

UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR  
MINERALS MANAGEMENT SERVICE



The Open and Non-Discriminatory )  
Movement of Oil and Gas as Required )  
by the Outer Continental Shelf Lands Act )

Proposed Rule

---

---

COMMENTS OF  
INDICATED PRODUCERS

---

---

The Indicated Producers<sup>1</sup> hereby submit Comments in response to the April 6, 2007 Proposed Rule issued by the Minerals Management Service (“MMS”) of the United States Department of Interior (“Interior”) in the above-referenced proceeding. *Open and Non-Discriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act*, 72 Fed. Reg. 17,047 (April 6, 2007) (“Notice”). In the Notice, MMS solicits comments to assist it in amending its regulations to implement its authority to ensure that, as required by Sections 5(e) and (f) of the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §§ 1334(e) and (f), pipelines provide open and non-discriminatory access to their facilities and services.

These comments are intended to address only the open and non-discriminatory access requirement as it applies to natural gas pipelines. The comments are not intended to address oil pipelines.<sup>2</sup> To the extent members of Indicated Producers wish to comment on

---

<sup>1</sup> Indicated Producers are an *ad hoc* group of companies having interests in natural gas transported on pipelines in the OCS. The members of the group for purposes of these Comments are BP America Production Company, Chevron U.S.A. Inc., ConocoPhillips Company, Exxon Mobil Corporation, and Shell Offshore Inc.

<sup>2</sup> While these comments do not address oil pipelines, the arguments presented herein, which demonstrate that the non-discrimination and open access condition does not and should not apply to production and production-related facilities and activities, apply with equal force to the production of oil and gas.

MMS's application of the non-discrimination and open access condition to oil pipelines, these companies or their affiliates will do so in separate comments.

## I. INTRODUCTION

In 2003, the U.S. Court of Appeals for the District of Columbia issued a decision vacating the Federal Energy Regulatory Commission's ("FERC") regulations requiring companies providing certain services in the Outer Continental Shelf ("OCS") to periodically file information with FERC concerning their services, shippers, rates, and terms and conditions of service.<sup>3</sup> Under the guise of authority it claimed under Sections 5(e) and (f) of OCSLA, FERC had promulgated the regulations in Order No. 639,<sup>4</sup> with the view that the regulations "would enhance competitive and open access to gas transportation."<sup>5</sup> FERC extended the reporting requirements not just to pipeline services on the OCS, but also to production-related services. The D.C. Circuit, however, held that FERC in Order No. 639 had overstepped its bounds under OCSLA. Specifically, the Court vacated Order No. 639 on grounds that FERC's authority under OCSLA is limited to specific tasks and does not give FERC "general powers to create and enforce open access rules on the OCS."<sup>6</sup> In contrast, the D.C. Circuit pointed to the Secretary of Interior's authority to grant rights-of-way for all pipelines in the OCS. On this basis, the Court

---

<sup>3</sup> *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *aff'd sub nom. The Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003).

<sup>4</sup> *Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, Order No. 639, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1996-2000] (CCH) ¶ 31,097 (2000); *order on reh'g*, Order No. 639-A, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1996-2000] (CCH) ¶ 31,103 (2000).

<sup>5</sup> *Williams*, 345 F.3d at 911.

<sup>6</sup> *Id.* at 916; *see also Chevron*, 193 F. Supp. 2d at 70-71.

concluded that Congress intended to place enforcement of the open access and non-discrimination requirements in the hands of the Secretary of the Interior.<sup>7</sup>

In the face of the D.C. Circuit's conclusion that the Department of the Interior, rather than FERC, has general enforcement authority under OCSLA, MMS issued an April 12, 2004 Advance Notice of Proposed Rulemaking ("Advanced Notice") to solicit "comment[s] on the scope, proposed action, and possible alternatives the MMS should consider . . . in fulfilling its responsibility of assuring open and non-discriminatory access to pipelines in the OCS." *The Open and Non-Discriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act*, 69 Fed. Reg. 19,137, 19,138 (April 12, 2004). Following its consideration of a number of comments submitted by interested parties, mainly shipper/producers and pipeline/transportation services companies, MMS issued the Notice "proposing new regulations that would establish a process for a shipper transporting oil or gas production from Federal leases on the OCS to follow if it believes it has been denied open and nondiscriminatory access to pipelines on the OCS." Notice at 17,047.

## II. EXECUTIVE SUMMARY

Producers have been involved in exploration, development and production activities in the OCS for over 50 years. As lessees in numerous OCS leases in the Gulf of Mexico ("GOM"), and as producers of a significant percentage of the oil and gas produced from the GOM, Indicated Producers have a vital interest in MMS' implementation of its authority under OCSLA.

Indicated Producers concur with the MMS proposal to adopt a regulatory regime to enforce OCSLA Sections 5(e) and (f) that does not impose the unwarranted burdens related to

---

<sup>7</sup> *Williams*, 345 F.3d at 913.

reporting requirements, such as those implemented by FERC in its Order No. 639 and vacated in *Williams*. Indicated Producers concur with the MMS proposal because the burden of reporting requirements would be pointless.

Indicated Producers agree that MMS should adopt a complaint-based approach to regulating transportation on the OCS. This regime should comprise two mechanisms. First, as proposed in the Notice, MMS should adopt a hotline mechanism modeled on FERC's Enforcement Hotline. Market participants could informally bring their complaints to MMS' attention through this hotline mechanism, and MMS personnel could then attempt to resolve any dispute without the need for formal proceedings. To address the situations where this informal process is inadequate, Indicated Producers agree that MMS should have in place more formal procedures for the prosecution of a complaint. Indicated Producers generally support the procedures proposed in the Notice. However, Indicated Producers urge MMS to establish a clear mechanism to provide public notice of all complaints filed with MMS and an opportunity for interested parties to seek to intervene. Further, MMS should publish all orders issued in the formal complaint proceedings. This is particularly important given the conclusion of the MMS that it will develop its substantive interpretation of the open and non-discriminatory access standard through case-by-case adjudications. Thus, it is essential that MMS make its decisions in the complaint cases readily available to the public.

Indicated Producers also strongly support MMS' proposal to limit the scope of the rule to pipeline facilities used to provide transportation services. As recognized by MMS in its Notice, under the express terms of OCSLA, the non-discrimination and open access requirements apply only to pipeline facilities used in providing such transportation services. The requirements do not apply to production platforms, production and production-related facilities on platforms or

upstream of such platforms, or to production and production-related facilities in multi-platform production complexes in the OCS, or to the production-related activities undertaken in or on such facilities. Production is an activity that is statutorily separate from pipeline transportation. Production activities are undertaken under rights held by producers under oil and gas leases issued by MMS. Under the plain terms of Sections 5(e) and (f) of OCSLA, the non-discrimination and open access requirements apply only to the rights-of-way and other grants of authority relating to pipeline transportation.

In so limiting the reach of the non-discrimination and open access requirements, Congress wisely excluded production-related activities. Producers hold the exclusive right to produce oil and gas under leases granted by the Department of the Interior. The imposition of a non-discrimination and open access condition on production-related facilities and activities would directly undermine the contract and property rights held by lessees. Oil and gas production is a highly competitive industry in the United States. Producers invest huge sums – sometimes billions of dollars in a single project – in offshore leases and production-related infrastructure. The willingness of producers to make this investment would be undermined if others could demand access to platforms and other production-related facilities after the producers have undertaken the substantial risk and expense of building the platforms and associated production-related infrastructure.

### **III. DISCUSSION**

#### **A. MMS Should Adopt Its Proposed Hotline And ADR Mechanisms As Well As A Formal Complaint System.**

An overarching question in MMS' Notice is how MMS should exercise its authority to enforce non-discrimination and open access requirements. MMS appropriately proposed not to implement mandatory reporting requirements as previously proposed by FERC.

In its Notice, MMS proposes a hotline mechanism through which complainants may request voluntary and informal alternative dispute resolution. MMS also recognizes that a more rigorous dispute resolution process might be necessary in certain cases, so it also proposes more formal complaint procedures. Notice at 17,050. As further detailed and explained below, the Indicated Producers agree that both hotline and a formal complaint procedures should be established to enable MMS to carry out its enforcement duties under OCSLA. Indicated Producers also support the proposed regulations insofar as they give potential complainants the option of either seeking an informal resolution of a dispute via the hotline mechanism or filing a formal complaint. *Id.* Complainants should not be forced to pursue an informal resolution of a matter if they believe that their dispute needs to be addressed in a formal complaint proceeding.

**1. MMS Should Adopt Its Proposed Informal Hotline And ADR Mechanisms.**

Indicated Producers support the creation of an informal hotline mechanism, in order to provide entities perceiving a violation of OCSLA with an opportunity to seek, at their option, the assistance of MMS personnel to resolve informally disputes relating to discrimination or a denial of access to pipelines in the OCS. Indicated Producers also support MMS' proposal to give the parties the option of agreeing to use Alternative Dispute Resolution ("ADR") mechanisms to resolve such disputes. *Id.*

Such mechanisms would carry with them several benefits, including the expeditious resolution of issues without costly proceedings. Such mechanisms would also avoid imposing unnecessary burdens on agency and industry participants. These mechanisms may be particularly useful for addressing matters that are not complex.

**2. A Carefully Structured Formal Complaint Process Should Also Be Adopted.**

Indicated Producers also support the proposal to institute a formal complaint mechanism for issues that are not resolved through an MMS hotline or ADR process. With the

option of a more formal complaint process, MMS and industry participants would have the ease and convenience of informal resolution, but the availability of a more formal process for more contentious or complex cases.

As proposed, parties to a complaint proceeding would be permitted to submit written complaints and responses. MMS would be empowered to request information from any “lessee, operator of a lease or unit, shipper, grantee, or transporter. . . to provide additional information that MMS believes is necessary to make a decision on whether open access or nondiscriminatory access was denied.” Notice at 17054. Indicated Producers fully support these procedures. Essential facts may be in the possession of third-parties and, therefore, MMS must be empowered to direct such parties to provide such information to the parties and MMS to ensure that decisions are based on all relevant facts.

Certain commenters to the Advanced Notice claimed that MMS does not have authority to conduct such hearings as it is not specifically empowered to do so pursuant to OCSLA. Notice at 17,051. MMS properly rejected this argument.

Section 5(a) of OCSLA, 43 U.S.C. § 1334(a), grants the Secretary of the Interior broad authority to administer the Act. This grant of authority includes the power to “prescribe such rules and regulations as may be necessary to carry out” the provisions of the Act. Inherent in the Secretary of the Interior’s authority to administer the Act, and to promulgate regulations to implement its responsibilities, is the primary responsibility to interpret the terms of the Act. *See United States v. Mead Corp.*, 533 U.S. 218, 227-30 (2001). Where the Secretary’s interpretation is in accordance with the plain language of the Act, or reflects a reasonable interpretation of ambiguous terms, the courts must give deference to the Secretary’s interpretation. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

Accordingly, it is the Secretary's responsibility to determine in the first instance the meaning of the open and non-discriminatory access standard and, concomitantly, to determine the circumstances under which a pipeline violates the standard. There is no basis in the statute to support the view that MMS may not establish reasonable procedures under which MMS may gather relevant facts in order to determine whether a pipeline has violated the open and non-discriminatory access standard as interpreted by the Secretary of the Interior. To the contrary, OCSLA provides the Department of the Interior with the right to hold hearings to adjudicate violations and to fashion appropriate remedies.

Under Section 24(b) of OCSLA, 43 U.S.C. § 1350(b), the Department of the Interior is explicitly empowered to hold hearings to determine civil penalties for *any* violation of OCSLA or of the regulations, orders, licenses, leases or permits issued thereunder. The Section states:

[I]f any person fails to comply with *any* provision of this subchapter, or any term of a lease, license, or permit issued pursuant to this subchapter, or *any* regulation or order issued under this subchapter, after notice of such failure and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than \$20,000 for each day of the continuance of such failure. The Secretary may assess, collect, and compromise any such penalty. *No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing.*

43 U.S.C. § 1350(b) (emphasis added). Inherent in this provision is the obligation of the Department of the Interior to make a determination that a violation has occurred. A person charged with a violation may not be assessed a penalty until the person has been afforded a hearing. Clearly, the hearing must encompass the underlying question whether a violation has occurred because the primary defense against an assessment of a penalty is the argument that no violation has in fact occurred.

Accordingly, Section 24(b) of OCSLA provides MMS with the authority to establish hearing procedures to consider the complaints of shippers and other interested persons that a pipeline has violated the open and non-discriminatory access requirements of OCSLA. In the event MMS determines, after the requisite hearing, that a violation has occurred, MMS can assess a penalty of up to \$20,000 for non-compliance. *See* Notice at 17,055.

If a pipeline refuses to cease its non-compliance and/or refuses to pay the assessed penalty, MMS can request the Attorney General or a United States Attorney to bring an action in federal district court to enforce the provisions of OCSLA and MMS' order finding a violation and imposing civil penalties. In such civil action, the Department can seek not only enforcement of civil penalties but also "a temporary restraining order, injunction, or other appropriate remedy" for the violation. As Section 24(a), 43 U.S.C. § 1350(a), states:

At the request of the Secretary [of the Interior], the Secretary of the Army, or the Secretary of the Department in which the Coast Guard is operating, the Attorney General or a United States attorney shall institute a civil action in the district court of the United States for the district in which the affected operation is located for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this subchapter, any regulation or order issued under this subchapter, or any term of a lease, license, or permit issued pursuant to this subchapter.

In the event that MMS concludes that there is no violation, or refuses to bring an enforcement action in a district court to remedy a violation, the complainant can seek judicial review in district court.

These provisions plainly demonstrate that MMS has full statutory authority to adjudicate complaints relating to pipelines' violations of the open and non-discriminatory access requirements of Sections 5(e) and (f) of OCSLA.

**3. MMS Should Adopt A Mechanism To Provide To The Public Notice Of Complaints And Access To Agency Decisions.**

Indicated Producers fully support MMS' proposal to leave the interpretation of the open and non-discriminatory access standards to case-by-case determination. The statutory standard should not be interpreted in a vacuum. Instead, it should be construed in the context of specific controversies.

However, this approach makes it essential that MMS provide the public with timely notice of the filing of complaints so that interested persons may monitor proceedings or seek to intervene. Further, MMS should make their decisions in such complaint proceedings readily available to the public so that interested persons can be apprised of MMS' construction of the open and non-discriminatory access standards in specific cases.

Specifically, Indicated Producers propose that MMS publish notice of each formal complaint, and provide a reasonable time within which interested persons may seek to intervene. Further, the records developed in such proceedings should be maintained and made accessible to the public for review, subject to a lawful determination by MMS that a portion of such records should be kept confidential under proposed Section 291.111. Finally, MMS should publish all decisions rendered by MMS and, ultimately, by the Interior Board of Land Appeals ("IBLA") or the Secretary of the Interior (or the Secretary's delegatee). These notices and decisions should be published in the *Federal Register*, and posted on the MMS website.

**4. MMS Should Establish A Limitations Period.**

Indicated Producers urge MMS to adopt a limitations period of two years within which persons may file a formal complaint, or pursue a claim informally via the hotline or ADR. The limitations period should begin to run from the date the potential complainant learns (or

should have learned with the exercise of reasonable vigilance) of the actions or circumstances that the complainant asserts constitute a denial of open and non-discriminatory access.

Such a limitations period is necessary to provide all parties with reasonable certainty with respect to activities undertaken in the OCS. Parties should not be exposed indefinitely to potential claims arising from past actions. Considerations of repose and reliance strongly support a reasonable limitations period. Indicated Producers believe that this period should be two years, which period reasonably balances the interests of both complainants and respondents.

**5. MMS Should Leave The Decision To Stay An MMS Order To Case-By-Case Determinations.**

MMS requests comments on whether it should automatically stay each of its decisions pending an appeal to the IBLA. Indicated Producers urge MMS to leave the question as to a stay of its decisions pending appeal to the IBLA to case-by-case determinations. The decision as to whether a stay is appropriate should turn on the facts and equitable considerations presented by each case. MMS should not prejudge these matters with a blanket rule automatically staying all orders. By leaving the matter to be decided in each case, MMS will be able to review the arguments of the affected parties in specific cases, and decide the question based on the facts and circumstances presented by each individual case.

**B. MMS' Proposed Regulations Properly Encompass Only The Facilities And Services Subject To OCSLA's Non-Discrimination And Open Access Standard.**

**1. MMS Correctly Proposes That The Plain Terms of Sections 5(e) And (f) Of OCSLA Apply To Pipeline Transportation But Not To Production-Related Activities.**

Under the express terms of OCSLA, the open and non-discriminatory access requirements apply only to "pipeline" facilities providing "transportation" services. MMS properly declined to encompass production-related services within the regulatory program. The

open and non-discriminatory access requirements do not extend to production facilities on platforms and the production-related services provided by those facilities. Nor does the statute impose the condition on facilities and activities upstream of the platform, such as subsea manifolds and production flowlines and the activities undertaken in such facilities. Had Congress wanted that broader reach, it would have crafted Sections 5(e) and 5(f) of OCSLA to include platforms and production facilities.

Instead, Congress took pains to draft OCSLA so that the open-access provisions only apply to *transportation by pipelines*, as evidenced by the plain terms of Section 5(e) of OCSLA:

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for *pipeline* purposes for the *transportation* of oil, natural gas, sulfur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary . . . and upon the express condition that 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 such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing . . . determine to be reasonable, taking into account, among other things, conservation and the prevention of waste.

43 U.S.C. 1334(e) (emphasis added). Section 5(f) similarly only includes transportation by pipelines within the scope of services subject to the open and non-discriminatory access requirement:

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the *transportation by pipeline* on or across the outer Continental Shelf of oil or gas shall require that the *pipeline* be operated in accordance with the following competitive principles:

(A) The *pipeline* must provide open and nondiscriminatory access to both owner and non-owner shippers.

- ...
- (2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection *any pipeline or class of pipelines* which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.
  - (3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that *pipelines* are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.
  - (4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to *pipelines* on or across the outer Continental Shelf.

43 U.S.C. 1334(f) (emphasis added). There is no mention of production and production-related facilities and services in any of these provisions.

For these reasons, MMS correctly recognized that there is no basis to conclude that the references to pipelines and transportation in Section 5(e) and (f) was intended to encompass production-related facilities or services.

2. **MMS Should Clarify The Distinction Between The Applicability Of Its Proposed Regulations To Leases And To Rights-Of-Way.**
  - a. **OCSLA Makes Clear that Production-Related Activities Are Governed By The Contractual Rights Granted To Lessees Under The Terms Of Oil And Gas Leases.**

The Notice suggests that the proposed MMS regulations may apply to pipelines on the OCS including those constructed and operated pursuant to leases. Notice at 17,049. The Notice also purports to encompass “platforms . . . directly related to the transportation of oil and

gas production.” *Id.* Indicated Producers respectfully request that MMS clarify that the regulations do not apply to producers’ facilities constructed under authority of their oil and gas leases, including production platforms and lease pipelines. Producers’ utilization of such facilities is under the exclusive right to explore for, develop, and produce oil and gas from the leased premises. Open and non-discriminatory access is directly in conflict with such exclusive rights.

While Section 5(f)(1)(A) contemplates the imposition of the non-discrimination and open access condition on “every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline” of oil or gas on or across the OCS, this language does not include leases under which MMS grants a lessee the exclusive right to explore, develop, and produce the oil and gas contained within the leased area. Leases are issued pursuant to Section 8 of OCSLA. *See* 43 U.S.C. § 1337(b)(4). Section 8 of OCSLA does not contain a non-discriminatory and open access requirement or condition. To the contrary, Section 8 contemplates the grant of *exclusive* rights to the winning bidder for lease rights to produce oil and gas from the leased area for the term of the lease. The exclusive contract rights are fundamentally inconsistent with a non-discrimination and open access condition.

In sum, the express terms of OCSLA foreclose the imposition of the non-discrimination and open access condition on production-related facilities and activities authorized under leases granted by the Secretary of the Interior.

**b. MMS’ Current Regulations, Which Properly Reflect The Statutory Scheme, Should Not Be Disturbed.**

MMS’ existing regulations carefully reflect the statutory distinction between transportation and production, and apply OCSLA’s open access requirements only to non-FERC-regulated pipelines used for transportation services. These existing regulations also reflect the

statutory distinction between facilities and activities authorized under a right-of-way and those authorized under a lease. MMS should ensure that its proposed regulations preserve these sound distinctions.

The non-discrimination and open access condition is only imposed on a pipeline for which a right-of-way must be granted. *See* 30 C.F.R. §§ 250.1001 (definition of “right-of-way pipelines”). Section 250.1010 of MMS’ regulations states that the holder of a right-of-way for an “oil or gas pipeline” shall “[p]rovide open and nondiscriminatory access to a right-of-way pipeline to both owner and nonowner shippers. . . .” 30 C.F.R. §§ 250.1010(f)(1) & (2)(i). MMS regulations define “pipelines” as the “piping, risers, and appurtenances installed for the purpose of *transporting* oil, natural gas, sulfur, or produced water.” 30 C.F.R. § 250.1001 (emphasis added). The definition of “pipelines” expressly excludes “[p]iping confined to a production platform or structure.” *Id.* This definition properly reflects the statutory distinction between production activities and facilities, and those facilities “installed for the purpose of transporting.” Indeed, the regulations separately define “[p]roduction facilities” as including “processing equipment for treating the production or separating it into its various liquid and gaseous components before transporting it to shore.” *Id.*

In contrast, a lessee is entitled under the terms of its leases to construct and operate pipelines, platforms and other production-related facilities that are necessary for the full enjoyment of the rights to produce and undertake other activities authorized under the lease.<sup>8</sup> The lease does not impose a non-discrimination and open access condition on these facilities and activities. Thus, the regulations do not impose such conditions on “[l]ease term pipelines,” as those pipelines are defined in 30 C.F.R. § 250.1001, or on platforms or other production-related

---

<sup>8</sup> *See, e.g.*, OCS oil and gas lease, Form MMS-2005 (March 1986) at Section 2(c).

facilities. For example, Sections 250.900 through 250.914 of the MMS regulations describe the requirements for platforms and structures. 30 C.F.R. §§ 250.900-914. These regulations, which pertain to construction requirements, do not impose an open access requirement on the platforms and structures. Once again this is consistent with the statutory limitation of the applicability of the non-discrimination and open access condition to pipelines and not to platforms and other production facilities.

Similarly, for lease term pipelines, which are pipelines owned and operated by a lessee and wholly contained within the lessee's lease, 30 C.F.R. § 250.1001, the lessee is entitled under the terms of its lease to construct the pipelines and other facilities that are necessary for the full enjoyment of the lease.<sup>9</sup> For such pipelines and other facilities (such as platforms), lessees need only acquire a right-of-use and easement pursuant to 30 C.F.R. § 250.160. MMS correctly does not impose a non-discrimination and open access condition on such rights-of-use and easements.

Finally, even where a lessee needs to construct platforms and other production-related facilities on a site off the lessee's own lease, MMS requires the producer to obtain a "right-of-use" and easement that is not subject to a non-discrimination and open access condition. *See* 30 C.F.R. § 250.160. Again, the absence of such a condition on rights-of-use and easements for off-lease platforms and other production-related facilities reflects the applicable statutory terms.

In sum, consistent with OCSLA and MMS' existing regulations, MMS should clarify that its proposed regulations only impose the non-discrimination and open access

---

<sup>9</sup> *Id.*

condition on right-of-way pipelines, and do not impose such conditions on production-related and other facilities and activities authorized under oil and gas leases.

**C. MMS Properly Exempted Certain Pipelines, But Should Clarify That Other Facilities Should Be Exempt From the Proposed Regulations.**

**1. Pipelines Subject To FERC's Natural Gas Act ("NGA") Jurisdiction Are Appropriately Exempt From The Non-Discrimination And Open Access Condition Under OCSLA To The Extent FERC Asserts The Authority To Enforce The OCSLA Condition Applicable To Such Pipelines.**

In exempting OCSLA pipelines that are FERC pipelines from the open access and non-discrimination requirements of the proposed regulations, MMS avoided duplication of the regulatory regimes of other federal agencies. Indicated Producers fully support this exemption. However, Indicated Producers urge the MMS to clarify the scope of this exemption.

Specifically, the language of the Notice does not expressly address whether the exemption would extend to gathering lines owned by interstate pipelines and operated "in connection with" interstate pipelines.<sup>10</sup> However, Indicated Producers request clarification that the proposed regulations would not apply to such gathering lines operated in connection with interstate pipelines to the extent that they are regulated by FERC pursuant to the NGA. By granting such clarification, MMS would avoid potential disputes over whether MMS or FERC is authorized to address complaints relating to access to gathering lines owned by interstate pipelines.

FERC retains authority to set the rates, terms and conditions applicable to the services provided by interstate pipelines in facilities found to constitute gathering under the

---

<sup>10</sup> See *Criteria for Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, 118 F.E.R.C. ¶ 61,114 at P 7 (2007) (citing *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1263 (8th Cir. 1991)).

NGA.<sup>11</sup> While gathering is generally exempt from FERC's jurisdiction under the NGA, FERC possesses ancillary authority over gathering provided by an interstate pipeline in connection with interstate pipeline services.<sup>12</sup> For this reason, while MMS' proposed regulations properly encompass gathering facilities owned by entities other than interstate gas pipelines, the regulations should exempt those facilities owned by interstate pipelines over which FERC exercises ancillary authority under the NGA.

**2. Facilities Constructed Pursuant To The Deepwater Port Act Are Appropriately Exempt From The Non-Discrimination And Open Access Condition Under OCSLA.**

Indicated Producers fully support MMS' conclusion that its proposed regulations are inapplicable to facilities constructed under the Deepwater Port Act. MMS proposes to exempt those facilities, including pipelines, for which the Secretary of Transportation "issue[s] a license for the ownership, construction, and operation of a deepwater port" Notice at 17,055 (quoting 33 U.S.C. 1503(b)). MMS correctly notes that, although the Department of Interior issues the right-of-way for pipelines that transport production from a deepwater port, the Secretary of Transportation authorizes the construction and regulates the operation of such pipelines. MMS further properly recognizes that the Deepwater Port Act specifically does not require natural gas deepwater ports to operate as common carriers or to provide open and non-discriminatory access to other parties. Accordingly, applicability of the proposed regulations to such facilities would be in direct contravention of the Deepwater Port Act.

---

<sup>11</sup> *Northern Natural Gas Co.*, 929 F.2d at 1269.

<sup>12</sup> *Id.*

**3. MMS Should Affirmatively Request FERC To Exercise Its Authority To Exempt Feeder Lines.**

Under Section 5(f)(2), FERC is authorized to exempt feeder lines from the non-discrimination and open access requirements of OCSLA. 43 U.S.C. § 1334(f)(2). This Section defines feeder lines as “any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.” *Id.* In its comments to the Advanced Notice, Indicated Producers urged MMS to affirmatively request that FERC exercise its authority to exempt feeder lines. MMS did not respond to this request in its Notice.

In FERC’s Order No. 639, which was vacated on other grounds in *Williams*, FERC exempted feeder lines from its reporting regime under Section 5(e) and (f) of OCSLA. FERC based this decision on the fact that such lines are typically owned and operated by the same entity holding the right to produce from the field served by the feeder line. In such circumstances, FERC concluded that issues of access or discrimination were not likely to arise. As FERC explained:

Such “feeder line” facilities are typically owned and operated by the same entity that holds the right to produce gas from a particular field; we do not expect issues of access or discrimination to arise where the same entity owns or leases both the mineral rights and the facilities necessary to draw gas from its own reservoirs.

Order No. 639 at 31,525. Further, FERC expressly stated that the exemption was intended to be as broad as permitted under the statute. As FERC stated, “we view our regulatory exemption as an expansive application of what OCSLA Section 1334(f)(2) allows.” Order No. 639-A at 31,684.

Moreover, the feeder line exemption is warranted because feeder lines are typically part of the complex production facilities and operations in the OCS and, accordingly,

are subject to the complex contractual relationships among producers holding lease and working interests in production. For example, these facilities include sub-sea flowlines flowing from wellheads or manifolds on the sea floor carrying bulk production to the point where it is later separated, dehydrated or further processed. Because of the relationship of feeder lines with production activities, the imposition of non-discrimination and open access requirements on feeder lines would be disruptive to the contractual relationships and expectations of entities holding the rights to produce oil and gas under applicable leases.

Finally, feeder lines are frequently constructed under authority of oil and gas leases. As previously noted, leases provided producers with *exclusive* rights to undertake activities necessary to explore for, develop, and produce oil and gas. Accordingly, exemption of feeder lines would appropriately reflect the fact that the open and non-discriminatory standard does not apply to platforms or piping that is constructed under the authority of oil and gas leases.

For these reasons, Indicated Producers again urge MMS to affirmatively request that FERC again grant an exemption for feeder lines.

#### **D. The Meaning Of The Open Access And Non-discriminatory Requirements.**

Indicated Producers support MMS' proposal not to attempt to devise bright-line tests under the non-discrimination and open access standard. These concepts are inherently difficult to comprehensively articulate in the abstract. Rather, they are best developed in the application of the standards on a case-by-case basis to the facts and circumstances presented in actual cases and controversies. This case-by-case approach has been effectively utilized by FERC (and its predecessor agency, the Federal Power Commission) in applying the undue discrimination standard under the NGA.

Further, Indicated Producers support MMS' proposal to apply a reasonableness test in applying the open and non-discrimination access standard. While Indicated Producers

agree that MMS is not bound by FERC precedent, the reasonableness test is consistent with FERC's general approach in addressing issues of discrimination under the NGA.

**1. Discrimination.**

While a specific bright-line definition of unlawful discrimination under OCSLA should be left to a case-by-case determination, one fundamental question is appropriately addressed at this time. During the public conferences held pursuant to the ANOPR, the MMS panel members asked commenters whether the discrimination standard under OCSLA should be read differently from the discrimination standard under the NGA. The panel members observed that under OCSLA, unlike the NGA, the discrimination standard was not qualified by the term "undue." Because of this difference, the panelists were interested to understand if this meant that the standard was stricter under OCSLA than under the NGA.

Section 4(b) of the NGA contains a prohibition against undue discrimination and preference. 15 U.S.C. § 717c(b); *see also* 18 C.F.R. § 284.7(b)(1) (requiring interstate pipelines to offer services without undue discrimination). Although there is no "per se" rule for when a transaction is unduly discriminatory, FERC has explained that

the general rule is that discrimination is "undue" when there is a difference in rates or service among similarly situated customers that is not justified, whether by differences in the cost of providing the service or by some other legitimate factors.<sup>13</sup>

Thus, under this standard, a party claiming undue discrimination must demonstrate that the customers are similarly situated.<sup>14</sup> While the question of whether different parties are similarly

---

<sup>13</sup> *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1982-1985] (CCH) ¶ 30,665 at 31,541 (1985).

<sup>14</sup> *See, e.g., Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 452 n.9 (D.C. Cir. 1988); *City of Vernon, Cal. v. FERC*, 845 F.2d 1042, 1046-47 (D.C. Cir. 1988); *Consolidated Edison Co. v. FERC*, 676 F.2d 763, 773 & n.31 (D.C. Cir. 1982).

situated must be resolved on the facts presented on a case-by-case basis,<sup>15</sup> there is no reason why the similarly-situated standard is not equally applicable to the discrimination standard under OCSLA and the undue discrimination standard under the NGA.

There is little basis in precedent or reason to suggest that the discrimination standard under OCSLA should be read as stricter than the undue discrimination standard under the NGA. In 1988, in issuing Order No. 491, FERC initially took the position that the OCSLA standard is stricter than the NGA standard, and concluded that OCSLA required pro rata allocation of capacity, while the NGA does not.<sup>16</sup> But subsequently, in Order No. 509, FERC backed away from this view and concluded that the standard in each statute should be read as essentially the same and that pro rata allocation would not be required under OCSLA.<sup>17</sup>

In *Bonito Pipe Line Co.*, 61 F.E.R.C. (CCH) ¶ 61,050 (1992), *aff'd in part and rev'd in part sub nom. Shell Oil Company v. FERC*, 47 F.3d 1186 (D.C. Cir. 1995), FERC in fact defined the OCSLA standard in the same way as the NGA standard. Specifically, FERC held that Bonito had discriminated against Shell by refusing access to Shell's sour crude oil while permitting existing shippers to ship similar crude oil. FERC concluded that Bonito had discriminated against Shell Oil because it had allowed access to similarly-situated shippers. This

---

<sup>15</sup> See, e.g., *Koch Gateway Pipeline Co.*, 84 F.E.R.C. (CCH) ¶ 61,143 (1998), *reh'g denied*, 85 F.E.R.C. (CCH) ¶ 61,426 (1998); *Wisconsin Gas Co. v. Viking Gas Transmission Co.*, 105 F.E.R.C. (CCH) ¶ 61,303 (2003).

<sup>16</sup> *Interpretation of Section 5 of the Outer Continental Shelf Lands Act* ("OCSLA"), Order No. 491, 43 F.E.R.C. (CCH) ¶ 61,006 at 61,031 (1988).

<sup>17</sup> *Interpretation of, and Regulations Under, Section 5 of the Outer Continental Shelf Lands Act (OCSLA) Governing Transportation of Natural Gas by Interstate Natural Gas Pipelines on the Outer Continental Shelf*, Order No. 509, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1986-1990] (CCH) ¶ 30,842 at 31,272-73 (1988).

is essentially the same standard that FERC applies under the NGA.<sup>18</sup> The D.C. Circuit upheld FERC's conclusion.

FERC's position in *Bonito* is reasonable. Under the NGA, FERC has held that discrimination is reasonable and lawful when it is founded on different treatment of shippers that are not similarly situated. Eliminating this concept of reasonableness would lead to patently absurd and unfair results where pipelines would be required to treat all shippers alike even when they are *not* similarly situated.

## **2. Open Access.**

As in the case of discrimination, the meaning of "open access" is best left to development on a case-by-case basis. Nevertheless, MMS should make clear that the standard is not narrowly designed to prohibit only an overt denial of physical access. As in the case of discrimination, a notion of reasonableness should be implied. On this basis, pipelines should be prohibited from conditioning access on the potential shipper's agreement to unreasonable rates, terms, and conditions of service. It remains for MMS to determine on a case-by-case basis what rates, terms, and conditions, when demanded by a pipeline, constitute an unreasonable denial of access.

FERC's decisions reflect this concept of reasonableness. FERC has concluded that gas pipelines in the OCS can give priority to shippers entering into firm contracts.<sup>19</sup> FERC reached the same conclusion for oil pipelines in the OCS.<sup>20</sup> FERC found that respect for firm contracts was important to support reliance interests necessary for the orderly development of the

<sup>18</sup> See, e.g., *Tennessee Gas Pipeline Co.*, 860 F.2d at 452 n.9.

<sup>19</sup> Order No. 509 at 31,272-74.

<sup>20</sup> *Caesar Oil Pipeline Co., LLC*, 102 F.E.R.C. (CCH) ¶ 61,339 at PP 34-38 (2003); *Proteus Oil Pipeline Co.*, 102 F.E.R.C. (CCH) ¶ 61,333 at PP 32-36 (2003).

OCS, concluding that upholding pre-existing contract rights was a reasonable basis to deny access to a shipper. Accordingly, like FERC's interpretation of discrimination, FERC's interpretation of open access under OCSLA implies a standard of reasonableness. MMS should adopt this same standard and establish that, while pipelines are lawfully permitted to deny access on reasonable grounds, pipelines may not deny access unreasonably or demand unreasonable rates, terms, and conditions as a condition to access.

## CONCLUSION

WHEREFORE, Indicated Producers comment on the Minerals Management Service's Notice of Proposed Rulemaking, as set forth above.

Respectfully submitted,



Thomas J. Eastment  
Nadine Moustafa  
Baker Botts L.L.P.  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
202-639-7717  
Attorneys for Indicated Producers

Douglas W. Rasch  
Exxon Mobil Corporation  
800 Bell  
Houston, TX 77002  
713-656-4418

J. Jeannie Myers  
Chevron U.S.A. Inc.  
Room 27070B  
1600 Smith Street  
Houston, TX 77002  
713-754-7834

Frederick T. Kolb  
BP America Production Company  
501 Westlake Park Boulevard  
Houston, TX 77253  
281-366-5009

Bruce A. Connell  
Conoco Phillips Company  
ML-1080  
Cherokee Building - CH1012C  
P.O. Box 2197  
Houston, TX 77252-2197  
281-293-1736

Charles J. McClees, Jr.  
Shell Offshore Inc.  
200 North Dairy Ashford  
Houston, TX 77079  
281-544-4516

Michael E. Coney  
Shell Offshore Inc.  
P.O. Box 60193  
New Orleans, LA 70160  
504-728-4643

Dated: June 5, 2007