150 FERC ¶ 61,103
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Enbridge Offshore Facilities, LLC Docket No. CP14-512-000

DECLARATORY ORDER

(Issued February 19, 2015)

1. On July 1, 2014, Enbridge Offshore Facilities, LLC (Enbridge) filed a petition pursuant to Rule 207 of the Commission's Rules of Practice and Procedure[1] for a declaratory order by the Commission finding that Enbridge's construction and operation of a bi-directional natural gas pipeline will not be subject to the Commission's jurisdiction under the Natural Gas Act over the transportation of natural gas in interstate commerce and facilities used to transport natural gas in interstate commerce.

2. As discussed below, the Commission will grant the petition.

## I. Background

3. Enbridge currently owns and operates approximately 125 miles of non-jurisdictional natural gas gathering pipelines in the Gulf of Mexico. Enbridge also owns and operates an offshore oil gathering pipeline and liquids handling facilities in southern Louisiana. Enbridge does not own or operate any interstate or intrastate natural gas transmission lines.

4. Enbridge states that it plans to construct a new, bi-directional natural gas pipeline (Gas Delivery Pipeline) to be operated as part of a larger project that will include enhanced oil recovery (EOR) operations at a new production field offshore of Louisiana. The field is expected to primarily produce oil, but natural gas also will be produced throughout the projected 40-year life of the production operation.

[1] 18 C.F.R. § 385.207 (2014).

5. Enbridge's Gas Delivery Pipeline will consist of approximately 100 miles of 12-inch diameter pipeline connecting a new deep-water production platform, located on the Outer Continental Shelf in approximately 4,000 feet (1,219 meters) of water, to an existing natural gas processing plant onshore in Plaquemines Parish, Louisiana (Venice Plant). Enbridge will also construct appurtenant facilities, including gas meters, electronic flow measurement and communication equipment, pigging/launching equipment, and associated piping located at the Venice Plant and the offshore platform.

6. The Gas Delivery Pipeline is designed to be a bi-directional pipeline to deliver natural gas produced at the offshore platform to the onshore Venice Plant for processing and to deliver processed natural gas from the Venice Plant to the production platform for use in EOR operations. Enbridge states that during the initial 18 to 36 months of offshore production operations, only a portion of the gas produced will be reinjected to increase oil production or used to power daily operations at the platform. During this period, most of the associated gas production will be moved by the Gas Delivery Pipeline in a south to north direction to the Venice Plant, where the gas will be processed and delivered to the downstream interstate pipeline grid. A separate pipeline will be constructed to deliver the oil production to shore.

7. After 18 to 36 months of operation, Enbridge expects the native pressure in the production field to drop to a point where the volumes of gas needed for injection into the producing formation to maximize oil production will exceed the amount of native gas being produced and reinjected. At this time, the direction of the flow of gas in the Gas Delivery Pipeline will be reversed to deliver processed gas in a north to south direction from the Venice Plant to the offshore platform for injection into the producing formation to enhance oil recovery. A small portion of the gas will be used to power platform operations.

8. The Gas Delivery Pipeline will operate at high pressure both when it is being used to deliver unprocessed native gas production to the Venice Plant and when it is delivering processed gas from the Venice Plant to the production area for injection in the EOR operations. The high operating pressure of the pipeline (up to 3,600 pounds per square inch (psi)), when it is moving the unprocessed gas to the Venice Plant, will minimize the risk of hydrate and retrograde condensate formation. The Gas Delivery Pipeline also will operate at high pressure (up to 3,600 psi) when delivering processed gas from the Venice Plant to the production area in order to deliver gas to the platform at the high pressures (1,800 to 2,000 psi) necessary for the enhanced oil recovery operations.

9. Enbridge requests that the Commission find that Enbridge's operation of the bi-directional Gas Delivery Pipeline, which is designed to move processed gas to the Outer Continental Shelf for use in oil and gas production activities and its operation of the pipeline to transport unprocessed gas from the Outer Continental Shelf to shore, will be exempt from the Commission's NGA jurisdiction over the transportation of gas in interstate commerce, and that the Gas Delivery Pipeline therefore will not be a jurisdictional facility.

## II. Procedural Matters

10. The Commission published a notice of the petition for declaratory order in the *Federal Register* on July 22, 2014.[2] No motions to intervene, notices of intervention, or protests were filed.

## III. Discussion

11. Under the Natural Gas Act (NGA), the Commission has jurisdiction over the transportation of natural gas in interstate commerce. However, section 1(b) of the NGA exempts the production and gathering of natural gas from the Commission's jurisdiction over the transportation of natural gas in interstate commerce. Section 1(b)'s exemption for the production and gathering of natural gas extends to the facilities used in those activities.[3] Enbridge's Gas Delivery Pipeline will be transporting gas in interstate commerce both when it is moving unprocessed gas from the offshore production platform to the onshore Venice Plant for processing and delivery into the interstate pipeline grid, and when it is delivering gas from the Venice Plant to the offshore platform for use in production activities.[4] Thus, the jurisdictional status of the Gas Delivery Pipeline depends on whether it will function as a production or gathering facility.

[2] 79 Fed. Reg. 40,097 (2014).

[3] *See, e.g., EP Operating Company, et al. v. FERC*, 876 F.2d 46 at 50 (5th Cir. 1989) ("Our decision is based on the record which clearly demonstrates that this facility is an integral part of production and gathering and therefore exempted by section 1(b).").

[4] Enbridge states that all of the processed gas used in the EOR operations will be owned by the single producer operating the production platform and conducting the EOR injection operations. Petition at 4. When the Venice Plant is not operating or for some other reason the producer is unable to arrange receipt of sufficient gas at the tailgate of the Venice Plant, the producer may arrange to receive gas at an interconnection with an intrastate pipeline or interstate pipeline inside the processing plant yard. Regardless, whether the gas transported from the Venice Plant to the production platform for EOR injection purposes is gas produced in federal waters or gas received from an interconnection with an intrastate pipeline or interstate pipeline inside the Venice Plant yard, the Gas Delivery Pipeline will be moving the gas interstate commerce as defined in section 2(7) of the NGA defines, 15 U.S.C. §717 a(7):

> 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

12. Because the NGA does not define production or gathering, the Commission has developed a legal test known as the primary function test for use in considering the jurisdictional status of facilities. However, as discussed below, the primary function test assumes the subject pipeline facilities will be used to transport gas *from* a production area to the interstate pipeline system, and its criteria, therefore, have been formulated to determine where non-jurisdictional gathering ends and jurisdictional transmission begins. Consequently, the primary function test's criteria are only useful in considering the jurisdictional status of Enbridge's Gas Delivery Pipeline when it will be used to transport gas from the production platform to the Venice Plant, i.e., during the first 18-36 months of production operations and the occasional periods thereafter when native gas production exceeds operational needs at the platform. The primary function test's criteria are not useful in determining the jurisdictional status of Enbridge's Gas Delivery Pipeline during most of the projected 40 years of its operation, i.e., when it will be transporting processed gas supplies from the Venice Plant to the Outer Continental Shelf platform for use in production activities.

13. Injection of the processed gas from the Venice Plant into the producing field to enhance oil recovery also will result in additional native gas being recovered over the life of the project. The native gas and the injected volumes from the Venice Plant will both be recovered along with oil, and reinjected to further enhance oil production. The only potential offshore use for the processed gas transported by Enbridge's Gas Delivery Pipeline from the Venice Plant, is in production activities and powering platform operations.

14. While Enbridge's planned use of the Gas Delivery Pipeline to transport processed gas onto the Outer Continental Shelf for EOR operations presents a matter of first impression, a finding that this use of the pipeline will be non-jurisdictional is supported by Commission orders involving EOR production activities in onshore situations. For example, in *East Cheyenne Gas Storage, LLC*,[5] and *Golden Gas Service Company,*,[6] the Commission did not require either company to obtain certificate authorization to construct or operate a pipeline to receive gas from an interstate pipeline and transport it for injection at the site of the company's EOR operations, which also resulted in the

[5] 132 FERC ¶ 61,097 (2010) (*East Cheyenne*).

[6] 126 FERC ¶ 61,094 (2009) (*Golden Gas*).

recovery of additional native gas.[7] We similarly find that Enbridge's use of its pipeline to transport processed gas to an offshore platform for EOR operations that will result in associated native gas production will be a production activity exempted by section 1(b) of the NGA from the Commission's jurisdiction over the transportation of gas in interstate commerce. Thus, Enbridge's planned use of the Gas Delivery Pipeline to transport processed gas from the onshore Venice Plant to the offshore platform does not provide a basis for finding that Enbridge needs certificate authorization under section 7 of the NGA to construct and operate the Gas Delivery Pipeline.

15. Next, we consider the jurisdictional status of Enbridge's Gas Delivery Pipeline during the periods that it will be used to transport gas from the Outer Continental Shelf production platform to the Venice Plant for processing and delivery into the interstate pipeline system. As discussed above, Enbridge states that additional gas supplies will not be needed at the production platform for EOR injection purposes until the producing formation's native pressure declines after the first 18-36 months of production operations. Further, the formation's pressure will be high enough during this initial period that only a small portion of the native gas production will need to be reinjected. Therefore, the pipeline's initial use will be to move most of the formation's associated gas production to the Venice Plant for processing. Enbridge also states that there will be times throughout the projected 40-year period of the production project that EOR operations will need to be temporarily suspended for operational reasons. During these periods of EOR interruption, gas will not be needed for injection and the pipeline's direction of flow will be temporarily reversed to transport any continuing native gas production to the Venice Plant for processing (rather than flaring it).

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[7] Similar to Enbridge's plans, Golden Gas planned to use its pipeline to transport gas to its production area where it would be injected to maximize oil recovery which would also result in additional associated native gas production. *Golden Gas*, 126 FERC ¶ 61,094 at P 4. In addition to transporting gas for its non-jurisdictional EOR operations, East Cheyenne also planned to use its pipeline to transport gas to and from jurisdictional storage facilities that it proposed to construct by converting depleted areas of its oil and gas production fields. *East Cheyenne*, 132 FERC ¶ 61,097 at P 7. The Commission granted East Cheyenne certificate authority to start using the pipeline for storage services once its storage facilities were completed, but the Commission did not require East Cheyenne to have certificate authority to construct and operate the pipeline for its EOR operations in the interim period. *Id.* PP 10-11. While East Cheyenne's and Golden Gas's onshore pipelines were relatively short (3.57 miles and 8 miles, respectively) because of their proximity to the interstate pipeline facilities with which they could feasibly interconnect, Enbridge's planned 100-mile long Gas Delivery Pipeline will necessarily be much longer because it will be delivering gas to EOR operations on the Outer Continental Shelf. Further, as discussed below, the need for bi-directionality of gas flow makes it infeasible for Enbridge to construct a shorter pipeline and interconnect with an existing offshore pipeline.

16. As noted above, the Commission generally applies its primary function test to determine whether pipeline facilities are jurisdictional transmission facilities or non-jurisdictional gathering facilities. The primary function test's original criteria, which were developed in the onshore context and first articulated in *Farmland Industries, Inc.*,[8] considers a number of physical and geographical factors, including the lengths and diameters of the pipelines at issue.[9] Although not part of the original of the primary function test, the Commission also has considered non-physical factors such as the original purpose and operation of the subject facilities and the general business activity of the owner of the facilities or company seeking to purchase the facilities. While the courts have sanctioned taking into account such non-physical factors, non-physical factors generally only come into play if the physical factors result in a close call.[10] The Commission also considers whether reaching a particular jurisdictional determination would be consistent with the goals of the NGA and the Natural Gas Policy Act of 1978

[8] 23 FERC ¶ 61,063, at 61,143 (1983) (*Farmland*).

[9] In addition to the lengths and diameters of the pipelines at issue, the other original *Farmland* criteria consider the extension of the subject facilities beyond the central point in the field, the facilities' geographic configuration, the location of compressors and processing plants, the location of wells along all or part of the facilities, and the operating pressures of the lines.

[10] *Williams Gas Processing-Gulf Coast Co. v. FERC*, 331 F.3d 1011, 1019 (D.C. Cir. 2003) (court instructing the Commission that non-physical factors, such as a system's historical evolution, must have only secondary importance in reaching determinations regarding the jurisdictional status of facilities). *But cf. Jupiter Energy Corp. v. FERC* (*Jupiter*), 482 F.3d 293, at 296-8. (5th Cir. 2007). In *Jupiter*, the court acknowledged that it had stated in a previous remand that non-physical factors are "secondary to the physical factors," (citing *Sea Robin Pipeline Co.*, 127 F.3d 365, at 371 (D.C. Cir. 1997)), but clarifying that non-physical factors cannot be ignored and must be considered when relevant to determining where gathering ceases and jurisdictional transmission commences. Specifically, the court found in its *Jupiter* remand that the Commission had not given sufficient consideration to non-physical factors that tended to suggest that Jupiter's facilities performed a gathering function, including the fact that Jupiter's only remaining shipper was its parent Unocal, neither Jupiter nor Unocal owned any other jurisdictional facilities, Unocal's business activity was gathering and production, and Unocal was seeking to integrate Jupiter's facilities into Unocal's own production. Since *Jupiter*, the Commission has sought to identify, on a case-by-case basis, any non-physical factors which, under the circumstances presented, should be given weight in determining the jurisdictional status of the facilities at issue. *See Tennessee Gas Pipeline Company*, 137 FERC ¶ 61,105, at P 40 (2011).

(NGPA).[11] The Commission does not consider any one factor to be determinative and recognizes that all factors do not necessarily apply to all situations.

17. In view of the "changing technical and geographic nature of exploration and production" further from shore and potential interconnections with existing interstate transmission facilities, the Commission concluded in 1990 in *Amerada Hess Corporation*[12] that a relatively long pipeline on the Outer Continental Shelf may be consistent with a primary function of gathering or production, whereas an onshore pipeline of similar length would not. Therefore, the Commission modified the primary function test for application to offshore facilities to apply a sliding scale to recognize that pipelines being constructed to gather offshore production were necessarily increasing in length and diameter as production activities moved further from shore and into deeper water.[13]

18. Further, in 1996 the Commission issued a policy statement establishing a presumption that new pipeline facilities that are designed to collect gas produced in water depths of 200 meters (656 feet) or more qualify as gathering facilities up to the point of

[11] 15 U.S.C. §§ 3301-3432 (2012). In finding in *Straight Creek Gathering, L.P.*, 117 FERC ¶ 61,005, at P 18 (2006), that a gathering determination for planned facilities would be consistent with the goals of the NGA and NGPA, the Commission took into account the fact that Straight Creek's parent company was in the business of gathering and processing gas, owned no jurisdictional interstate gas pipeline facilities, and had formed Straight Creek for the purpose of constructing and operating the planned new gathering system. The Commission also recognized the need for an expanded gas infrastructure in eastern Kentucky to unlock the producers' currently shut-in gas and that federal and state representatives and local producers had demonstrated strong support indicating the need for the facilities. The facilities would also result in additional supplies of gas to the public and promote competition within the area of the proposed facilities, which also would be consistent with the goals of the NGA and the NGPA.

[12] 52 FERC ¶ 61,268, at 61,988 (1990).

[13] In *Sea Robin Pipeline Company*, 87 FERC ¶ 61,384 (1999), the Commission further reformulated the primary function test for offshore facilities to add a central aggregation point criterion for use in situations where there is an identifiable point on an offshore system where gas is received from multiple upstream areas and at which there is a change in physical attributes, such as multiple smaller diameter upstream pipelines delivering gas into a larger diameter trunk line that takes the gas to shore.

potential interconnection with existing interstate transmission facilities,[14] and that the Commission therefore would only apply its primary function test to determine the jurisdictional status of that portion of a pipeline that would extend beyond a point of potential interconnection with existing interstate transmission facilities. The Commission explained that beyond that point of potential interconnection, it could see little difference in function between the existing jurisdictional interstate transmission line that takes gas to shore and a newly built line that would take gas to the same area onshore, and that as a matter of policy, owners of pipeline facilities that perform similar functions should be subject to the same regulatory requirements.[15]

19. Enbridge's 100-mile long Gas Delivery Pipeline will begin at a production platform at a location where the water depth is 4,000 feet (1,219 meters). Almost half of the pipeline will be in water that is deeper than 200 meters.[16] While the rebuttable presumption of an exempt gathering function only applies to a deep-water pipeline up to the first point of potential interconnection with existing jurisdictional transmission facilities,[17] it must be a *feasible* point of potential interconnection, taking into account the purposes for which the pipeline will be used and operated.

20. As discussed above, during the projected forty years that Enbridge's Gas Delivery Pipeline will be in operation, it will only be used for relatively short periods to transport gas from the offshore production area to shore. The majority of the time the pipeline will be used to transport processed gas from the onshore Venice Plant to the offshore production platform for injection in the EOR operations. If an existing offshore interstate transmission facility follows a path that comes close at any point to the planned route for Enbridge's Gas Delivery Pipeline, that existing pipeline is being used to transport gas to shore and would not have the bi-directional flexibility to transport processed gas to an

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[14] *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 FERC ¶ 61,222, at 61,756 (1996), *order dismissing reh'g*, 75 FERC ¶ 61,291 (1996).

[15] *Id*. at 61,757.

[16] *See* map included as Exhibit A to Enbridge's petition.

[17] We note that in *Discovery Producers Services and Discovery Gas Transmission*, 78 FERC ¶ 61,194 (1997), the Commission decided that the presumption of gathering status would not apply to any portion of the 104-mile long trunkline of Discovery's planned offshore system because only the first 2.5 miles of the pipeline would be in water slightly deeper that 200 meters. In view of the circumstances, the Commission found it appropriate to apply the primary function test to the entire trunkline and found that it was a jurisdictional transmission facility.

interconnection with Enbridge's pipeline. Because there is no feasible point at which Enbridge's Gas Delivery Line would be able to interconnect with an existing offshore transmission facility, we find that the presumption of a primary gathering function for a deep-water pipeline should apply to Enbridge's entire Gas Delivery Pipeline.

## IV. Conclusion

21. For the reasons discussed herein, we grant Enbridge's petition for a declaratory order finding that its planned Gas Delivery Pipeline will not be engaged in jurisdictional transportation of gas in interstate commerce and that its construction and operation of the pipeline therefore are exempt from certification requirements and the Commission's jurisdiction under section 7 of the NGA.

The Commission orders:

Enbridge's petition for declaratory order is granted based on the findings herein that the Gas Delivery Line will be used in exempt natural gas production and gathering activities under section 1(b) of the NGA not subject to the Commission's jurisdiction and section 7 certification requirements.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.