



Federal Trade Commission Act (“FTC Act”) and, therefore, not subject to the final rule. This clarification is necessary to conform the rule promulgated here to the scope of the Commission’s authority under the FTC Act and to prevent oil pipelines regulated under the ICA from being required to comply with potentially conflicting regulatory requirements. The Commission suggests in the Revised NPRM that it must “assess on a case-by-case basis” whether any particular oil pipeline or any particular conduct of an oil pipeline may fall outside the scope of the proposed regulations. *See* Revised NPRM at 27. As AOPL has maintained throughout these proceedings, however, oil pipelines regulated by FERC under the ICA are not subject to these regulations as a matter of law because of their status as common carriers subject to the ICA.<sup>4</sup> “Case-by-case” determinations cannot change the law.

## **I. COMMUNICATIONS AND SERVICE**

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## **II. BACKGROUND**

### **A. Association of Oil Pipe Lines**

AOPL is an unincorporated trade association that represents common carrier oil pipeline companies. The membership is predominantly composed of U.S. oil pipeline

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<sup>4</sup> *See* AOPL Initial Comments on NPRM at pages 4-9.

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. Comments Submitted Previously By AOPL**

In May 2008, the Commission issued an Advance Notice of Proposed Rulemaking (“ANPRM”) under Subtitle B of Title VIII of EISA.<sup>5</sup> AOPL submitted comprehensive comments in response to the ANPRM, in which AOPL explained that (i) interstate common carrier oil pipelines regulated by the FERC under the ICA are exempt from Commission jurisdiction under the FTC Act and, therefore, under EISA; (2) the language of Section 811 of EISA evinces a legislative intent to exclude oil pipeline transportation from the reach of the statute; and (3) 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 regulations on interstate common carrier oil pipelines.

In August 2008, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) in this proceeding.<sup>6</sup> AOPL submitted comprehensive comments in response to the NPRM. AOPL again argued, among other things, that oil pipelines regulated by FERC under the ICA are exempt from Commission jurisdiction under the FTC Act and, therefore, under EISA.

**C. Revised Notice of Proposed Rulemaking**

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<sup>5</sup> 73 Fed. Reg. 25,614 (May 7, 2008).

<sup>6</sup> 73 Fed. Reg. 48,317 (Aug. 19, 2008).

On April 16, 2009, the Commission issued the Revised NPRM. With respect to the scope of the Rule, consistent with Section 811 of EISA, the Revised NPRM provides that the Rule would be applicable to any person over which the Commission has jurisdiction under the FTC Act. Proposed Section 317.1. In response to the comments that AOPL filed on the NPRM, the Revised NPRM states that “not all pipelines necessarily fall outside the coverage of the FTC Act,” but that “[c]ertain pipeline companies or their activities may fall outside the coverage of the FTC Act to the extent that they are acting as ‘common carriers.’” Revised NPRM at 26.

The Commission states further that:

FERC regulation of pipelines would be an insufficient basis upon which to exempt pipeline companies if they engage in prohibited conduct in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates. The Commission therefore must assess on a case-by-case basis whether any particular “person” as defined in the revised proposed Rule – or any conduct at issue – may fall outside the scope of the revised proposed Rule, and/or whether the conduct at issue falls under the “in connection with” language in the revised proposed Rule.

Revised NPRM at 27.

The Revised NPRM also observes that the Commission can exercise jurisdiction over interstate common carrier oil pipelines under the Clayton Act,<sup>7</sup> an antitrust statute which has no bearing upon the scope of the Commission’s jurisdiction under the FTC Act or Section 811 of EISA.

### **III. COMMENTS**

#### **A. The Commission Should Clarify That Oil Pipelines Regulated By FERC Under the ICA Are Not Subject to The Proposed Regulations.**

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<sup>7</sup> Revised NPRM at 26, note 75.

The Revised NPRM correctly states that “any ‘person’ not subject to Commission jurisdiction under the FTC Act would also not be subject to Commission jurisdiction under the revised proposed Rule.” Revised NPRM at 25. The Revised NPRM also states that “[c]ertain pipeline companies or their activities may fall outside the coverage of the FTC Act to the extent that they are acting as ‘common carriers.’” Revised NPRM at 26. It appears, however, that the Revised NPRM intends to regulate oil pipelines on a “case-by-case basis” depending upon the activities and conduct of the oil pipeline in question, even if the oil pipeline is regulated by FERC under the ICA. *Id.* at 26-27. AOPL respectfully submits that “case-by-case” analysis is unnecessary and inappropriate with respect to oil pipelines regulated by FERC under the ICA. Case-by-case analysis cannot subject to the proposed rule persons which are exempt from Commission jurisdiction under the FTC Act (*e.g.*, oil pipelines regulated by FERC under the ICA), and would result in confusion and increased litigation without serving any purpose under EISA.

As AOPL’s Initial Comments filed in response to the NPRM explained in detail, oil pipelines that provide common carrier transportation in interstate commerce are regulated by FERC under the ICA, and are therefore exempt from Commission jurisdiction under the FTC Act, and, consequently, under EISA.<sup>8</sup> The Revised NPRM does not take issue with AOPL’s legal analysis.<sup>9</sup> The Revised NPRM suggests, however, that jurisdiction under the FTC Act and the EISA is dependent on a “case-by-case”

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<sup>8</sup> AOPL Initial Comments on NPRM at pages 4-9.

<sup>9</sup> In the NPRM, the Commission recognized that the “FTC Act does not extend to common carriers that are subject to the ICA and its amendments.” NPRM at 27. The NPRM, however, incorrectly claimed that oil pipelines are not subject to the ICA. *Id.* In the Revised NPRM, it appears the Commission no longer maintains that oil pipelines are not subject to the ICA, since it recognizes that “certain pipeline companies ... fall outside the coverage of the FTC Act.” Revised NPRM at 26.

analysis of whether the oil pipeline is “acting as [a] ‘common carrier’” or is “engage[d] in conduct in connection with wholesale petroleum markets covered by EISA.” Revised NPRM at 26-27. On the contrary, all oil pipelines regulated by FERC under the ICA are exempt from the jurisdiction of the FTC Act and the EISA.

All oil pipelines regulated by FERC under the ICA are common carriers. 49 U.S.C. app § 1(1) (1988). No set of circumstances exists under which an oil pipeline regulated by FERC under the ICA would NOT be a common carrier. It is, therefore, wholly unnecessary and inappropriate for the Commission to “assess on a case-by-case basis” whether or not an oil pipeline regulated by FERC under the ICA is “acting as a ‘common carrier.’” Revised NPRM at 27.

Nor is it correct that “FERC regulation of pipelines would be an insufficient basis upon which to exempt pipeline companies if they engage in prohibited conduct [under the rule].” Revised NPRM at 27. As explained above, if an oil pipeline is regulated by FERC under the ICA, it is by definition a common carrier that is exempt from the FTC Act. Jurisdiction under the FTC Act is not dependent on a pipeline’s “activities” or whether it engages in certain “conduct in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates.” Revised NPRM at 26-27. The FTC Act’s exemption for common carriers is written “in terms of *status* as a common carrier subject to the Interstate Commerce Act, not *activities* subject to regulation under that Act.” *FTC v. Miller*, 549 F.2d 452, 455 (7<sup>th</sup> Cir. 1977) (emphasis added); *id.* at 460 (rejecting the FTC’s suggestion “that Congress intended the clear language of the common-carrier exemption to be tortured into a limitation only upon ... activities [regulated by FERC’s predecessor, the Interstate Commerce Commission, under the

ICA]”). Indeed, the FTC Act’s common carrier exemption would have little meaning if an oil pipeline regulated by FERC under the ICA was only exempt to the extent it did not engage in conduct within the scope of the proposed rule.

The Revised NPRM asserts that “pipeline companies and their *owners* or *affiliates* are often involved in multiple aspects of the petroleum industry – including the purchase and sale of petroleum products, and the provision of transportation services – and they may engage in conduct in connection with wholesale petroleum markets.” Revised NPRM at 26-27 (emphasis added). AOPL agrees that some oil pipelines have affiliates that engage in the purchase and sale at wholesale of petroleum products (although many do not). However, unlike oil pipelines, those affiliates are not regulated by FERC under the ICA. The Commission, however, seems to blend FERC-regulated oil pipelines together with their affiliates that are not regulated by FERC under the ICA to claim that activity by these affiliates may justify the Commission’s regulation of oil pipelines that are regulated by FERC under the ICA.<sup>10</sup> This assumption would allow the Commission to impose a duplicative and potentially conflicting scheme of regulation on oil pipelines already regulated by FERC under the ICA. It was precisely to avoid such duplicative and conflicting regulation that the FTC Act excludes common carriers regulated under the ICA.<sup>11</sup> The “in connection with” language in the revised proposed Rule cannot be used

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<sup>10</sup> See Revised NPRM at 27 (“FERC regulation of pipelines would be an insufficient basis upon which to exempt pipeline companies if they engage in prohibited conduct in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates.”).

<sup>11</sup> See *FTC v. Miller*, 549 F. 2d at 455 (explaining that in granting an exemption from the FTC Act for certain companies such as banks or common carriers subject to the ICA, “Congress demonstrated its adherence to its traditional policy of dividing regulatory responsibilities along industry lines, rather than, as the FTC suggests, on the basis of particular activities.”).

to give the Commission jurisdiction over activity that has been entrusted to another agency under the ICA. To promulgate regulations consistent with the terms and intent of Subtitle B of Title VIII of EISA as well as the FTC Act itself, the Commission should clarify that proposed Part 317 does not apply to oil pipelines regulated by FERC under the ICA.

**B. If the Revised NPRM Is Not Clarified, Then Oil Pipelines May Be Subject to Conflicting Regulatory Requirements.**

The Revised NPRM observes that some commenters sought a clarification that the proposed Part 317 would not require the disclosure of commercially sensitive information. If the Commission were to insist on seeking to apply these regulations to oil pipelines regulated by FERC under the ICA, then AOPL would share this concern, particularly because Section 15(13) of the ICA prohibits oil pipelines subject to the ICA from disclosing certain confidential shipper information.<sup>12</sup> For example, oil pipelines are prohibited from revealing any information concerning the “nature, kind, quantity, destination, consignee, or routing” of volumes a pipeline shipper may be delivering into or may be receiving from an oil pipeline. This prohibition may place oil pipelines in conflict with proposed Section 317.3(b), which would make it unlawful for a person to “intentionally fail to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or tends to distort market conditions for any such product.”

The Revised NPRM states that “[t]he Commission does not intend . . . to impose disclosure obligations on market participants unless the omission of material fact is made

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<sup>12</sup> 49 U.S.C. app. § 15(13) (1988).

with the intent to deceive and those omissions are of the type that distort or tend to distort market conditions.” Revised NPRM at 67. This generalized statement, however, fails to provide an assurance that proposed Part 317 would not require the disclosure of commercially sensitive information and would not require a violation of Section 15(13) of the ICA because a pipeline is in no position to judge whether protecting confidential shipper information could “distort or tend to distort market conditions.” To alleviate the potential conflicting regulatory compliance requirements, and in accordance with the Commission’s jurisdictional bounds under Section 811 of EISA, AOPL reiterates its request that the Commission expressly exempt oil pipelines regulated by FERC under the ICA from any final rule issued herein.

#### **IV. RESPONSE TO GENERAL QUESTIONS FOR COMMENT**

**Does the revised proposed Rule strike an appropriate balance between protecting consumers from petroleum market manipulation and limiting attendant costs to industry such as the chilling of legitimate business conduct and compliance burdens?**

With respect to oil pipelines, No. The Commission should clarify that proposed Part 317 will not apply to oil pipelines regulated by FERC under the ICA in order to avoid chilling legitimate business conduct and imposing an unreasonable compliance burden on oil pipelines that are already regulated by FERC. The imposition of proposed Part 317 on oil pipelines regulated by FERC under the ICA would result in inconsistent and overlapping regulation, such as the potentially conflicting information disclosure requirements discussed above, and in needless costs to pipelines, to pipeline shippers, and, ultimately, to consumers, while serving no purpose under EISA.

The cost of inconsistent and overlapping pipeline regulation could be substantial. If shippers are permitted to challenge oil pipeline rates and practices at the Commission

as well as at the FERC, the result will be confusion and increased litigation, which will do nothing to benefit consumers. To the extent overlapping regulation undermines the ability of oil pipelines to charge compensatory rates authorized under FERC regulation, that in turn may deter the construction of additional pipeline infrastructure. No additional consumer-protection benefits would be achieved.

## V. CONCLUSION

For the reasons set forth above, AOPL urges the Commission to clarify that oil pipelines regulated by FERC under the ICA are exempt from the regulations proposed in the Revised NPRM.

Respectfully submitted,

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