Alan S. Armstrong
Senior Vice President
& General Manager
918/573-2398
918/573-9375 FAX
alan.armstrong@williams.com

MIDSTREAM
One Williams Center, WRC-3
P.O. Box 2848
Tulsa, OK 74101-2848

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Delivered Via Messenger
To Room 4223

Department of the Interior
Director, Minerals Management Service (MS 4230)
1849 C Street, N.W.
Washington, D.C. 20240-0001

Attention: Policy and Management Improvement

Re: Comments of The Williams Companies on MMS Advance Notice
Of Proposed Rulemaking
The Open And Non-Discriminatory Movement Of Oil And Gas
As Required By The Outer Continental Shelf Lands Act
69 Fed. Reg. 19,137 (April 12, 2004)

Ladies and Gentlemen:

The Williams Companies (Williams) appreciates this opportunity to comment in response to the referenced advance notice of proposed rulemaking by the Minerals Management Service (MMS). Through its subsidiaries, Williams owns and operates various natural gas pipelines across the Gulf of Mexico, and therefore, any such proposed regulations are of particular importance to Williams.

As outlined in said notice (dated March 29, 2004; published April 12, 2004), MMS seeks "comments and any suggestions to assist us in potentially amending our regulations regarding how the Department of the Interior (DOI) should ensure that pipelines transporting oil or gas under permits, licenses, easements, or rights-of-way on or across the Outer Continental Shelf (OCS) 'provide open and non-discriminatory access to both owner and non-owner shippers' as required under section 5(f) of the Outer Continental Shelf Lands Act (OCSLA)." MMS particularly seeks comments in four areas: (1) definitions of certain terms; (2) actual access problems that may have been

encountered by industry participants; (3) complaint resolution processes; and (4) information or data gathering. Williams herein addresses each of these areas in turn.

DEFINITIONS

The subject notice indicates that MMS is considering revising or creating definitions of the following terms:

"Non-discriminatory access" and **"Open access"** are terms best understood and defined together, in the context as articulated by Congress in OCSLA section 5(f): "The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334(f)(1)(A). In order to understand what Congress meant by such terms, it is significant to recognize the "*means*" selected by Congress to achieve open, nondiscriminatory access, *i.e.*, Congress included in section 5(e) "ratable takes" provisions whereby pipelines can be required to transport or purchase oil or gas in the vicinity in proportionate amounts, without discrimination.[1] Relatedly, it is also significant to recognize that, in the 1978 amendments, Congress was addressing reports that integrated petroleum companies were restricting access to their pipelines by non-owner shippers[2] -- hence the reference in section 5(f) to "access to both owner and nonowner shippers." Thus, Congress particularly was addressing anticompetitive concerns arising from pipeline owners denying access to unaffiliated shippers by undersizing, or otherwise restricting access to, pipeline capacity that was using Federal rights-of-way.

Such unlawful denial of "open and nondiscriminatory access" can appear in the form of prohibitive physical access or prohibitive economic access. However, Congress did not intend these terms to take on any meaning that would imply common-carrier or other utility-type forms of pervasive regulation, such as those under the Interstate Commerce Act (ICA) or the Natural Gas Act (NGA). Indeed, in establishing "common carrier"[3] status for pipelines transporting oil or natural gas through "Federal lands" under the Mineral Leasing Act, Congress expressly excluded from the definition of "Federal lands" all "lands on the Outer Continental Shelf." 30 U.S.C. § 185(b)(1). Similarly, in promulgating the 1978 OCSLA amendments, Congress rejected a proposal to subject all

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1 *See Williams Cos. v. FERC*, 345 F.3d 910, 913-14 (D.C. Cir. 2003) (*Williams*).

2 *See* H.R. Rep. No. 95-590, at 290 (1977) (Additional views of Reps. J. Seiberling, C. Dodd, J. Eilberg, J. Miller, M. Udall). *See also* 124 Cong. Rec. H26,784 (daily ed. Aug. 17, 1978) (statement of Rep. Seiberling concerning creation of "bottleneck monopolies" through inadequate sizing of pipelines); 124 Cong. Rec. H1627 (daily ed. Jan. 31, 1978) (citing various documents regarding pipeline sizing concerns).

3 *See* 30 U.S.C. § 185(r)(1).

OCS gas pipelines to NGA regulation and all OCS oil pipelines to ICA regulation,[4] Congress instead ultimately amending the OCSLA to add "Competitive principles governing pipeline operation," including "open and nondiscriminatory access." 43 U.S.C. § 1334(f).[5]

Accordingly, consistent with Congress's intent, **"open and nondiscriminatory access"** means transportation access that is made available to all shippers who request it, regardless of affiliation to the pipeline's owner(s), and ratably if insufficient capacity exists to transport all amounts requiring transportation.

"Pipelines subject to OCSLA" means all pipeline and accessory facilities used in the movement or transportation of oil or natural gas on or across the OCS, with the sole exception of those pipelines exempted pursuant to OCSLA section 5(f)(2).

"Service provider" means any entity moving or transporting oil or natural gas on or across the OCS.

"Shipper" means any entity requiring pipeline transportation of oil or natural gas on or across the OCS.

ACCESS PROBLEMS RARE

Under the OCSLA as amended, access problems appear to be rare. As noted above, prior to the 1978 amendments to the OCSLA, Congress found that certain integrated oil companies with affiliated pipeline and shipper interests discriminated against and denied access to non-owner shippers, thereby placing them at a competitive disadvantage.[6] Congress addressed these problems in the 1978 amendments by (1) conditioning all grants of authority for OCS pipeline transportation to require the pipeline

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4 *See* 124 Cong. Rec. H2,093 (daily ed. Feb. 2, 1978). *See also* 124 Cong. Rec. H2092-93, H2097 (daily ed. Feb. 2, 1978) (Congress likewise rejected a proposal to amend section 5(3) to require that all OCS pipelines transport "without discrimination and at reasonable rates" and settled on "without discrimination" instead).

5 *See also* 43 U.S.C. § 1332(3) ("consistent with the maintenance of competition"); 43 U.S.C. § 1801(7) ("to preserve and maintain competition"); 43 U.S.C. § 1802(2)(D) ("to preserve and maintain free enterprise competition"); 43 U.S.C.§ 1334(a) (requiring consultation with the Attorney General on "matters which may affect competition").

6 Pipeline owners (such as Williams) that have no affiliated shipper-producers, do not have that incentive to deny or restrict access to competing producers. Their incentive is to optimize throughput from any and all shippers.

to "provide open and nondiscriminatory access to both owner and nonowner shippers" (43 U.S.C. § 1334(f)(1)(A)); while (2) continuing to subject grants of pipeline rights-of-way to a ratable take condition "that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced . . . in the vicinity of the pipelines in such proportionate amounts" as determined by the Federal Energy Regulatory Commission (FERC) after a full hearing (43 U.S.C. §1334(e)).

Moreover, the OCSLA as amended contains powerful remedies for failure to comply with the OCSLA. *See* section 5(e), 43 U.S.C. § 1334(e) ("ground for forfeiture of the grant [of rights-of-way] in an appropriate [U.S. district court] judicial proceeding"); section 24(a), 43 U.S.C. § 1350(a) (injunctions or restraining orders issued by U.S. district courts); section 24(b), 43 U.S.C. § 1350(b) (civil penalties up to $20,000 for each day of non-compliance); section 24(c), 43 U.S.C. §1350(c) (criminal fines up to $100,000 and imprisonment up to ten years). These potent remedies, together with the judicial enforcement proceedings established in OCSLA section 23 (as discussed below), have had a strong deterrent effect in preventing violations of the access provisions of the OCSLA, as evidenced by the scarcity of litigation.

Indeed, only one reported case involving the Bonito pipeline[7] was identified by commenters at the three public meetings held by MMS pursuant to the subject notice. While certain commenters referenced a case in the North Padre Island area,[8] that case involved a complaint under the NGA, not under the OCLSA, as the complainant's (Shell) counsel in that case, Mr. Eastment, pointed out at the Washington, D.C. public meeting.[9]

Williams notes that, before any person can commence a civil action concerning any OCSLA violation, section 23(a)(2) of the OCSLA, 43 U.S.C. § 1349(a)(2), requires that the Secretary of Interior be given 60 days notice. This procedure thus readily

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7 *Bonito Pipe Line Co.*, 61 FERC ¶ 61,050 (1992), *aff'd sub nom. Shell Oil Co. v. FERC*, 47 F.3d 1186 (D.C. Cir. 1995) (*Bonito*).

8 *Shell Offshore Inc. v. Transcon. Gas Pipeline Corp.*, 100 FERC ¶ 61,254 (2002) *order on reh'g*, 103 FERC ¶ 61,177 (2003), *appeal pending sub nom Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, D.C. Cir. No. 03-1179.

9 Mr. Eastment also pointed out that the discrimination and rate standards under the NGA simply cannot be equated to the open and nondiscriminatory access standards under the OCSLA. *See* Summary of Comments, OCSLA Policy Workshop, Washington, D.C., May 11, 2004, at 8. These comments aptly refute earlier comments suggesting that the rates in that case were so high and discriminatory as to have violated the OCSLA access standards. *See id.* at 3.

provides MMS with the most reliable documentation of the "scope, magnitude and seriousness"[10] of any encountered access problems.

COMPLIANCE IS A JUDICIAL MATTER

In OCSLA sections 23 and 24, 43 U.S.C. §§ 1349-1350, Congress specifically and precisely prescribed the means of enforcing the OCSLA. As discussed earlier, section 24 prescribes a formidable array of civil and criminal remedies. Sections 23 and 24(a) detail the judicial process by which an adversely affected person or the Justice Department can commence a civil action in the appropriate U.S. district court to challenge a violation of the OCSLA. As detailed in section 23(a)(6), with the sole exception provided in subsection (c) dealing with judicial review in the U.S. Courts of Appeal of certain leasing program, exploration plan, or development plan actions of the Secretary of Interior, the provision for "citizen suits" in section 23 is the ***exclusive*** method to challenge "actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter." 43 U.S.C. § 1349(a)(6). Section 23(b)(1) moreover provides that, except for said judicial review specified in subsection (c), "the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves . . . production." 43 U.S.C. § 1349(b)(1). "Production" is defined by the OCSLA to include the "transfer of minerals to shore." 43 U.S.C. § 1331(m).

Given the relative scarcity of pipeline access disputes and litigation under the OCSLA as amended, there is scant caselaw under the OCSLA. Indeed, in the sole *Bonito* case (cited above), while the access issue there (*i.e.*, refusing access to a non-owner shipper on the basis of oil quality) was litigated in administrative proceedings before the FERC, the court in *Williams* found that "the parties [in *Bonito*] had not questioned FERC's general authority to order open-access enhancing conduct on the OCS."[11]

In light of *Williams*, the *Bonito* case proceeded well outside the authority which Congress prescribed under the OCSLA, and thus the question becomes what process should have been followed to resolve a case such as *Bonito*. As noted above, OCSLA section 23 states that such actions must be commenced in a U.S. district court.

Caselaw under parallel <u>onshore</u> pipeline access provisions under the Mineral Leasing Act[12] likewise reveals that enforcement is a matter of judicial rather than

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10 69 Fed. Reg. 19,137, 19,139 (April 12, 2004).

11 *Williams*, 345 F.3d at 916.

12 As noted earlier, 30 U.S.C. § 185(r) imposes "common carrier" status upon pipelines using onshore rights-of-way on Federal lands.

administrative process. Thus, in *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953) (*Chapman*), the court held that Congress did not authorize the Secretary of Interior to impose specific and detailed regulations and conditions to govern pipeline operation as a common carrier:

> Had Congress desired the Secretary to enter upon such comprehensive supervision of those to whom rights-of-way were granted, we believe it would have expressed its desire more clearly and in more detail. Instead, Congress required that a condition be incorporated in any rights-of-way granted, and provided for court decision of any question which might arise as to the adequacy of compliance.

Chapman, 204 F.2d at 51. This case thus analogously confirms that which the OCSLA expressly provides – enforcement is a matter for judicial resolution rather than administrative resolution.

COMPLIANCE INFORMATION GATHERING IS A MATTER FOR DISCOVERY IN COURTS

As in FERC's failed attempt to promulgate information-reporting regulations as a means of enforcing the OCSLA's open and nondiscriminatory access condition, the question here is under what statutory authority may the Secretary of Interior similarly impose such information-reporting regulations. Again, *Chapman* teaches that the Secretary is without authority to impose any such regulations to administratively enforce compliance with such right-of-way conditions; instead, Congress entrusted such matters of compliance to the U.S. district courts.[13] Thus, Congress deemed the judicial process, not the administrative process, to be best suited for such matters of enforcing compliance with the OCSLA, including the courts' formal discovery procedures and protections for garnering those <u>particular</u> facts that are material and relevant to the <u>particular</u> matter at hand.

Moreover, aside from the absence of statutory authority, any reporting regulations akin to those unlawfully promulgated by FERC would be tantamount to pervasive regulation in search of a problem.[14] No such wide-spread problem has been shown to exist, and those who argue that such information is necessary to even know if violations

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13 *Chapman*, 204 F.2d at 51.

14 Not to mention the fact that any such transportation rate information is already reported to MMS in the supporting calculations of transportation allowances used in royalty valuations.

exist run headlong against *Chapman*, as well as against Congress's choice that such commercially-sensitive[15] information is best explored under the supervision of courts.

"SPINDOWNS," A NON-ISSUE

Having addressed each of the four areas outlined in the subject notice, we feel compelled to address a non-issue raised by some of the commenters at the public meetings – i.e., the assertion by some that the sole focus of any regulations here should be "spindowns." This is short-hand for suggesting that the MMS step in where FERC has stepped out (at the insistence of Congress) in the regulation of "gathering" rates.

That is, while Congress in enacting the NGA in 1938 expressly exempted "gathering" from NGA regulation, gathering nonetheless historically has been regulated under the NGA "in connection with" non-exempt sales and transportation services with which gathering was "bundled."[16] However, in more recent years, as the result of Congress's deregulation of wellhead gas prices and correspondingly urging FERC to "unbundle" sales, transportation and gathering, NGA-jurisdictional interstate pipelines were virtually extricated from their traditional merchant sales role. Absent their traditional gas purchase and resale function, interstate pipelines therefore no longer needed to be in the gathering business and thus proceeded to transfer their production-area gathering facilities by way of spinoffs to non-affiliates or spindowns to affiliates.

Such historically NGA-regulated "gathering" thus, with FERC approval and encouragement and with affirmation by the courts,[17] became free of NGA regulation – all as the result of Congress's conclusion (beginning in 1978) that pervasive, command-and-control NGA regulation of the production area had proven to be a miserable failure and that competition instead should be given a freer hand.[18] Moreover, Congress concurrently amended the OCSLA in 1978 to reinforce its desire for competitive access to pipelines in the OCS by adding competitive principles governing pipeline operation, together with greater avenues and remedies under the OCSLA for enforcing compliance and deterring violations, as discussed earlier. In so doing, Congress rejected proposals to

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15 *See Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54, 61-62 (D.D.C. 2002), *aff'd*, *Williams*, 345 F.3d 910. Indeed, the district court in that case enjoined FERC from making public such commercially-sensitive information. *Id.* at 59, n.8.

16 *See United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1125 (D.C. Cir. 1996) (*United Distribution*).

17 *See, e.g., Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996), *cert. denied sub nom., Amoco Energy Trading Corp. v. FERC*, 519 U.S. 1142 (1997).

18 *See United Distribution*, 88 F.3d at 1123-25.

protecting their legal rights, both as a matter of private contract and as a matter of knowing when access is being denied in violation of, and correctable under, the OCSLA.

IN CONCLUSION, Williams applauds MMS's efforts here to carefully consider the statutory authority for any regulations before proposing same. In light of the foregoing comments, Williams recommends that MMS take particular care in assessing and articulating the authority which Congress committed to the Secretary of Interior in the OCSLA. Perhaps the best outcome of this advance notice would be a clear, concise statement of policy by the MMS as to its understanding of the OCSLA and the division of authority thereunder, and as to how, consistent with its understanding, it intends in the future to exercise that authority which is delegated to the Secretary of Interior. Williams further recommends that, without infringing upon the authority delegated to the courts to enforce the OCSLA, MMS may propose an informal, voluntary complaint resolution process, such as the "hotline" suggested in MMS's notice.

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19 As noted previously, unlike the owner-shipper problems that gave rise to the 1978 OCSLA amendments, the incentive of "spindown" pipelines is to maximize throughput from any and all sources of production.

20 *See, e.g.*, *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 371 (5th Cir. 1997); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002), *cert. denied*, 124 S.Ct. 48 (2003).

Williams appreciates the opportunity to comment here, and should there be any questions or need for further information, please do not hesitate to call Michael Short at (713) 215-2819.

Respectfully submitted,

Alan S. Armstrong

Alan S. Armstrong
Senior Vice President &
General Manager