For example, FERC has indicated that any procedure that would allow a pipeline to transport the entire tender of one

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51. See Christopher J. Barr, *Growing Pains: FERC’s Responses to Challenges To The Development Of Oil Pipeline Infrastructure*, 28 Energy L.J. 43, 64-65 (2007).

52. 49 U.S.C. app. § 1(4).

53. See, e.g., *Belle Fourche Pipeline Co.*, 28 F.E.R.C. ¶ 61,150 (1984).

54. Barr, *supra* note 51, at 65.

55. See Christopher J. Barr, *Unfinished Business: FERC’s Evolving Standard for Capacity Rights on Oil Pipelines*, 32 Energy L.J. 563 (2011).

56. See *Express Pipeline P’ship*, 61 Fed. Reg. 58,12069 (Mar. 25, 1996) (approving of declaratory order procedure to address non-traditional rates and terms of service).

57. See, e.g., *Palmetto Products Pipe Line LLC*, 151 F.E.R.C. ¶ 61,090 (2015) (approving 90/10 split for committed shippers and uncommitted shippers, respectively).

shipper while refusing to transport any portion of another's is "unlawful on its face."<sup>58</sup> Furthermore, the allocation procedure cannot be structured for the purpose of protecting the pipeline's competitive position or designed to favor one type of shipper over another.<sup>59</sup> Firm commitments and other non-traditional arrangements have been limited to new projects—such as new construction or expansion—where FERC has found that committed shippers are necessary to obtain financing and to ensure the financial viability of the project.<sup>60</sup>

While the ICA's common carrier obligation has significant implications for pipelines dealing with requests for capacity, the jurisdictional restrictions of the ICA limit its application on the OCS. By its own terms, the ICA only applies to common carriers engaged in transportation of oil "from one State or Territory of the United States . . . to any other State or Territory of the United States . . . or from one place in a Territory to another place in the same Territory" or to shipments to or through a foreign country.<sup>61</sup> In a string of decisions beginning in the early 1990s, FERC found that this language excluded certain OCS pipelines from the ICA's purview.

In *OXY Pipeline, Inc.*, two pipeline owners on the OCS filed petitions for a declaratory order from FERC that their pipelines were not subject to the ICA's jurisdiction and therefore that the companies did not have to adhere to the statute's tariff filing and record-keeping requirements.<sup>62</sup> The two pipelines at issue ran from wells located on the OCS off the coast of Louisiana to interconnects with another pipeline also located on the OCS. The oil was sold at the interconnect, and neither of the two companies had any control over the product past that point.<sup>63</sup> The two companies argued that FERC lacked jurisdiction because there was no reference to the OCS in the ICA's jurisdictional provisions.

After scrutinizing OCSLA, FERC determined that the OCS should be treated as an "exclusive federal enclave" and that it is not an organized "Territory" or "State" within the meaning of the ICA.<sup>64</sup> Therefore, FERC concluded that the ICA does not cover pipelines engaged in the

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58. *Belle Fourche Pipeline Co.*, 28 F.E.R.C. ¶ 61,150, at 61,281.

59. Muchow & Mogel, *supra* note 41, at § 85.05.

60. See, e.g., *Colonial Pipeline Co.*, 146 F.E.R.C. ¶ 61,206 (2014) (denying a petition for declaratory order to approve non-traditional rate structure when not part of a new expansion or construction project on the grounds that a change to an existing system would create two classes of shippers and be unduly discriminatory).

61. 49 U.S.C. app. § 10501(a)(B)(2) (1988).

62. *Oxy Pipeline, Inc.*, 61 F.E.R.C. 61,051 (1992).

63. *Id.* 61,226-61,227.

64. *Id.* 61,227 n.11.

transportation of oil “solely on or across the [OCS].”<sup>65</sup> The same day, FERC also issued its opinion in *Bonito Pipe Line Co.*<sup>66</sup> In that case, the operator of an oil pipeline located entirely on the OCS sought a declaratory order asserting that it was not subject to the ICA’s common carrier obligations. Using virtually identical language to its *Oxy Pipeline* decision, FERC determined that, like the tariff and record-keeping requirements, the ICA’s common carrier obligations do not extend to pipelines transporting oil solely on or across the OCS.<sup>67</sup>

In both *Oxy Pipeline* and *Bonito Pipe Line*, FERC stated that the ICA would still apply to pipelines on the OCS if “the facilities exited the enclave and the oil moved in interstate commerce.”<sup>68</sup> However, precisely when oil pipelines that shipped to shore would be considered as moving oil “in interstate commerce” remained unclear.

FERC addressed this issue in *Ultramar, Inc. v. Gaviota Terminal Co.*<sup>69</sup> In that decision, Ultramar, a refinery in California, brought a claim against Gaviota Terminal Company for a refund of rates it claimed to be unlawful and discriminatory under the ICA. FERC dismissed the claim for lack of ICA jurisdiction, finding that the movement of the oil at issue was solely intrastate. Ultramar purchased oil from the OCS, receiving title as the oil exited an onshore processing facility in California. The oil was shipped from the OCS through a third party’s pipeline into a processing facility where Ultramar took title. The oil subsequently moved through Gaviota’s terminal system and then through two other pipelines within California before it reached Ultramar’s facility in Los Angeles.<sup>70</sup> There, Ultramar processed the oil, and the products were shipped from the refinery into interstate commerce.<sup>71</sup>

Ultramar argued that the part of the transportation it deemed discriminatory occurred onshore, and that FERC had indicated in *Oxy Pipeline* and *Bonito Pipe Line* that oil shipments moving beyond the OCS could be jurisdictional. Ultramar also noted that once the processed oil left its refinery, the motor fuels and other refined products were unquestionably shipped in interstate commerce.<sup>72</sup> FERC found that the leg from the OCS to shore could not be considered a shipment in interstate commerce because the OCS was not a “State,” and, therefore, only one state was involved with this portion of the shipment. FERC then noted that

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65. *Id.* 61,228.

66. *Bonito Pipe Line Co.*, 61 F.E.R.C. 61,050 (1992).

67. *Id.* 61,221.

68. *Id.*

69. *Ultramar, Inc. v. Gaviota Terminal Co.*, 80 F.E.R.C. ¶ 61,201 (1997).

70. *Id.* 61,809.

71. *Id.*

72. *Id.*

all shipments from that point up to Ultramar's refinery occurred solely within California and thus also only involved one state.<sup>73</sup> Finally, FERC found that it could not base jurisdiction on the movement of the refined products because the processing of the oil caused a break in transportation and the transportation of the refined products constituted a separate shipment.<sup>74</sup>

Thus, as interpreted by FERC, OCS oil pipelines are not subject to FERC regulation under the ICA—including those provisions governing capacity allocation—if the pipelines are wholly contained on the OCS, ship from the OCS to a single state onshore, or ship from the OCS to multiple states, provided there is a sufficient break in the transportation prior to the interstate leg.

### *C. All Pipelines – The Outer Continental Shelf Lands Act*

While the NGA and the ICA are designed to focus on the transportation and sale of oil and natural gas, OCSLA's primary goals include the "expeditious and orderly development" of the OCS generally.<sup>75</sup> Thus, OCSLA is a broad statute designed to serve a variety of functions. OCSLA simultaneously asserts federal authority over the OCS,<sup>76</sup> prescribes an applicable—and sometimes mandatory—body of law for the OCS,<sup>77</sup> and establishes a federal leasing program with associated rules and regulations for implementation thereof.<sup>78</sup>

As part of orderly development, OCSLA is concerned with the "maintenance of competition" on the OCS, which in turn incentivizes ensuring open access to pipeline infrastructure for production.<sup>79</sup> Section 1334(e) of OCSLA charges the Secretary of the Interior with prescribing rules and regulations for all OCS pipeline right-of-ways (ROWs) and allows the Secretary to grant ROWs subject to certain conditions.<sup>80</sup> To further the goal of orderly development and promotion of competition, Section 5(e) of OCSLA provides that one such condition mandates that the

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

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73. *Id.* 61,810.

74. *Id.*

75. 43 U.S.C. § 1332(3) (2014).

76. *Id.* § 1332(1).

77. *Id.* § 1333.

78. *Id.* §§ 1334, 1337.

79. *Id.* § 1332(3).

80. *Id.* § 1334(e).

such proportionate amounts as the Federal Energy Regulatory Commission . . . may, after a full hearing . . . determine to be reasonable.<sup>81</sup>

Similarly, Section 5(f) of OCSLA provides that every permit, license, easement, ROW or other grant of authority to transport oil or gas by pipeline on the OCS must require the pipeline be operated in accordance with certain “competitive principles,” including provision of “open and nondiscriminatory access to both owner and nonowner shippers.”<sup>82</sup> The Bureau of Safety and Environmental Enforcement (BSEE), which is the principal regulatory agency under the Department of the Interior tasked with administering these provisions of OCSLA, has enacted regulations mirroring these requirements.<sup>83</sup>

### *1. Early Application by FERC*

By its terms, OCSLA applies to the entire universe of both oil and gas pipelines on the OCS, regardless of whether such pipelines are shipping in interstate commerce or would constitute a gathering facility under the NGA. Until recently, FERC interpreted its mandate under OCSLA broadly and construed the statute as assigning to FERC the primary responsibility of enforcing its provisions. For example, FERC quickly implemented special licensing provisions for OCSLA pipelines, although it limited these actions to natural gas pipelines within its NGA jurisdiction.<sup>84</sup> FERC indicated, however, that it read OCSLA to potentially extend its regulatory authority beyond the jurisdictional limits of the ICA and the NGA.

FERC’s expansive interpretation of its OCSLA jurisdiction is evident in the *OXY Pipeline* and *Bonito Pipe Line* decisions. After first declaring that FERC did not have jurisdiction over a pipeline transporting oil solely on or across the OCS under the ICA, FERC nevertheless stated that the pipelines in those cases remained subject to OCSLA’s open access requirements.<sup>85</sup>

*Bonito Pipe Line* is particularly enlightening on the scope of FERC’s perceived power at the time of the decision. The case involved a dispute

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81. *Id.*

82. *Id.* § 1334(f)(1)(A).

83. *See* 30 C.F.R. § 250.1010(f) (2015) (stating that, by accepting a ROW grant, an applicant agrees that it will transport “without discrimination” and provide “open and nondiscriminatory access” to both owner and non-owner shippers).

84. *See, e.g., Interpretation of Section 5 of the Outer Continental Shelf Lands Act*, Order No. 491, 43 F.E.R.C. ¶ 61,006 (1988) (requiring jurisdictional natural gas lines on the OCS to obtain blanket transportation certificates under 18 C.F.R. Part 284 and suggesting that OCSLA might require pro rata allocation of capacity).

85. *Oxy Pipeline, Inc.*, 61 F.E.R.C. ¶ 61,051, at 61,228; *Bonito Pipe Line Co.*, 61 F.E.R.C. ¶ 61,050, at 61,221.

over an interconnect to Bonito Pipe Line's Louisiana-adjacent OCS pipeline and presented the issue of whether Bonito had an obligation to accept undesirable shipments of crude from the Auger Unit being developed by Shell. Bonito's pipeline shipped sour crude to an interconnect with the Ship Shoal Pipeline, partially owned by Shell Pipe Line. Although the Ship Shoal Pipeline accepted sour shipments from Bonito, the overall stream of the pipeline ran sweet after the Bonito shipments were commingled with sweet crude from other sources.<sup>86</sup> A Shell Oil Company subsidiary requested access to the Bonito system to transport sour crude from the Auger Unit, which was being developed as a sour crude field. Bonito determined that acceptance of the additional sour shipments from Auger would increase the overall sulfur content of Bonito's line, so it asked Ship Shoal to state in advance whether it would accept the increased sour stream prior to responding to Shell's request. According to Bonito, Ship Shoal informed Bonito that it would not accept the shipments with the increased sulfur content, and Bonito likewise declined to transport from Auger.<sup>87</sup>

Bonito subsequently sought a declaratory order from FERC stating that it was not a common carrier under the ICA and consequently was not required to accept shipments from Auger. Bonito further argued that its refusal to accept the Auger crude was justified and not unduly discriminatory because the Auger volumes would degrade the overall stream such that it was no longer a sweet line, and Ship Shoal had "flatly refused" to accept the Auger volumes.<sup>88</sup>

After holding that the ICA did not apply, FERC nevertheless determined that OCSLA's open and nondiscriminatory access requirements required Bonito to accept Shell's shipments. First, FERC noted that the Bonito pipeline was and had always been a pipeline that shipped sour crude. Thus, Bonito's refusal to accept sour crude from Auger, while simultaneously accepting sour crude from other shippers constituted discrimination.<sup>89</sup> FERC further held inconsequential the fact that the Auger volumes would turn the commingled stream sour, because some shippers' prior receipt of a "windfall" for the sale of their sour crude could not "override Bonito's obligation to avoid discrimination" under OCSLA.<sup>90</sup> Thus, FERC ordered Bonito to accept the interconnect. Indicative of its belief in OCSLA's extensive power, FERC even suggested that OCSLA might require prorationing similar to the ICA if

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86. *Bonito Pipe Line Co.*, 61 F.E.R.C. ¶ 61,050, at 61,219.

87. *Id.*

88. *Id.* 61,221.

89. *Id.*

90. *Id.*

there was insufficient capacity on the pipeline, and that it might even require Bonito to foot a portion of the bill for the costs of the interconnect.<sup>91</sup>

Four years after *Bonito Pipe Line*, FERC issued an OCS policy statement making it clear that it would require *all* OCS pipelines to provide fair and unrestricted access even when neither the NGA nor the ICA applied.<sup>92</sup> FERC declared that it would treat open access complaints filed under OCSLA seriously and that nondiscrimination under OCSLA would “at a minimum” require “nondiscriminatory access and nondiscrimination with respect to rates and terms and conditions of service.”<sup>93</sup>

FERC flexed its OCSLA muscle again in *Murphy Exploration & Production Co. v. Quivira Gas Co.*<sup>94</sup>—this time over a natural gas gathering line. Murphy Exploration and Production filed a discrimination complaint against Quivira Gas alleging discriminatory rates for the transportation of natural gas on Quivira’s twelve-inch pipeline running from the OCS to onshore Louisiana. Though over twenty-four miles in total length, only 2.5 miles of the pipeline sat on the OCS,<sup>95</sup> and FERC determined that the pipeline performed only a gathering function and was not subject to FERC jurisdiction under the NGA.<sup>96</sup> Nevertheless, Murphy argued that Quivira had violated OCSLA’s open and nondiscriminatory access provisions set forth in Section 5. Murphy presented evidence that Quivira charged Murphy 38.6 cents per Mcf to transport gas, while charging another company only 18.5 cents for the same service.<sup>97</sup>

FERC found that OCSLA provided it with authority to regulate the rates charged by Quivira, even if the facilities fell outside of its NGA jurisdiction. FERC also held that this OCSLA power extended to the entire pipeline, thereby allowing it to regulate the more than twenty miles of pipeline not even located on the OCS.<sup>98</sup> Citing OCSLA, FERC therefore ordered Quivira to show cause and demonstrate why it had not violated OCSLA’s open access requirements.<sup>99</sup>

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91. *Id.* 61,225.

92. *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*, 74 F.E.R.C. ¶ 61,751, at 61,758 (1996).

93. *Id.* 61,759.

94. *Murphy Exploration & Production Co. v. Quivira Gas Co.*, 81 F.E.R.C. ¶ 61,148 (1997).

95. *Id.*

96. *Id.* 61,669.

97. *Id.*

98. *Id.* 61,670 (internal quotations omitted).

99. *Id.* 61,671. FERC eventually dismissed Murphy’s complaint after Quivira agreed to charge all of its customers the same rate. FERC found that this change eliminated any possibility of discrimination and that a retroactive reimbursement



## 2. Limitation of FERC's Role

The issue of the extent of FERC's authority to administer OCSLA's open access provisions came to a head in the early 2000s, when FERC issued Order 639 requiring natural gas pipelines on the OCS, including gathering lines, to periodically report information regarding their pricing and service structure.<sup>100</sup> With looming burdensome reporting requirements, offshore gatherers fought back. Several companies sought judicial relief in *Williams Companies v. FERC*.<sup>101</sup> The United States Court of Appeals for the District of Columbia held that OCSLA did not give FERC the authority to establish a "general open access regime"; instead, OCSLA assigned the Commission "narrow and specific" duties.<sup>102</sup> The court examined the pertinent sections of OCSLA, Sections 5(e) and (f), and found that Section 5(e) merely grants FERC a single power, "to determine, along with the Secretary of Energy, the proportions of oil, gas, or other minerals that each member of any relevant group of pipelines may be required to transport or purchase."<sup>103</sup> Likewise, Section 5(f) only allows FERC to require pipelines seeking permits, licenses, and easements under other statutes administered by FERC, such as the NGA, to meet competitive principles<sup>104</sup> and outlines a consultation procedure that FERC must follow when establishing procedures for the issuance of such grants.<sup>105</sup> The D.C. Circuit held that none of these provisions granted FERC the sweeping authority to regulate OCS pipelines that it claimed.<sup>106</sup>

Not to be deterred, FERC construed *Williams Companies* to solely limit its rulemaking authority and maintained that it still had the ability to exercise broad adjudicatory power like it had in *Bonito Pipe Line* and

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of charges would be inappropriate under OCSLA. *Murphy Exploration & Prod. Co. v. Quivira Gas Co.*, 94 F.E.R.C. ¶ 61,174 (2001).

100. Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf, Order No. 639, 65 Fed. Reg. 20,354 (Apr. 10, 2000). FERC specifically chose not to apply these reporting requirements to oil lines, finding that they had previously established a presumption that oil rates were reasonable, but acknowledged that it was questionable whether judicial review would uphold this presumption as applied to oil lines located wholly on the OCS. See Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf, Order No. 639-A, 65 Fed. Reg. 47,294, n. 42 (Aug. 2, 2000) (citing Revision to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, 58 Fed. Reg. 58,753 (Nov. 4, 1993)).

101. *Williams Companies v. FERC*, 345 F.3d 910 (D.C. Cir. 2003).

102. *Id.*

103. *Id.* at 913.

104. *Id.* at 914.

105. *Id.*

106. *Id.* at 916.

*Murphy Exploration & Production*<sup>107</sup> This interpretation led to further litigation, and the D.C. Circuit once again clarified that FERC's role on the OCS was limited to that of a "licensor."<sup>108</sup>

In *Williams Gas Processing - Gulf Coast Co.*, FERC allowed Transco, a pipeline company subject to the agency's NGA jurisdiction, to spin down the gathering portion of its line to an affiliate, WGP, thereby removing the gathering section of the pipeline from NGA jurisdiction.<sup>109</sup> Shell Offshore shipped natural gas through the gathering system to Transco's jurisdictional transportation line and eventually to Transco's main pipeline onshore. Prior to the spin down to WGP, Transco charged Shell eight cents per dekatherm to move the gas from Shell's interconnect with the gathering system to Transco's main pipeline some 230 miles away. WGP subsequently notified Shell that it intended to charge twelve cents per dekatherm to move the gas 3.08 miles through the gathering system. Thus, once the gathering affiliate took over, Shell would have been required to pay twenty cents for transportation to Transco's main line, when it previously only paid eight cents for the same service.<sup>110</sup>

Shell filed a complaint with FERC, alleging that Transco and WGP were attempting to force gas producers to pay unjust and unreasonable rates.<sup>111</sup> Shell also alleged that WGP was attempting to inject anticompetitive terms into the agreement, such as forcing Shell to dedicate its entire reserves to WGP for the life of the field.<sup>112</sup> Shell requested that FERC reassert NGA jurisdiction over the gathering facility.<sup>113</sup> Other gas producers soon filed their own complaints against WGP alleging that WGP had violated OCSLA.<sup>114</sup> However, these other producers subsequently settled with WGP and voluntarily dismissed their complaints.<sup>115</sup>

FERC determined that it had the power to reassert NGA jurisdiction over WGP because Transco and WGP had "acted in concert" and "in a manner that frustrate[d] the Commission's effective regulation" of Transco, the jurisdictional pipeline.<sup>116</sup> Furthermore, even though the complaints based on OCSLA had previously been dismissed, FERC found that WGP had violated

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107. See *Williams Gas Processing - Gulf Coast Co. L.P. v. FERC*, 373 F.3d 1335, 1344 (D.C. Cir. 2004).

108. *Id.*

109. *Id.* at 1339.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Williams Gas Processing - Gulf Coast Co.*, 373 F. 3d at 1340.

114. *Id.*

115. *Id.* at 1341.

116. See *Arkla Gathering Services Co.*, 67 F.E.R.C. ¶ 61,257 (1994) (indicating that FERC would use a two-part test for reasserting jurisdiction over a spun down gathering facility).

OCSLA by “abusing” its “monopoly power.”<sup>117</sup> On review, the D.C. Circuit held that FERC had incorrectly applied its own tests in reasserting jurisdiction under the NGA, and that it had once again exceeded its authority under OCSLA. The court clarified that, whether the Commission acts in a rulemaking or adjudicatory capacity, the text of OCSLA “unambiguously constrained FERC’s authority to its role as licensor” and FERC had no “general power to enforce OCSLA’s open access provisions.”<sup>118</sup>

Soon after the *Williams* cases, FERC issued a policy statement acknowledging that OCSLA did not provide FERC any “general power” to enforce open access on the OCS and limited FERC’s authority to a “few well-defined tasks.”<sup>119</sup> FERC further noted that its role as a “licensor” did not extend to offshore gathering facilities outside of its NGA jurisdiction because these facilities did not receive licenses under that Act.<sup>120</sup> Frustrated, perhaps understandably so, FERC’s Commission Chairman observed that FERC had been “repeatedly rebuffed by the courts” in its attempts to protect against the “monopoly power” of offshore gathering systems.<sup>121</sup> The Chairman concluded that FERC would simply have to accept the fact that “[u]nder current law, offshore gathering is an unregulated monopoly.”<sup>122</sup> With this pronouncement, FERC largely stepped into the background of the administration of OCSLA and its open access provisions, leaving room for a new regulator to take over.<sup>123</sup>

### 3. *Current Administration by the Department of the Interior*

The Department of the Interior interpreted the *Williams* opinions as providing it primary responsibility to enforce OCSLA’s open access requirements. A final rule promulgated by the Minerals Management Service (MMS), BSEE’s predecessor, states that the “MMS believes the

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117. *Williams Gas Proc.- Gulf Coast Co.*, 373 F.3d at 1341.

118. *Id.* at 1344 (internal quotations omitted).

119. *Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, 72 Fed. Reg. 10514, 10521 (Mar. 8, 2007).

120. *Id.*

121. *Commission Clarifies Policy on Jurisdiction Over Natural Gas Gathering Facilities*, FERC News Release (Doc. Nos. PL05-10-000 & RP02-99-011), February 15, 2007, available at <http://www.ferc.gov/media/news-releases/2007/2007-1/02-15-07-G-1.pdf> [perma.cc/CS68-HG84].

122. *Id.*

123. The Commission has warned, however, that it may still reassert NGA jurisdiction over spun down gathering affiliates in certain circumstances. See *Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates supra* note 121, at ¶ 61,582-61,592 (clarifying that FERC will consider reasserting NGA jurisdiction over a gathering affiliate if (1) the gatherer uses its market power to benefit the jurisdictional affiliate, and (2) that benefit is contrary to the policies of the NGA).

[*Williams*] court's decision means that the OCSLA provides the Secretary of the Interior the authority to issue and enforce rules to assure open and nondiscriminatory access to pipelines."<sup>124</sup> The MMS proceeded to promulgate comprehensive open access regulations, located at 30 C.F.R. § 291.1, *et seq.*, which are currently administered by BSEE. The regulations outline both an informal and formal complaint procedure for shippers who believe they have been denied open and nondiscriminatory access to an OCSLA pipeline.<sup>125</sup> An aggrieved shipper may elect to informally resolve an allegation using a toll-free hotline provided and administered by BSEE. A shipper can choose to remain anonymous, and all information given to BSEE during the informal procedure is considered confidential to the extent permitted by law.<sup>126</sup> BSEE's personnel will investigate and mediate the dispute, as well as provide informal, non-binding oral advice.<sup>127</sup> An alternative dispute resolution procedure is also available—before or after a complaint is filed—for informal resolution of an allegation.

Shippers may also file a formal complaint with the Director of BSEE, either before or after proceeding through the informal process.<sup>128</sup> A complaint must be filed no later than two years after the alleged denial of access. The filing party must pay a \$7,500.00 fee and serve the complaint on all persons named therein.<sup>129</sup> The parties named must submit a written answer, and BSEE may collect additional information from the parties and from third parties.<sup>130</sup> Following review of the complaint, answer, and other information collected during the investigation, the Director will make a finding of fact and conclusions of law, and will render a decision.<sup>131</sup> If there is a finding that the transporter has not provided open access or has engaged in discriminatory behavior, the Director may enforce a number of remedies, including execution of an order to provide open and nondiscriminatory access, assessment of civil penalties, forfeiture of the underlying ROW, or pursuit of a civil action for a temporary restraining order, injunction, or other equitable remedies.<sup>132</sup> A party adversely affected by the Director's decision may appeal the decision to the Interior

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124. Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, 73 Fed. Reg. 34,630, 34,631 (June 18, 2008).

125. 30 C.F.R. § 291.104(a) (2015).

126. *Id.* § 291.102.

127. *Id.*

128. *Id.* § 291.106.

129. *Id.*

130. *Id.* §§ 291.107, 291.110.

131. *Id.* § 291.112.

132. *Id.* § 291.113.

Board of Land Appeals.<sup>133</sup> The appeals procedure is modeled after the appeal process for royalty disputes, which the MMS decided would be “more cost-effective . . . less intrusive,” and in line with its goal of encouraging resolution of open access issues as opposed to FERC’s more formal process involving discovery, evidentiary hearings, and protective orders.<sup>134</sup>

The MMS declined to provide an exemption in its open access regulations for lateral, feeder, and lease pipelines on the grounds that doing so was unnecessary: “The plain language of section 5(e) and (f) of OCSLA clearly states that open and nondiscriminatory access requirements apply only to pipelines that transport oil and gas . . . . If the function of laterals, feeders and gathering lines is for production purposes prior to transportation, these rules do not apply to those facilities.”<sup>135</sup> Thus, for purposes of regulation of OCSLA open access by the Department of the Interior, a critical determination is whether the movement of oil or gas constitutes “transportation,” and no blanket exception applies based on how the line is named or defined by a company or a regulatory authority, including FERC.

Although the MMS stated its view that OCSLA granted jurisdiction over all pipelines transporting production on the OCS to the MMS, its open access regulations do not extend to “FERC pipelines.”<sup>136</sup> FERC pipelines are defined as any pipelines within FERC’s jurisdiction under the ICA or the NGA.<sup>137</sup> The MMS determined that imposition of OCSLA’s open access requirements to pipelines subject to the NGA or the ICA would be unnecessarily duplicative and, thus, exercised its authority pursuant to OCSLA to “not to duplicate FERC compliance efforts.”<sup>138</sup> As a result, determining the jurisdictional lines between FERC pipelines and OCSLA pipelines can be a tricky yet important legal query.

Even more challenging, however, is determining precisely what actions BSEE would consider to be denials of open access under OCSLA’s provisions. When it promulgated open access regulations, the MMS declined to include express standards in the regulations, desiring instead to refine its definition of open access over time through resolution of actual complaints.<sup>139</sup> The MMS stated only that it would use a broad

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133. *Id.* § 291.114.

134. Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, 73 Fed. Reg. at 34634.

135. *Id.* at 34632.

136. *Id.* at 34634.

137. 30 C.F.R. § 291.101 (2015).

138. Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, 73 Fed. Reg. at 34634.

139. *Id.* at 34631.

“reasonableness standard” to resolve disputes;<sup>140</sup> it anticipated clarification of this standard through application of the complaint procedure. The MMS estimated that it would receive approximately five formal complaints and fifty calls to the open access hotline the first year, followed by fewer complaints in subsequent years once the regulations had been applied in a series of decisions.<sup>141</sup> To date, however, no reported decisions interpret these provisions, and BSEE’s hotline staff has revealed that there have been few, if any, calls to the open access hotline. Thus, while “open and nondiscriminatory access” is required, there is virtually no authority suggesting what BSEE expects in this regard in order to satisfy the mandate of OCSLA.

In resolving disputes, BSEE could look to FERC’s prior OCSLA decisions or rulings made pursuant to FERC’s authority under the ICA or the NGA. The MMS seemed to imply as much in its rulemaking by finding that administration under these other statutes and OCSLA would be redundant and that “FERC’s anti-discriminatory compliance oversight under the NGA and ICA will ensure open and nondiscriminatory access to pipelines under the OCSLA for those pipelines subject to the NGA and ICA.”<sup>142</sup> The comments of the MMS could be read to indicate that compliance with the same competitive standards of the NGA, and certainly the common carrier obligations of the ICA, would satisfy OCSLA’s requirements. Yet, the MMS has expressly stated that it “is not bound by, and does not intend to necessarily base its determinations of reasonableness” on FERC decisions.<sup>143</sup>

The MMS further noted the differences between the statutory requirements of OCSLA and the NGA and ICA. For example, the NGA, as interpreted by FERC, requires no “*undue* discrimination,”<sup>144</sup> while OCSLA simply states that access should be granted “without discrimination.”<sup>145</sup> Accordingly, OCSLA could impose higher standards on transporters than that which FERC requires for compliance with the NGA. However, the MMS did indicate, in the final rule enacting its

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140. Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, 72 Fed. Reg. 17047, 17048 (April 6, 2007) (proposed rule).

141. *Id.* at 17057.

142. Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, 73 Fed. Reg. at 34634.

143. Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, 72 Fed. Reg. at 17048.

144. 18 C.F.R. 284.7 (2015) (emphasis added).

145. 43 U.S.C. §1334 (2014).

OCSLA open access regulations, that it would take a less formal, more hands-off approach than that of FERC in these areas.<sup>146</sup>

## II. ACCESS TO INFRASTRUCTURE OTHER THAN PIPELINES

For the most part, third party access to OCS infrastructure other than pipelines remains unregulated in the United States. Virtually no authority would allow regulators to mandate access to a production platform or facility. Department of the Interior regulations administered by BSEE's sister organization, the Bureau of Ocean Energy Management (BOEM), provide for certain types of access between a party and the government, but do not address third party access rights, which are entirely a function of private agreements such as platform use agreements, production handling agreements,<sup>147</sup> or other case-specific access or use arrangements.

### A. Rights-of-Use and Easements

For example, BOEM regulations provide for issuance of rights-of-use and easements (RUEs). There are two types of RUEs: traditional RUEs and alternative use RUEs. Traditional RUEs may be issued when an entity needs to construct and maintain platforms, artificial islands, installations, or other devices at an OCS site other than the one covered by the entity's OCS lease.<sup>148</sup> The entity must use the RUE for exploration, development, production activities, other on- or off-lease operations, or other purposes approved by BOEM.<sup>149</sup> Alternative use RUEs, which are relatively new, permit parties to use existing structures for energy-related or marine-related purposes not authorized by another statutory authority.<sup>150</sup> The alternative use RUE holder may or may not be the lessee or owner of the facility.

Traditional and alternative use RUEs provide entities the right to locate and use facilities on the OCS. However, the facilities themselves are private property. Consequently, a RUE will not be issued without permission from

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146. See *Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act*, 73 Fed. Reg. at 34634 (stating that the MMS rejected the more formal complaint procedure used by FERC in order to avoid a "chilling effect" on complaints).

147. Production handling agreements often involve complex arrangements specific to a particular facility or project. However, both a shelf and a deepwater model form are available as an initial resource. See 2006 AAPL Production Handling Agreement (Deepwater); 2014 AAPL Production Handling Agreement (Shelf), available at OCS Advisory Board, <https://ocsadvisoryboard.org/documents> [perma.cc/9F28-67BH] (last visited Aug. 29, 2015).

148. 30 C.F.R. § 550.160(a) (2015).

149. *Id.*

150. *Id.* § 585.1000(a).

the owner of the facility and, if located on a leased block, from lessees as well. If an entity applies for a traditional RUE on a leased area, it must notify the lessees and give them an opportunity to comment on the application.<sup>151</sup> An applicant for an alternative use RUE must reach a preliminary agreement regarding the alternative use with the owner of the existing OCS facility and the lessees of the lease on which the facility is located.<sup>152</sup> Once BOEM has reviewed the application for an alternative RUE and reviewed competitive offerings, the lessees and owner of the facility must approve any proposal or an alternative use RUE will not be issued.<sup>153</sup>

The necessity of owner approval as a prerequisite to third party access to OCS facilities other than pipelines is illustrated by *Rooster Petroleum, LLC v. Fairways Offshore Exploration, Inc.*<sup>154</sup> Rooster was a co-owner of a federal lease covering High Island block 141 (HI 141) offshore Louisiana. Oil and gas production from HI 141 moved through a connecting pipeline to High Island block 154 (HI 154), where it was processed at a platform and associated facilities on the block. Fairways held the lease covering HI 154 and owned the platform located on the lease. Pursuant to a platform use agreement between Rooster and Fairways, Rooster was the designated operator of the HI 154 platform and was granted the right to access and use the platform to process production from both HI 141 and HI 154. Production from HI 154 ceased in August 2011, and the HI 154 lease was scheduled to expire 180 days after cessation of production. Because there was still production from HI 141, Rooster applied to BOEM for a traditional RUE in order to preserve its access to the HI 154 platform to process production from HI 141. Fairways sent a letter to BOEM formally objecting to the RUE, citing its obligation to decommission the platform within one year of the lease expiration and the financial risk posed by delaying this process. BOEM refused approval of the RUE due to lack of consent from the former lessee and current facility owner: “BOEM’s authority to issue RUEs does not encompass the power to authorize Rooster to co-opt the private property of a third party against that party’s will.”<sup>155</sup> Thus, as seen in this case, lessee and owner approval are essential for third parties seeking access to existing OCS platforms and production facilities in the United States.

*Rooster Petroleum* also reflects a key difference as to the decommissioning of infrastructure between the United States, on one

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151. *Id.* § 550.160(d).

152. *Id.* § 585.1004.

153. *Id.* § 585.1007.

154. *Rooster Petroleum, LLC v. Fairways Offshore Exploration, Inc.*, 2013 U.S. Dist. LEXIS 170994 (E.D. La. Dec. 4, 2013).

155. *Id.* at \*4-5.



hand, and Norway and the United Kingdom, on the other. This distinction extends to the decommissioning of platforms and production facilities that are located on an expired lease or are no longer useful for production on an existing lease. In *Rooster Petroleum*, ongoing liability risks were raised by the platform owner, Fairways, in its objection to Rooster's request for a RUE allowing for the platform's continued use. BSEE regulations requiring prompt decommissioning, as well as the concerns of owners that may subject themselves to additional liability and increased costs if they delay removal or reefing, have led to a preference for decommissioning over preservation in the hope that a future use for a facility may exist.

In 2007, the MMS published a study of idle offshore facilities on the OCS, which determined that there were 1,227 idle structures and 2,175 active structures in the Gulf of Mexico in 2003.<sup>156</sup> The MMS also updated its decommissioning regulations, enacting the current 30 CFR Part 250, Subpart Q in 2002.<sup>157</sup> Under current regulations, a lessee has one year after a lease terminates to remove all platforms and other facilities located on the lease.<sup>158</sup> A lessee must decommission all wells, pipelines, and other facilities even on active leases if these facilities are no longer "useful for operations."<sup>159</sup> After conducting additional reviews in 2008, BSEE determined that there continued to be too many idle structures and issued Notice to Lessees and Operators (NTL) No. 2010-G05, which is commonly referred to as the "idle iron" NTL.<sup>160</sup> This NTL sought to clarify Subpart Q by setting timelines for when a facility would be considered no longer useful. Under the NTL, all platforms that have not been used to support operations for five years are deemed no longer useful and must be decommissioned.<sup>161</sup>

Some of the same concerns that drive these strict decommissioning regulations also create private incentives to do away with idle structures. Both BSEE and industry participants recognize that idle or dilapidated structures pose significant safety hazards to shipping and other industries, increasing the risk of an accident or well control event. The omnipresent threat of hurricanes further makes leaving any structures dormant in the Gulf of Mexico a risky endeavor. The cost to decommission a toppled or

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156. Mark J. Kaiser & Allan G. Pulsipher, Coastal Marine Inst., *Idle Iron in the Gulf of Mexico* 1 (2007).

157. Oil and Gas and Sulphur Operations in the Outer Continental Shelf-Decommissioning Activities, 67 Fed. Reg. 35,398 (May 17, 2002).

158. 30 C.F.R. § 250.1725 (2015).

159. *Id.* § 250.1703.

160. Department of Interior, *NTL No. 2010-G05*, Bureau of Safety and Envtl. Enforcement (Sep. 15, 2010), <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2010/10-g05/> [perma.cc/VGG6-C7GZ].

161. *Id.*

damaged facility can be exponentially greater than conventional decommissioning costs.<sup>162</sup> Thus, both the private and public interests in the Gulf of Mexico incentivize prompt decommissioning of infrastructure, and the United States' regulatory structure will often mandate decommissioning idle structures as opposed to preserving structures and pipelines for future use by others.

### III. DEEPWATER PORTS

Deepwater ports constitute an exception to the United States' general rule that a party has no right to access a third party's offshore facilities. Congress enacted the Deepwater Port Act (DWPA) in 1974, which established a licensing system for ownership, construction, and operation of deepwater ports beyond the United States' territorial seas.<sup>163</sup> A deepwater port is a non-vessel fixed or floating structure used as a port for the transportation, storage, or handling of oil or natural gas to or from a state, including transportation from the OCS.<sup>164</sup> A deepwater port includes all associated equipment, such as pipelines, pumping stations, mooring buoys, and platforms.

This definition evolved through the enactment of two amendments. Initially, the DWPA only covered oil importation. Thus, only a single deepwater port was licensed under the original version of the DWPA: the Louisiana Offshore Oil Port facility. In 2002, the DWPA was amended by the Maritime Transportation Security Act to incorporate importation of natural gas. Recently, the words "or from" were added, allowing for exportation from a state, in addition to importation to a state. These two amendments may prompt an increase in applications, particularly with regard to the growing number of liquefied natural gas (LNG) export projects in the United States.

Deepwater ports are primarily regulated through the licensing requirements administered by the Maritime Administration and the Coast Guard, with various other agencies peripherally involved in the process. The DWPA prohibits the issuance of a license for a deepwater port without the approval of adjacent states.

A deepwater port that transports, stores, or handles oil is required to operate as a common carrier under the ICA.<sup>165</sup> An oil deepwater port must

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162. See, e.g., *Mariner Energy, Inc. v. Devon Energy Prod. Co.*, 690 F. Supp. 2d 558 (S.D. Tex. 2010), *aff'd*, 517 F. App'x 226 (5th Cir. 2013) (explaining how, following Hurricane Rita, a working interest owner's potential decommissioning liability for a facility increased from \$678,801.00 to approximately \$25 million).

163. 33 U.S.C. § 1503 (2014).

164. *Id.* § 1502(9).

165. *Id.* § 1507(a).

accept, transport, or convey without discrimination all oil delivered to the deepwater port, with two exceptions: the license holder is subject to effective competition of oil from alternative systems, and the license holder sets its rates and conditions of service on the basis of competition.<sup>166</sup> If common carrier standards are not met, the Secretary of Transportation shall commence a proceeding before FERC or request the Attorney General take appropriate steps to enforce them. The Secretary of Transportation may also suspend or revoke a license.<sup>167</sup> Conversely, a natural gas deepwater port is not required to operate as a common carrier; a licensee or affiliate may exclusively utilize the entire capacity. The licensee may make unused capacity available to others pursuant to reasonable terms and conditions imposed by the licensee.<sup>168</sup>

Nevertheless, to date, little attention has been paid to access to deepwater ports, most likely due in part to the limited number of such facilities. Currently, twenty applications for deepwater ports have been filed, two to import oil and eighteen to import LNG. Seven licenses have been issued, four of which are presently active. Of these seven, only the Louisiana Offshore Oil Port and the Northeast Gateway LNG facility are operational. However, as noted above, this situation could change as a result of the December 2012 amendment to the DWPA allowing exportation of LNG. As the interest in exporting LNG increases and more deepwater ports are constructed, issues may arise regarding access to those facilities.

#### CONCLUSION

Third party access on the OCS is largely dependent on the type of infrastructure to which access is sought. Pipelines transporting oil and gas are regulated by the NGA, the ICA, and OCSLA, all of which call for open and nondiscriminatory access for third party shippers. Yet, as a practical matter, there is very little guidance on what open access under OCSLA requires because BSEE's regulatory scheme remains unused and untested since its implementation in 2008. In addition, pipelines that serve functions other than transportation go unregulated, and other infrastructure such as platforms and production facilities are not subject to open access regulations. For that reason, a critical part of planning new deepwater prospects, as well as maintaining existing production anywhere on the OCS, involves the give and take of negotiating private contractual agreements whenever it is not feasible for a party to construct its own facilities.

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166. *Id.* § 1507(b).

167. *Id.* § 1507(c).

168. *Id.* § 1507(d).