UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

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Market Manipulation Rulemaking	)	P082900
	)	

INITIAL COMMENTS OF THE ASSOCIATION OF OIL PIPE LINES

Pursuant to the Notice of Proposed Rulemaking ("NOPR") issued by the Federal Trade Commission ("Commission") on August 13, 2008,[1] the Association of Oil Pipe Lines ("AOPL") hereby submits these Initial Comments in this proceeding, in which the Commission seeks public comment on proposed regulations to implement Subtitle B of Title VIII of the Energy Independence and Security Act of 2007 ("EISA").[2]

For the reasons stated herein, AOPL urges the Commission to revise the proposed 16 C.F.R. Part 317, *Prohibition of Energy Market Manipulation Rule*, to clarify that it does not apply to interstate common carrier oil pipelines regulated by the Federal Energy Regulatory Commission ("FERC") under the Interstate Commerce Act ("ICA").[3]

First, contrary to the Commission's determination in the NOPR, interstate common carrier oil pipelines regulated by the FERC under the ICA are exempt from Commission jurisdiction under the Federal Trade Commission Act ("FTC Act") and, consequently, under the EISA. Second, even if these oil pipelines were subject to Commission jurisdiction, the language of EISA Section 811 evinces legislative intent to

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[1] 73 Fed. Reg. 48,317 (Aug. 19, 2008).

[2] 42 U.S.C. §§ 17301-17305.

[3] As used herein, the term "oil pipelines" refers to all pipelines regulated by the FERC under the ICA, including crude oil and petroleum products pipelines.

exclude oil pipeline transportation from the reach of the statute. Third, the Commission should determine that it is not "necessary or appropriate in the public interest or for the protection of United States citizens" to impose proposed Part 317 on interstate common carrier oil pipelines because (i) those oil pipelines are regulated comprehensively by the FERC under the ICA, (ii) there is little or no potential for manipulation of oil commodities prices by interstate common carrier oil pipelines, and (iii) the price of oil pipeline transportation is an immaterial component of retail costs of gasoline and other petroleum products.

I. COMMUNICATIONS AND SERVICE

All communications and correspondence with respect to these Initial Comments and to this proceeding in general should be served upon the following individuals:

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II. BACKGROUND

A. Association of Oil Pipe Lines

AOPL is an unincorporated trade association that represents 48 common carrier oil pipeline companies. The membership is predominantly composed of U.S. oil pipeline companies but also includes companies affiliated with Canadian pipelines. These companies transport almost 85% of the crude oil and refined petroleum products shipped through pipelines in the U.S. The members of AOPL are subject to regulation by FERC under the ICA with respect to their interstate pipeline operations; state public service commissions generally regulate their intrastate operations.

B. Advance Notice of Proposed Rulemaking

AOPL submitted comprehensive Initial Comments in response to the Advance Notice of Proposed Rulemaking ("ANOPR") issued by the Commission on May 1.[4] The AOPL ANOPR Comments explained: (1) that interstate common carrier oil pipelines regulated by the FERC under the ICA are exempt from Commission jurisdiction under the FTC Act and, consequently, under the EISA; (2) that the language of Section 811 evinces a legislative intent to exclude oil pipeline transportation from the reach of the statute; and (3) that the Commission should determine that it is not "necessary or appropriate in the public interest or for the protection of United States citizens" to impose proposed Part 317 on interstate common carrier oil pipelines.

For the reasons discussed below, the NOPR's analysis of the first point was in error. The NOPR failed to address the second point. With respect to the third point, the NOPR cites a lone federal district court decision in support of the proposition that FERC regulation of oil pipelines under the ICA is no bar to Commission regulation of oil pipelines under EISA. That proposition, however, side-steps AOPL's argument, based upon the language of Section 811, that it is not "necessary or appropriate in the public interest or for the protection of United States citizens" to impose proposed Part 317 on oil pipelines that are regulated comprehensively by the FERC under the ICA.

[4] 73 Fed. Reg. 25,614 (May 7, 2008).

III. COMMENTS

A. Interstate Common Carrier Oil Pipelines Regulated By the FERC under the ICA Are Exempt From Commission Jurisdiction Under the FTC Act and, Consequently, Under EISA.

The AOPL ANOPR Comments explained that interstate common carrier oil pipelines are exempt from Commission jurisdiction under EISA. AOPL ANOPR Comments at 9-10. The Commission's jurisdiction to enforce the EISA is limited by its jurisdiction under the FTC Act. EISA § 813. The FTC Act expressly exempts from the Commission's jurisdiction "common carriers subject to the Acts to regulate commerce." 15 U.S.C. § 45(a)(2). The phrase "Acts to regulate commerce" refers to the ICA. *See, e.g., FTC v. Miller*, 549 F.2d 452, 454-55 n.1 (7th Cir. 1977). Since interstate oil pipelines are common carriers subject to the ICA, they are exempt from the Commission's jurisdiction under the FTC Act and the EISA.[5]

The NOPR acknowledges that "[b]ecause the EISA does not expand or contract Commission jurisdiction or the scope of any rule's coverage, any person to which Commission jurisdiction under the FTC Act does not extend would also lie outside Commission jurisdiction under the proposed rule." NOPR at 26. The NOPR also correctly states that the "FTC Act does not extend to common carriers that are subject to the ICA and its amendments." NOPR at 27. The NOPR, however, incorrectly claims that the ICA does not apply to oil pipelines. *Id.* (contending that the ICA applies only "to interstate rail, trucking and busing; domestic offshore water carriage; and pipelines

[5] It is well established that the FTC Act's exemption for common carriers is a broad one and applies to the entity's "*status* as a common carrier subject to the Interstate Commerce Act." *FTC v. Miller*, 549 F.2d at 455 (emphasis added).

carrying commodities *other than water, gas, or oil.*") (citation omitted) (emphasis in original).

Stated simply, the NOPR relies on the wrong version of the ICA. The version of the ICA cited by the NOPR applies to those carriers that remained regulated by the Interstate Commerce Commission ("ICC") after the regulation of oil pipelines was transferred to the FERC.[6] Oil pipelines, which have been governed under the ICA for over a century, are regulated by the FERC under a prior version of that statute.

FERC Chairman Joseph T. Kelliher explained in September 3, 2008 testimony before the Subcommittee on Energy and Water Development of the Committee on Appropriations of the United States Senate:

> "Regulation of oil pipelines is governed by the version of the ICA as it stood on October 1, 1977, the day of enactment of the Department of Energy Organization Act. That version can be found only as an appendix to the 1988 edition of Title 49 of the Unites States Code (cited as 49 App. U.S.C. § 1, et seq. (1988)). The 1977 version of the ICA also has been reproduced and made available on the FERC website." (Attachment A at pp. 2-3)

The Interstate Commerce Act, as originally enacted in 1887, primarily governed railroads and telegraph companies. In 1906, the Hepburn Act extended the scope of the ICA to include "common carriers engaged in … [t]he transportation of oil … by pipeline." 34 Stat. 589 (1906). From 1906 to 1977, oil pipelines were regulated by the ICC. In 1977, the Department of Energy Organization Act created the FERC and transferred jurisdiction over interstate oil pipelines from the ICC to the new agency. Pub. L. No. 95-91, 91 Stat. 565 (1977); 42 U.S.C. §§ 7155, 7172(b); *see also Trans Alaska*

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[6] *See, e.g., CF Industries v. FERC*, 925 F.2d 476 (D.C. Cir. 1991)(holding that while oil pipelines are governed by the FERC, anhydrous ammonia pipelines remain regulated by the ICC). In 1995, the ICC was abolished and jurisdiction over the industries regulated by the ICC was transferred to the Surface Transportation Board. The Surface Transportation Board continues to regulate pipelines that transport commodities "other than water, gas, or oil." 49 U.S.C. § 15301.

Pipeline Rate Cases, 436 U.S. 631, 634 n.4 and 640 (1978) (discussing the 1906 passage of the Hepburn Act and the 1977 transfer of jurisdiction to the FERC); *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, 1491-93 (D.C. Cir. 1984) (same).

At the time of the transfer of oil pipelines to FERC regulation, railroads and other carriers remained under ICC jurisdiction. In 1978, however, the version of the ICA under which the ICC continued to govern railroads and other carriers was amended and completely recodified and renumbered. *See* Pub. L. No. 95-473, 92 Stat. 1337 (1978) ("ICA Recodification Act") (recodifying ICA provisions governing carriers other than oil pipelines at subtitle IV of Title 49 of the United States Code, 49 U.S.C. § 10101, *et seq*.). The NOPR cites to the recodified and renumbered version of the ICA to support the proposition that the ICA does not apply to oil pipelines. NOPR at 27 (citing 49 U.S.C. § 10101-16106).

The ICA Recodification Act, however, made clear that the FERC would continue to regulate oil pipelines under the version of the ICA that existed on October 1, 1977, the date of enactment of the Department of Energy Organization Act. *See* ICA Recodification Act at § 4(c); *see also Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158, 160 n.3 (D.C. Cir. 1987) ("In October 1978, the Interstate Commerce Act was recodified at 49 U.S.C. § 10101-11916. However, oil pipelines continue to be regulated under the original Act, and statutory references in this opinion will be to the prior version of Title 49 of the United States Code."); *Farmers Union*, 734 F.2d at 1493 n.18 (explaining that the ICA Recodification Act did not amend the ICA as it governed oil pipelines).[7] As Chairman Kelliher recently explained, the version of the ICA that applies

[7] Section 4(c) of the ICA Recodification Act provides that those portions of the ICA that were repealed and recodified in 1978 nevertheless remain in effect as they existed on October 1, 1977, to the extent:

to oil pipelines may be found in an appendix to the 1988 version of Title 49 of the United States Code. *See also ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 956 n.1 (D.C. Cir. 2007) (explaining that the version of the ICA governing oil pipelines "was reprinted in the appendix to Title 49 of the United States Code. Because newer editions of the Code do not include the ICA, however, all citations to the ICA in this opinion refer to the 1988 U.S. Code."). Given the clear language of the ICA Recodification Act and the continued application of the 1977 ICA to oil pipelines by the courts, there can be no dispute that interstate common carrier oil pipelines are governed by the ICA.

It appears that when the ICA was recodified in 1978 the citation to the ICA in the definitions portion of the FTC Act was also changed. However, the revision to the FTC Act's definitions to account for the recodification cited only to the new version of the ICA and not the version of the ICA governing oil pipelines. This error in recodification does not remove oil pipelines from the FTC Act exemption granted by Congress.

The FTC Act exempts from the Commission's jurisdiction "common carriers subject to the Acts to regulate commerce." 15 U.S.C. § 45(a)(2). Prior to 1978, the definitions portion of the FTC Act defined "Acts to regulate commerce" as including "the Act entitled 'An Act to regulate commerce,' approved February 14, 1887, and all Acts amendatory thereof and supplementary thereto." *See* 15 U.S.C. § 44 (Historical and Statutory Notes). This definition clearly refers to the ICA. *See, e.g., FTC v. Miller*, 549

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(1) those laws (A) vested functions in the Interstate Commerce Commission, or in the chairman or members of the Commission, related to the transportation of oil by pipeline, and (B) vested functions and authority in the Commission, or an officer or component of the Commission, related to the establishment of rates or charges for the transportation of oil by pipeline or the valuation of any such pipeline; and

(2) those functions and authority were transferred by sections 306 and 402(b) of the Department of Energy Organization Act (91 Stat. 581, 584, 42 U.S.C. §§ 7155, 7172(b)).

F.2d 452, 454-55 n.1 (7th Cir. 1977). During the recodification, the definitions portion of the FTC Act was changed to define the phrase “Acts to regulate commerce” as “subtitle IV of Title 49.” *See* 15 U.S.C. § 44 (Historical and Statutory Notes).

The sole statutory authority cited in the FTC Act’s Historical and Statutory Notes for the definitional change was the ICA Recodification Act. *See* 15 U.S.C. § 44 (Historical and Statutory Notes). The ICA Recodification Act, however, makes clear that it was intended only to “restate, *without substantive change*, laws enacted before May 16, 1978, that were replaced by those sections,” and that it should “not be construed as making a substantive change in the laws replaced.” ICA Recodification Act § 3(b)(emphasis added). The ICA Recodification Act also stated that “[a]n inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.” *Id.* Moreover, as explained above, the ICA Recodification Act made clear that the provisions of the ICA relating to oil pipelines were not repealed and continued to provide the statutory basis for the FERC’s regulation of oil pipelines. *Id.* at § 4. Thus, nothing in the ICA Recodification Act affects the status of oil pipelines as common carriers subject to the ICA or provides any authority for removing from oil pipelines the exemption from the FTC Act granted by Congress to common carriers regulated by the ICA.

In short, oil pipelines are regulated by the FERC under the ICA. As common carriers regulated under the ICA, they are exempt from the Commission’s jurisdiction under the FTC Act. Since oil pipelines are exempt from the FTC Act, they are also exempt from the EISA. The Commission, therefore, should clarify that any Rule it promulgates under Section 811 of the EISA does not apply to common carrier oil pipelines subject to the ICA.

B. The Language of Section 811 Evinces a Legislative Intent to Exclude Oil Pipeline Transportation From the Reach of the Statute.

Even if the Commission had jurisdiction under the FTC Act and EISA to regulate oil pipelines, the plain language of the EISA reveals a Congressional intent to exclude interstate common carrier oil pipelines from regulation under Section 811 of EISA. AOPL ANOPR Comments at 10-11. Section 811 of EISA prohibits the use of manipulation or deception "in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale . . . ." There is no mention of transportation and related services provided by oil pipelines.

Had Congress intended for EISA to govern oil pipeline transportation, it would have drafted an anti-manipulation statute similar to anti-manipulation statutes it wrote in recent years for the electric and natural gas industries. For example, Section 222 of the Federal Power Act,[8] which was enacted by Section 1283 of the Energy Policy Act of 2005 ("EPACT"),[9] explicitly is applicable to sales and purchases of electric power *as well as* to electric transmission:

> It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy *or the purchase or sale of transmission services subject to the jurisdiction of the Commission*, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers (emphasis added).

[8] 16 U.S.C. § 824v.

[9] Pub. L. No. 109-58, § 1283, 119 Stat. 594, 979 (Aug. 8, 2005).

Similarly, Section 4A of the Natural Gas Act,[10] which was enacted by Section 315 of EPACT,[11] explicitly is applicable to sales and purchases of natural gas *as well as* to natural gas transportation.

The fact that Congress chose *not* to address transportation in Section 811 of EISA evinces a Congressional intent to exclude oil pipeline transportation from the reach of the statute. Nor can the Commission rely on an expansive interpretation of "in connection with" to justify reaching what Congress did not authorize it to regulate. The transportation of crude oil and petroleum products for a fee, which is what oil pipelines do, is not "in connection with" the purchase or sale of crude oil gasoline or petroleum distillates at wholesale. Pipelines are not a party to those transactions and are no more "connected with" them than is a firm like Fed Ex or UPS "connected" to the sale of the products that it carries.

C. The Commission Should Determine That It Is Not "Necessary or Appropriate in the Public Interest or for the Protection of United States Citizens" to Impose Proposed Part 317 on Interstate Common Carrier Oil Pipelines.

1. Interstate Common Carrier Oil Pipelines Are Regulated By the FERC Under the ICA.

The rates and charges, rules, practices and other aspects of transportation service offered by interstate common carrier oil pipelines are subject to extensive regulation by the FERC under the ICA. The breadth of this regulation was described in detail in the AOPL ANOPR Comments at 5-8.

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[10] 15 U.S.C. § 717c-1 ("It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.").

[11] Pub. L. No. 109-58, § 315, 119 Stat. at 691.

Under section 811 of EISA, the Commission should regulate oil pipelines only if it determines that it is "necessary or appropriate in the public interest or for the protection of United States citizens" to impose proposed Part 317 on oil pipelines. The NOPR states that "FERC's authority with respect to price manipulation in such markets is not exclusive, however, and would not preclude the Commission from promulgating an anti-manipulation rule that may reach conduct also subject to FERC's authority." NOPR at 31 n. 92, *citing United States v. Reliant Energy Services, Inc.* 420 F. Supp. 2d 1043 (N.D. Cal. 2006)("*Reliant*"). Setting to one side the exemption from the FTC Act discussed above, the argument that FTC regulation is not *legally preempted* by the FERC does not address AOPL's point that the FTC *should not* regulate oil pipelines, because as a practical matter, the comprehensive nature of FERC regulation renders additional FTC regulation unnecessary. AOPL ANOPR Comments at 11-12. In short, FTC regulation of oil pipelines under Section 811 is neither necessary nor appropriate in the public interest or for the protection of U.S. citizens.

2. There Is Little or No Potential for Manipulation of Oil Commodities Prices On the Part of Interstate Common Carrier Oil Pipelines.

In addition to comprehensive FERC regulation of interstate common carrier oil pipelines under the ICA, the Commission itself has determined that there is little or no potential for manipulation of oil commodities prices on the part of oil pipelines. This was discussed in AOPL ANOPR Comments at 13-17.

In 2006, for example, the Commission investigated gasoline price manipulation and concluded that "regulation and competition provide important constraints on pipeline owners' ability to raise tariffs or otherwise engage in anticompetitive conduct."[12] The Commission also concluded that "[p]ipeline regulation limits the ability of pipelines to exercise market power by charging higher tariffs or by withholding existing capacity from nominating shippers."[13]

In addition, oil pipelines must compete with other modes of oil transportation. In addition to competition from other pipelines, oil pipeline transportation is subject to inter-modal competition (in contrast, for example, to electric power transmission). Approximately thirty percent of the crude oil and petroleum products consumed in this country is transported via barge or ship.[14]

3. The Price of Oil Pipeline Transportation Is an Immaterial Component of Retail Costs of Gasoline and Other Petroleum Products.

The Commission itself has acknowledged that "[d]irect infrastructure costs (such as pipeline tariffs, marine vessel shipping rates, and terminaling fees) constitute a relatively small portion of the total delivered cost of gasoline. Even a relatively large percentage price increase in the costs of transportation and storage services would have

[12] Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* 30 (2006)("*Katrina Report*"). "Pipelines subject to FERC rate regulation cannot increase rates over the published tariff except under limited circumstances. Pipelines can offer discounts on the tariffs (usually based on volume), but FERC rules prohibit common-carrier pipelines from discriminating among customers. Accordingly, pipelines must offer the same rate to all customers that meet stipulated requirements (*e.g.*, a minimum volume requirement)." *Id.* at 32.

[13] *Id.*

[14] Statement of Benjamin S. Cooper, Executive Director, Association of Oil Pipe Lines, on Behalf of the American Petroleum Institute and the Association of Oil Pipe Lines, Before the Federal Trade Commission (Aug. 2, 2001).

only a small percentage effect on the quantity of product delivered to a market and on delivered product prices."[15]

Indeed, a Commission investigation in 2005 confirmed that gasoline prices, and gasoline price increases, are not attributable to pipeline transportation costs.[16] This investigation also confirmed that gasoline price increases were attributable to market forces and not to market manipulation.[17] *See also* AOPL ANOPR Comments at 17-18.

IV. QUESTIONS ON PROPOSED SPECIFIC PROVISIONS

Is the Commission's determination that the proposed Rule meets the rulemaking standard – that the rule is "necessary or appropriate in the public interest or for the protection of United States citizens" – correct? In what way is the proposed Rule necessary or appropriate? In what way does the proposed Rule fail to be necessary or appropriate?

For the reasons stated in these Initial Comments, proposed Part 317's application to oil pipelines is neither "necessary [n]or appropriate." As explained in Section III.A., above, oil pipelines are exempt from the Commission's jurisdiction under the FTC Act and the EISA. In addition, as discussed in Section III.B., Congress did not intend for oil pipelines to be regulated under the EISA. Moreover, for the reasons discussed in Section III.C., interstate common carrier oil pipelines (i) are regulated by the FERC under the ICA, (ii) have little or no potential to manipulate oil commodities prices, and (iii) represent an immaterial component of retail costs of gasoline and other petroleum products.

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[15] *Katrina Report, supra* note 13, at 29. "Pipelines are generally the lowest-cost method of transporting large quantities of refined petroleum products." *Id.* at 30. Indeed, the approximate cost for pipeline transportation from Houston to New York for a gallon of gasoline is just three cents. *Id.*

[16] *See generally* Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition* (2005).

[17] *Id.* at ii.

The Commission did not provide for safe harbors or exemptions from the proposed Rule. Should there be safe harbors or exemptions? If so, what should they be? To what should they apply; that is, what types of acts or practices should constitute a safe harbor? Why should that be so? What types of acts or practices should be exempt? Why should that be so?

As explained in Section III.A., oil pipelines are exempt from the Commission's jurisdiction under the FTC Act and the EISA. Thus, the Commission should clarify that its proposed rules do not apply to interstate common carrier oil pipelines. If the Commission nevertheless determines that it may reach oil pipelines under this rule, AOPL urges the Commission to provide a safe harbor protecting oil pipelines against any culpability under the rule so long as they are acting in accordance with the ICA and FERC regulation of oil pipelines pursuant to the ICA.

V. CONCLUSION

For the reasons set forth above, AOPL urges the Commission to revise the proposed regulations to clarify that they do not apply to interstate common carrier oil pipelines regulated by the FERC under the ICA.

Respectfully submitted

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DATED: October 17, 2008

ATTACHMENT A

TESTIMONY OF
THE HONORABLE JOSEPH T. KELLIHER
CHAIRMAN
FEDERAL ENERGY REGULATORY COMMISSION

BEFORE THE SUBCOMMITTEE ON ENERGY AND WATER DEVELOPMENT
COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE

SEPTEMBER 3, 2008

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to appear before your Subcommittee to discuss Energy Supply and Constraints in Western North Dakota. My testimony today will include a description of the nation's oil pipeline network, a brief history of oil pipeline regulation, a description of the Federal Energy Regulatory Commission's (FERC) authority under the Interstate Commerce Act to regulate the transportation of oil and oil products by pipelines and the jurisdictional limitations of the Act on that authority, a description of current oil pipeline rate regulation, and comments on North Dakota crude oil transportation.

<u>OIL PIPELINES IN THE UNITED STATES</u>

The nation's oil pipeline network consists of approximately 200,000 miles of pipelines performing a variety of roles. Crude petroleum systems transport crude oil and synthetic oil from production areas and marine terminals to refineries. The refiners produce a variety of petroleum products, principally gasoline, heating oil, and jet fuel, but also liquefied petroleum gases (*e.g.*, butane and propane), kerosene, heavier distillates, naphthas, and asphalt. A system of pipelines separate from crude oil lines transport refined petroleum products from refineries or import terminals to distribution points. Both crude oil and petroleum product transportation is measured in barrels (bbls.). A barrel equals 42 U.S. gallons.

A BRIEF HISTORY OF OIL PIPELINE REGULATION

The Interstate Commerce Act (ICA) gives the Commission the authority to regulate the transportation rates and practices of oil pipelines. The Hepburn Act of 1906 began the regulation of interstate oil pipelines, making pipelines common carriers subject to regulation. The Act was an amendment to the existing Interstate Commerce Act that from its enactment in 1887 had focused primarily on railroad and telegraph company regulation. The responsibility for regulating oil pipeline rates was vested in the Interstate Commerce Commission (ICC) and remained with the ICC until 1977, when the Department of Energy Organization Act was enacted. That Act transferred jurisdiction over oil pipeline regulation from the ICC to the new Department of Energy and the Federal Power Commission, predecessor to FERC.

Regulation of oil pipelines is governed by the version of the ICA as it stood on October 1, 1977, the day of enactment of the Department of Energy Organization Act. That version can be found only as an appendix to the 1988 edition of Title 49 of the United States Code (cited as 49 App. U.S.C. § 1, et seq.

(1988)). The 1977 version of the ICA also has been reproduced and made available on the FERC website.

REQUIREMENTS, AND LIMITATIONS, OF THE ICA

The ICA applies to the transportation of oil and oil products, *i.e.*, crude oil and petroleum products, from one state to any other state, from any place in the United States to a foreign country, and from a foreign country to any place in the United States (but only insofar as such transportation takes place within the United States). Because oil pipelines are common carriers, the ICA requires that they provide transportation upon reasonable request. This means, for example, that an oil pipeline operating at full capacity must prorate that capacity among current shippers to make capacity available for a new shipper requesting transportation service from the pipeline. In prorationing, the Commission cannot legally give preferential treatment to domestic oil producers over foreign sources.

The ICA requires that all charges for oil pipeline transportation must be just and reasonable.   Oil pipelines must file tariffs showing all their rates and charges and can make changes to those rates and charges only after 30 days' notice to the Commission and the public. On its own motion or in response to a protest, the Commission can suspend tariff filings for up to seven months and institute investigations into their lawfulness; at the end of the suspension period, the proposed tariffs can go into effect subject to refund. The Commission can also investigate the lawfulness of oil pipeline rates and practices and prescribe changes upon complaint or its own initiative.

Some matters the ICA does **not** confer jurisdiction over are the siting and construction of oil pipelines (authority rests with states and local jurisdictions), mergers and acquisitions, abandonment of service, and safety (authority rests with the Department of Transportation's Pipeline and Hazardous Materials Safety Administration).

RATEMAKING UNDER THE ICA

The Commission until 1992 historically used two ratemaking methodologies for the adjudication of oil pipeline rates – cost-based and market-based. The Commission's cost-based ratemaking methodology for oil pipelines employs a "trended original cost" rate base and was instituted in Opinion No. 154-B, *Williams Pipe Line Co*., 31 FERC & 61,377 (1985). In brief, a pipeline's annual revenue requirement is calculated using a rate base that is trended to account for inflation.

As an alternative to the cost-based ratemaking approach, the Commission adopted a market-based approach for Buckeye Pipe Line Company in Opinion No. 360, *Buckeye Pipe Line Company, L.P.*, 53 FERC & 61,473 (1990). *Buckeye* implemented a lighter-handed regulatory approach that permitted rates charged by the pipeline in competitive markets to be determined by market forces.

In Title XVIII of the Energy Policy Act of 1992 (EPAct 1992), Congress directed the Commission to establish a "simplified and generally applicable ratemaking methodology for oil pipelines." Congress in EPAct 1992 also protected oil pipelines' existing rates by deeming them "to be just and reasonable" as of the date of enactment.

There was no legislative history to discern how Congress intended the Commission to simplify its ratemaking methods, and the text of EPAct 1992 itself provided little guidance. In response, the Commission instituted rulemakings that culminated in Order No. 561, which adopted rate methodologies for oil pipeline rate changes, Order No. 571, which established filing requirements for cost information that pipelines must include with cost-of-service rate filings, and Order No. 572, which established filing requirements for pipelines proposing to charge market-based rates. These ratemaking methodologies became effective on January 1, 1995, and were affirmed by the U.S. Court of Appeals for the D.C. Circuit in 1996, *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir 1996).

The regulations adopted in response to EPAct 1992 provide an indexing, or a price cap, methodology as the simplified and generally applicable ratemaking methodology for oil pipelines. The existing rates deemed to be just and reasonable by Congress in EPAct 1992 form a baseline for future oil pipeline rate changes within an indexed ceiling. The index used under the Commission's regulations is the annual change in the Producer Price Index for Finished Goods (PPI-FG), including an annual adjustment factor, currently plus 1.3 percent. Under indexing, oil pipeline rates may be adjusted up to the ceiling level established by the index. Rates changed under the index methodology may not exceed the ceiling level. If the ceiling level goes down, pipelines must lower existing rates that exceed the new ceiling level. The regulations also provide for challenges to individual rates on the basis that they are substantially in excess of the pipeline's costs, even though the rate may be at or below the ceiling level.

A pipeline can seek to charge rates above its index ceiling level by showing that its cost of service substantially exceeds the revenue resulting from application of the index, or by negotiating an agreement with all its current shippers to charge higher rates. A pipeline that desires to charge market-based rates may do so after it has asked for and received from the Commission a finding that it lacks significant market power in the markets it serves.

Other provisions of the Commission's regulations also provide procedures to resolve contentious issues short of full-blown litigation. All protested tariff filings are referred to a settlement judge, and disputed rates are set for hearing only after settlement proves infeasible.

NORTH DAKOTA CRUDE OIL TRANSPORTATION

There has been dramatic growth in crude oil production in the Williston Basin area of North Dakota that has increased the North Dakota oil producers' need for available oil pipeline capacity to move their crude oil to market. In 2007, North Dakota crude oil production was approximately 125,000 barrels per day. In March 2008, daily production levels had risen by 22,000 barrels to approximately 147,000 bpd, or an increase of approximately 17.5 percent on an annual basis. Existing pipelines serving the area are operating at full capacity, requiring that they apportion their capacity among shippers.

At the same time, crude oil imports from Canada are rising. Annual crude oil production levels for 2007 published by the Alberta Resources Conservation Board reveal the Alberta Basin yielded about 482,000,000 barrels that year or 1,860,000 bpd, a 3 percent increase from 2006. Significantly, Canadian imports are projected to reach 3,400,000 bpd by 2017. Canadian oil imports currently comprise 20 percent of U.S. crude oil supply and represent our largest source of oil imports. We expect this trend to continue. These imports are reliable supplies from a secure country and improve our energy security.

However, Canadian imports require space in the pipeline and can create bottlenecks in pipeline capacity that limit the amount of crude oil that can be moved out of the North Dakota production region. Pipelines serving North Dakota are increasing their capacity, which should help to alleviate capacity shortages; nevertheless, it is likely that with additional growth in North Dakota crude oil production and Canadian imports the pipelines' proposed capacity increases still will not be adequate to transport North Dakota production without capacity prorationing among shippers seeking that capacity.

While the Natural Gas Act authorizes the Commission to issue certificates of public convenience and necessity to natural gas companies to construct and operate pipelines for the transportation of natural gas in interstate commerce, there is no similar authority with regard to oil pipelines. For natural gas pipelines, the Commission serves as the lead agency in charge of processing applications to construct interstate natural gas pipeline facilities, conduct the necessary environmental review pursuant to the National Environmental Policy Act, and coordinate the timing of other necessary federal permits. The Natural Gas Act allows the Commission to attach reasonable conditions to its decisions or "certificates." Further, Commission authorizations convey the right of eminent domain to the recipients of the certificate which may be exercised in the U.S. District Court for the district where the facility will be located or in state courts. In the instances where there is an application for a new pipeline or where a new service on an existing system is being proposed (most likely due to facility additions), the Commission has the authority to approve initial rates for the new service. It should also be noted that interstate natural gas pipelines are contract carriers, *i.e.*, their services are provided on a contractual basis. Thus, if a pipeline is already fully used, a new shipper is not entitled to a prorationed share of the capacity.

The siting of oil pipelines by contrast is handled primarily by state agencies. The Interstate Commerce Act, thus, does **not** authorize the Commission to regulate the siting or construction of oil pipelines.

The Commission recognizes the need for investment in energy transportation infrastructure to meet the nation's growing demand for energy and encourages new and expansion crude oil pipeline projects. The Commission, in fact, has approved several settlement proposals involving rates for expansion of Enbridge Pipeline's North Dakota mainline to provide additional crude oil takeaway capacity for the North Dakota production area, and rates for other

Enbridge Energy Company proposals to expand the major pipelines importing Canadian crude oil to help relieve pipeline capacity bottlenecks. However, there is no ICA or other statutory provision that allows the Commission to regulate how much foreign oil can displace domestic oil in oil pipelines, since oil pipelines under the ICA are common carriers that must provide nondiscriminatory service to all who request it.

The Commission's regulatory authority also begins only at the border and extends only to transportation that takes place within the United States, regardless of the source of the oil being transported. The Commission thus does not have a role in regulating foreign sources of crude oil entering the United States, but only its movement once it crosses the border. The Commission also does not regulate how much crude oil is coming into the United States from Canada.

CONCLUSION

The nature of the problem is that North Dakota oil production and Canadian crude oil imports exceed current pipeline takeaway capacity in the region. Both domestic and Canadian crude oil production are increasing, exacerbating the competition for limited pipeline capacity. There have been additions to pipeline takeaway capacity in the region, but not enough to eliminate constraints or accommodate future increases in North Dakota production or Canadian imports.

The best solution is to increase the pipeline capacity available to both sources of crude oil. FERC supports energy infrastructure development and the Commission has participated as a member of the Interstate Oil and Gas Compact

Commission Crude Oil Market Infrastructure Task Force that was first convened in 2006 to investigate the crude oil market dynamics in the Rocky Mountain region. However, the parties themselves must resolve who will commit to support the development of new infrastructure and who is willing to pay for it. FERC for its part will continue to work with all parties to achieve these ends.