

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 92-1206

WILLISTON BASIN INTERSTATE,
PIPELINE COMPANY,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF JURISDICTION

This Court has jurisdiction to review this case under
Section 19(b) of the Natural Gas Act (NGA), 15 U.S.C. § 717r(b).

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission
("Commission" or "FERC") reasonably determined that a proposed
expansion of existing gathering facilities owned and operated by
the Amerada Hess Corporation ("Amerada") will constitute
"production or gathering" facilities exempt from Commission
jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C.
§ 717(b) ("NGA").

STATUTES AND REGULATIONS

The pertinent statutes and regulations are included in the
addendum to this brief.

STATEMENT OF THE CASE

I. Nature of the Case, the Course of Proceedings, and its Disposition Below.

Amerada Hess Corporation is primarily engaged in the exploration, development, production and refining of hydrocarbons, including natural gas. Amerada owns reserves in several fields generally located north and south of Tioga, North Dakota (Tioga Fields). Since the early 1950s, Amerada (through a wholly owned subsidiary Tioga Gas Plant, Inc. ("TGP")) has been operating 800 miles of gathering facilities, with pipe-diameters ranging from 2 to 30 inches, linking 550 wells in this producing area. None of these facilities has ever been deemed subject to the Commission's jurisdiction. Throughout this period, Amerada's sole outlet for gas gathered in the Tioga Field system has been through an interconnection with the Williston Basin Interstate Pipeline Company (Williston), a natural gas company subject to regulation by FERC under the NGA, located near the northern end of the gathering system.

In February 1991, Amerada, acting on behalf of TGP, filed with the Commission a petition for a declaratory order disclaiming NGA jurisdiction over the construction of a proposed 114.5-mile expansion of its subsidiary's existing gathering facilities (including a 60.5-mile long gathering mainline), and seeking a Commission declaration that such facilities, when operational, would qualify for the "production or gathering" exemption under section 1(b) of the Natural Gas Act (NGA). The expansion, once completed, would enable Amerada to interconnect

with a second interstate pipeline, Northern Border Pipeline Company ("Northern Border") near the southern end of its gathering system.

Williston intervened in the declaratory order proceeding in opposition to Amerada's petition. Williston argued that the expansion will essentially perform transportation in interstate commerce (subject to the Commission's certificate and rate jurisdiction under the NGA) as opposed to exempt production or gathering functions.

In this appeal, Williston is challenging two Commission orders which declare Amerada's proposed expansion to be "production or gathering" facilities exempt from FERC regulation under NGA § 1(b). These orders are: 1) Amerada Hess Corp., "Declaratory Order," FERC Docket No. CP 91-1314-000, 57 FERC ¶ 61,063 (1991); and 2) Amerada Hess Corp., "Order Denying Rehearing," FERC Docket No. CP 91-1314-002, 59 FERC ¶ 61,117 (1992).

II. Statement of the Facts

A. Background: The Existing Gathering System and Amerada's Proposed Expansion

Since the 1950s, almost all gas produced from the Tioga Fields has been conveyed over a system of gathering pipelines to be processed at the Tioga Gas Processing Plant (Tioga Plant), owned by Amerada's subsidiary TGP. ^{1/} The Tioga Plant is

^{1/} Amerada's existing gathering system includes an existing spine, at least 60 miles long, that links the southern Tioga fields with the Tioga Gas Plant. See color-coded map of
(continued...)

located near the northern end of Amerada's existing gathering facilities, and is adjacent to an interstate pipeline owned and operated by Williston in Williams County, North Dakota. After processing at the Tioga Plant, gas is either tendered to Williston for transportation or purchase, or returned to the production fields, via the Tioga gathering system, for production purposes.

In early 1991, Amerada sought to expand this gathering system. The expansion would consist of a 60.5 mile length of 10-inch expansion pipeline, which has a design capacity of 65 MMcf/daily (see R. 13; J.A. 12), to serve as a "spine," or mainline, for the expansion facilities that will run parallel along the same right-of-way that serves the existing Amerada gathering spine. 2/ However, unlike Amerada's existing spine, see note 1, supra, which currently conveys gas primarily northward from production fields to the Tioga Processing Plant, the expansion mainline would originate at the Tioga Plant and

1/ (...continued)

Amerada's gathering system, attached to Amerada's intervenor's brief. According to Amerada, this map "illustrates currently operating gathering system expansion facilities in blue; the gathering system expansion in red." R. 5; J.A. 4.

- 2/ The remainder of the expansion consists of compression facilities and pipelines with the following lengths and diameters: 9 miles of 3-inch pipeline, 16.5 miles of 4-inch pipeline, 6.5 miles of 5-inch pipeline, 15 miles of 6-inch pipeline, and 7 miles of 8-inch pipeline. Williston has conceded that "[t]hose short spur lines that will be constructed (or are already in construction and in operation) may well perform a production or gathering function." R. 67; J.A. 58.

convey gas in the opposite direction, southward, to the "Cherry Creek" compression station, located 4.4 miles north of a proposed interconnection with Northern Border Pipeline Company, an interstate pipeline. At Cherry Creek, the gas would be compressed to a line pressure sufficiently high to enable it to be received by Northern Border, and then conveyed for the remaining 4.4 miles at pipeline pressure, further southward to the interconnection with Northern Border.

B. Amerada's Petition For A Declaratory Order And Williston's Opposition Thereto

1. In a February 21, 1991 petition for a declaratory order disclaiming NGA jurisdiction over the proposed expansion, Amerada explained that while, as an initial matter, the expansion mainline would convey primarily gas treated at the Tioga Plant, over time the expansion mainline would convey increasing volumes of unprocessed gas gathered from new wells developed in the "Winnipeg" strata of the Tioga Fields. R. 6; J.A. 5.

According to Amerada, it is currently uneconomical for producers to develop Winnipeg reserves because it would cost at least \$430,000 annually to move this gas over the existing gathering system. R. 4-5; J.A 3-4. Construction of the expansion, on the other hand, would enable Amerada to produce gas from the Winnipeg strata economically, because gas produced from these wells would be permitted to flow at wellhead pressure directly into the expansion spine, where it would then flow southward without processing or additional compression until it

reaches the Cherry Creek compression facilities. R. 6;

J.A. 5. 3/

Amerada represented that Winnipeg gas has a relatively high percentage of nitrogen and carbon dioxide, impurities which must be removed to meet Northern Border's pipeline quality standards. Amerada explained further that, despite the high nitrogen and carbon dioxide content in Winnipeg strata gas, the relatively low volumes expected to be produced during 1992 (3.2 MMcf/daily) could be commingled with and absorbed into volumes of processed gas already flowing southward from the Tioga Plant through the expansion mainline, without the need for any treatment and without significantly diminishing the overall "pipeline quality" of the expansion mainline volumes. R. 6; J.A. 5. As future development of Winnipeg wells progresses, however, increased production of Winnipeg gas into the expansion mainline would raise the level of impurities to such an extent that the commingled volumes would no longer meet pipeline quality standards. R. 6; J.A. 5. Therefore, to purify the commingled Winnipeg gas, Amerada also proposed to install amine and dehydration units near the Cherry Creek compressor station, 4/

3/ Amerada Hess explained that at the Cherry Creek station, this line pressure of the expansion spine must be stepped-up by means of compression to meet Northern Border's pipeline pressure requirements. R. 9-10; J.A. 8-9. For this reason, Amerada Hess' expansion includes as many as two new compressors at Cherry Creek.

4/ Amine units eliminate carbon dioxide from the gas stream, thereby satisfying pipeline quality standards. See R. 6; J.A. 5.

approximately 4.4 miles from the Northern Border interconnection. R. 6-7; J.A. 5-6.

Apart from gathering Winnipeg gas along the expansion mainline, 5/ Amerada explained that the proposed expansion would be integrated with existing gathering facilities throughout its length in order to perform production functions. Interconnections between the existing and expansion facilities would enable production from existing wells to be achieved more efficiently and economically, and would permit reactivation and/or reconnection of previously abandoned and disconnected wells. More particularly, Amerada represented that the expansion facilities would be utilized to supply volumes for "gas lift" purposes in reservoirs along the route. 6/ The additional volumes used for gas lift would optimize production techniques in the gathering region as it would supplant a more costly production alternative, "pumping," currently prevalent in the Tioga Fields. R. 7-8; J.A. 6-7.

Amerada also explained that the availability of gas lift resulting from the expansion facilities would make it

5/ Amerada represented that it "has concentrated on Winnipeg prospects in several areas along the route of the gathering system expansion, and other producers operating along the gathering system expansion may also develop Winnipeg wells as far south as the vicinity of the Cherry Creek facilities." R. 6; J.A. 5.

6/ Gas lift is a process whereby volumes of gas are injected into the well bore in order to stimulate crude oil production. According to Amerada Hess, it is an important part of planning and enhancement in a maturing field with steadily depleting reservoirs. R. 7; J.A. 6.

economically feasible to reconnect 10 wells in the "Hawkeye Field," and reactivate 22 miles of currently unutilized line in the field. 7/ In addition, the expansion facilities would deliver "lease fuel" (i.e., gas consumed to drive compressors located on field leases) along almost the entire length of the expansion. R. 8; J.A. 7. 8/ Finally, Amerada pointed out that the proposed expansion mainline will permit its gathering system to interconnect with a second interstate pipeline, Northern Border, at a point closest to its existing gathering facilities at Cherry Creek. See R. 12; J.A. 11. Based on the foregoing submission, Amerada asserted in its petition that the primary function of the proposed expansion facilities would be "production or gathering," exempt from Commission regulation under Section 1(b) of the NGA.

2. On March 22, 1991, Williston intervened in the proceeding and filed an answer asserting that the proposed expansion facilities, and particularly the 60.5 mile, 10-inch

7/ With the more widespread use of "gas lift" and the reactivation of the Hawkeye Field, Amerada projected an increase in oil production of 1,000 bbl/daily in the Tioga Fields producing region. R. 8; J.A. 7.

8/ To enable it to perform gas lift operations efficiently and economically, Amerada Hess proposed to replace three old compressors (that would otherwise cost more than \$500,000 over the next four years to maintain) with two new compressors. These compressors would be located at the northern end of the expansion spine, near the Tioga Processing Plant, see R. 82; J.A. 71, and would perform the dual function of carrying gas from the spine to the fields for gas lift purposes, and adding line pressure to convey southward all processed volumes flowing to the Cherry Creek compression and treatment facilities. See R. 7, 9; J.A. 6,8.

spine of the expansion, would perform transportation functions, rather than production or gathering functions, and thus would be subject to NGA jurisdiction. Williston complained that all gas currently delivered from wells into Amerada's existing gathering system is conveyed to the Tioga Processing Plant near an interconnection point with Williston and, therefore, the primary purpose of the proposed expansion spine could only be to transport these processed volumes southward, away from Williston, to an interconnection with Northern Border. R. 30. Williston argued that the length and diameter of the expansion mainline, its operating pressure (assertedly typical of transportation lines), and its location vis-a-vis existing wells, the processing plant and the central point in the field, were all indicative of transmission, not gathering. (See discussion of the "primary function" test, infra at pp. 23-29.)

Williston also argued that to the extent laterals to the spine will be reactivated or constructed, they will be used to convey volumes from the expansion mainline to the gas fields, not from the fields to the spine, which Williston claimed is uncharacteristic of a gathering function. R. 49. Williston asserted further that there is no credible support for Amerada's representation that future development of the Winnipeg strata within the southern 40 mile range of the expansion spine would yield material receipts of gas. R. 30; J.A. 26. Williston requested the Commission to hold a technical conference to

inquire into factual details of Amerada's proposed expansion. 9/

3. In its April 8, 1991 response to Williston's Answer, Amerada provided additional details relating specifically to its prospects for production from new wells in the Winnipeg strata, as follows:

a. Amerada first stated that it anticipates drilling a minimum of 10 wells in the Winnipeg strata, each with an average daily production capacity of 2.5 MMcf, and an average estimated 10 Bcf of reserves. R. 77; J.A. 66. According to Amerada, the aggregate daily production anticipated from these wells (25MMcf) will represent 62% of the volumes (40 MMcf/daily) tendered to Northern Border. Without the production from the Winnipeg strata, Amerada explained, it would not have committed to acquire firm capacity on Northern Border, 10/ or to spend \$14 million

9/ As further evidence of the alleged transportation function of the expansion, Williston filed as an amendment to its answer a copy of a "letter of intent" to construct a pipeline that Amerada had filed with the North Dakota Public Service Commission (NDPSC). R. 70-71; J.A. 59-60. Williston asserted that because the NDPSC's siting jurisdiction over pipelines did not extend to gathering lines, Amerada Hess's filing of this letter of intent with the NDPSC should be construed as an admission that the expansion spine would not be used for gathering, within the meaning of the NGA. The Commission found NDPSC's definition of transmission versus gathering for siting purposes not to be controlling in this proceeding. R. 115 n.11; J.A. 102 n.11.

10/ Amerada stated that Northern Border, unlike traditional pipelines with substantial commodity rates, recovers the same level of costs from reserved shippers, regardless of usage, under a demand charge. See R. 77; J.A. 66.

to expand the existing gathering facilities. R. 76-77;
J.A. 65-66.

b. Amerada further explained that Williston's high transportation rates had been a major impediment to its economical development of the Winnipeg strata. According to Amerada, the new Winnipeg wells developed along the spine will produce only dry gas, i.e., gas not associated with oil, while existing wells in the Tioga Fields region produce wet casinghead gas, i.e., gas associated with crude oil. R. 77, J.A. 66.

Accordingly, unlike existing casinghead production, which yields revenues from both oil sales and natural gas sales, development and production of dry gas wells from the Winnipeg strata must be justified without the revenue stream derived from oil sales. R. 77; J.A. 66. With the current level of Williston's transportation rates factored into the marketing of Winnipeg strata gas, Amerada essentially stated that it would not break-even until each well produced at least 12 Bcf, which was more than its estimate (10 Bcf) of the average reserves underlying each undeveloped well. R. 77; J.A. 66. However, with the expansion gathering facilities in operation, the cost of marketing Winnipeg production would decline to such an extent that it would be economical for Amerada to develop new wells with reserves as low as 6 Bcf. R. 78, J.A. 67.

c. As a third reason why Winnipeg strata wells cannot be developed economically within the confines of its existing gathering system, Amerada explained that Winnipeg wells are

projected to produce naturally at substantial wellhead pressures, i.e., in excess of 1000 pounds/square-inch gauge (psig), far exceeding the pressure of the existing gathering lines.

Therefore, to receive Winnipeg production into existing lines, Amerada would have to lower the natural pressure of Winnipeg wells, and incur the cost of recompressing it for subsequent redelivery. In contrast, the proposed expansion mainline would "accommodate the wellhead pressure of Winnipeg production without the duplicative steps of decompression and recompression." R. 79; J.A. 68.

4. In a further reply, Williston asserted that, based on data compiled by the U.S. Department of Energy, Amerada's claims about Winnipeg strata reserves and the productivity of future wells must be considered "dubious." R. 99; J.A. 86. 11/ Williston also claimed that there was no merit to Amerada's suggestion that Williston's transportation rates inhibited Amerada from developing the Winnipeg strata economically. 12/

11/ Williston did not file a copy of these data at any time during this proceeding, and thus they are not part of the record in this case. Nonetheless, Williston argued that the data would show that there are 312 Bcf of dry gas reserves in the entire state of North Dakota. Therefore, Williston argued, "[o]ne-third of all non-associated proven gas reserves would have to be located in the small area of this single strata in which Amerada contemplates future drilling." R. 100; J.A. 87.

12/ Williston claimed that Amerada failed to develop the Winnipeg strata between 1984 and 1988 when Williston's rates were two-thirds lower under certain rate schedules. R. 98-99; J.A. 86. The Commission ultimately found this argument to be "largely irrelevant to the inquiry herein," in essence, because it was not based on current market conditions. R. 121 n.24; J.A. 107-08 n.24.

C. The Commission's Declaratory Order Disclaiming Jurisdiction

On October 18, 1991, the Commission issued an order declaring that Amerada's expansion facilities will be exempt from FERC regulation under the NGA. Applying the factors enunciated in its Farmland Industries, Inc. decision, 13/ as modified by Amerada Hess, et al. 14/, the Commission concluded that the primary functions of the expansion facilities, including the 60.5 mile, 10-inch spine, will be production or gathering, and thus exempt from regulation under NGA § 1(b).

In support, the Commission observed that the proposed expansion "will run through the center of a prolific producing area," R. 117; J.A. 104, and that, given the capacity for gas lift and lease fuel operations, the proposed facilities are designed to operate as an integral, essential component of field production. 15/ The Commission also found that the expansion mainline would function as a gathering line by virtue of receiving unprocessed volumes directly from interconnections with individual wells along its route. As the Commission put it:

13/ 23 FERC ¶ 61,063 (1983).

14/ 52 FERC ¶ 61,268 (1990). To avoid confusion between the 1990 order and the orders under review, which (although involving different cases) bear the same case name, this brief follows the same convention used in petitioner's brief (Pet Br. 13) by referring to the 1990 order as "Amerada Hess, et al."

15/ The Commission stated: "the expansion will function so to enhance TGP's present activities of carrying gas to the field for field use and production enhancement, processing, and gathering natural gas for delivery into the interstate market. R. 118; J.A. 105.

The increased Winnipeg volumes from these wells, which [Amerada] will be able to economically produce as a result of the operation of the expansion, will eventually be treated near the expansion's downstream terminus. . . . The expansion will extend to the nearest interstate pipeline capable of receiving the contemplated volumes (i.e., Northern Border) from the last point of interconnection with existing gathering facilities (i.e., Cherry Creek).

R. 117; J.A. 107. The Commission also relied in part on Amerada's experience as producer-gatherer. Thus, since the 1950s, it has limited its activities in the Tioga Fields area to exploration, production, processing and gathering natural gas and crude oil.

The Commission rejected Williston's claims that the size and the length of the expansion mainline, ipso facto, disqualified the expansion mainline as a production and gathering facility. It noted that under its 1990 decision in Amerada Hess, et al., supra, the size and length of the facility are no longer major determining factors in resolving whether a pipeline's primary function is transportation versus production-or-gathering.

R. 119; J.A. 106. The Commission observed that initially (i.e., until the Winnipeg wells are developed and brought into production) the expansion mainline may "exhibit some divergence from the usual configuration of a more typical gathering system." However, the Commission noted, this divergence will likely disappear as unprocessed gas from Winnipeg strata wells flows in increasing amounts into the expansion mainline, requiring

treatment and conditioning close to the Northern Border interconnection. 16/

Likewise, the Commission rejected Williston's claim that Amerada's projected development of Winnipeg strata volumes is speculative or grossly exaggerated. 17/ It also rejected Williston's claim that the expansion cannot be exempt under NGA 1(b) because some of the volumes in the mainline will flow through laterals toward the production fields, and not vice versa. The Commission found that in conveying gas away from the mainline to fields for gas lift and lease fuel operations, the expansion facilities would perform a "production" function apart from their "gathering" function, and that each function independently falls within the NGA 1(b) exemption for "production or gathering." See R. 121; J.A. 108.

Commissioner Moler (now the Chair of the Commission) dissented in a separate opinion, stating that she would find the proposed spine to be jurisdictional, R. 123; J.A. 110, inter

16/ The Commission also concluded that even if development of the Winnipeg wells along the expansion mainline ultimately proved unsuccessful, this would not alter its view that the facility performs primarily a gathering function. Under these circumstances, the spine would be regarded as the "tailgate" of the Tioga Plant, i.e., simply a second means of egress for Tioga Field volumes to the nearest point of interconnection with another interstate pipeline that is adjacent to the production area. R. 107, 117, 119-20; J.A. 106-107.

17/ The Commission declined to find Amerada's projections to be "speculative" or "grossly exaggerated," accepting Amerada's argument, inter alia, that it would not have committed \$ 14 million to expand the gathering system without the expected production from the Winnipeg strata. R. 120; J.A. 107.

alia, because of its length and diameter, and based on the expected usage of the facilities before the Winnipeg wells are developed.

D. The Commission's Order On Rehearing

Williston filed a request for rehearing arguing that the Commission erred in finding that the expansion will function as gathering facilities, and that the Commission misapplied the criteria of its own "modified primary function" test enunciated in Amerada Hess, et al., supra. Specifically, Williston repeated its arguments that the facilities failed each of the Farmland factors as modified by Amerada Hess, et al.

On May 1, 1992, the Commission (with Commissioner Moler dissenting) issued an order denying Williston's rehearing request. The Commission again rejected Williston's argument that the size and length of the expansion mainline were dispositive, noting that it has consistently rejected a mechanical application of these Farmland factors. Applying a "sliding scale" approach to both onshore and offshore facilities, see R. 215 n.3, J.A. 174 n.3, the Commission reiterated its view that

the 60-mile length and 10-inch diameter of the pipeline is the result of various operational facts facing Amerada Hess, including the size of the producing area through which the facilities will run, the availability of existing rights of way, and the location of the proposed interconnection with Northern Border.

R. 215; J.A. 174. The Commission also explained that the additional compression facilities were likewise a function of

distance, and the range of operating pressures (975 to 1300 psig) was not inconsistent with gathering activities.

The Commission further rejected as speculative Williston's argument that its order declaring the expansion to be exempt gathering facilities would enable Amerada to operate the facilities in a discriminatory manner, stating:

No potential shipper of gas has intervened to make such a claim. The record is devoid of any facts indicating that such problems have occurred in the past, and Williston is in relevant function a competitor.

R. 216; J.A. 175. Finally, the Commission made clear that its disclaimer of jurisdiction was neither permanent nor irrevocable. On the contrary, as it stated: "should the primary function of the subject facilities change in the future, we would 'examine that issue in the event a complaint were filed with respect to such a change of use of the facilities.'" R. 216; J.A. 175.

This appeal followed.

SUMMARY OF ARGUMENT

A. The Commission's finding that Amerada's proposed expansion will function primarily as production or gathering facilities, and therefore will be exempt from Commission NGA jurisdiction, rests on a solid legal foundation and is amply supported by the facts of record. Because neither the NGA nor its legislative history provides a definition for the terms "production or gathering," this Court should accord Chevron deference to the Commission's reasonable interpretation of the gathering exemption of NGA Section 1(b), i.e., as authorizing an application of the "modified primary function" factors enunciated in Amerada Hess, et al..

B.1. In this case, the Commission properly applied its "modified primary function" test, a standard developed from years of experience and case law, to determine that the primary function of Amerada's proposed expansion will be nonjurisdictional "production or gathering." As the courts have concluded, this test necessarily involves a case-by-case weighing of all the pertinent facts and circumstances of a particular case rather than the application of any overarching bright-line standards. Thus, in reaching its decision, the Commission correctly shunned a mechanical application of any one factor of its modified primary function test.

2. The record amply supports the Commission's findings that the 60.5-mile long spine of the proposed expansion will perform "production or gathering:" 1) it will be used to convey

unprocessed gas (25 MMcf/daily) from new wells located along the length of the line to be developed from the Winnipeg strata; and 2) it will also be used to convey processed volumes from the Tioga Plant to the field for lease fuel supply and gas lift operations to facilitate production of existing wells. As the Commission correctly recognized, both types of activities performed by the facilities--gathering as well as production--are exempt under Section 1(b), and therefore, the combined effects of both groups of activities were properly considered in determining the primary function of the facilities.

The Commission's findings in this case support a reasonable conclusion that the expansion mainline will, in effect, satisfy the "behind the plant," "location of wells" and "geographic configuration" factors of the "modified primary function" test. As Amerada proceeds with its planned development of the Winnipeg strata, increasing volumes of unprocessed Winnipeg gas from Amerada's and other producers' wells to be located at various points along the mainline are expected to be delivered, unprocessed, directly into the expansion's mainline. Moreover, once Winnipeg volumes flow through the expansion increase to the point that the carbon dioxide content in that gas can no longer be sufficiently diluted, the commingled stream of gas flowing south through the mainline will be treated and conditioned in amine and dehydration units to be installed at Cherry Creek, approximately 4.4 miles upstream of the planned interconnection with Northern Border. In this regard, the 56.1 mile length of

expansion spine north of Cherry Creek will essentially function "behind the plant," as is typical of gathering lines.

C. Petitioner's claims to the contrary lack merit. In arguing that the size and length of the expansion spine disqualify it as a gathering facility, Williston relies almost exclusively on cases pre-dating the Commission's announcement of its policy change in Amerada Hess, et al.. However, as explained infra, the pre-Amerada Hess, et al. cases can no longer be considered "binding precedent" for this case, because the Commission's analysis of the primary function of onshore facilities has been expanded to include the changing technical and geographic nature of exploration and production, and because the size and length of onshore facilities are no longer deemed the major determining factors that they once were.

Finally, the Commission properly rejected Williston's claim that the past activities of facility operators are irrelevant to a determination of what the primary function of future facilities will likely be. In seeking an exemption for the facilities involved here, Amerada has made projections and representations to the Commission as to: 1) the future use of the expansion mainline; 2) the anticipated benefits of Winnipeg well production and reactivation of Hawkeye Field wells; and 3) the economies and efficiencies to be achieved from the lease fuel supply, gas lift operations, and compressor replacement. In these circumstances, Amerada's past specialization (i.e., since the early 1950s) in exploration and production has an important bearing on the

predictability of the primary function of these future facilities, and on the credibility of Amerada's technical projections.

ARGUMENT

THE COMMISSION'S DETERMINATION THAT AMERADA HESS' EXPANSION FACILITIES ARE EXEMPT PRODUCTION OR GATHERING FACILITIES REFLECTS A REASONED APPLICATION OF ITS "MODIFIED PRIMARY FUNCTION" TEST, AND IS WELL-SUPPORTED IN THE RECORD.

The Commission's finding that Amerada's proposed expansion will function primarily as production or gathering facilities and therefore will be exempt from Commission NGA jurisdiction rests on a solid legal foundation, and is amply supported by the facts of record. In what follows, we detail first the legal standard applied by the Commission and observe that the Commission is entitled to deference in that regard. We then examine the relevant record facts, and show that the Commission properly applied the controlling standard to the facilities here involved. Finally, we show that petitioner's contrary claims have no substance.

A. Introduction: The Modified Primary Function Test Applied By The Commission To Determine Whether Pipeline Facilities Are Being Used For Jurisdictional Or Non-Jurisdictional Activities

It is important, at the outset, to set forth the governing legal standard applied by the Commission in this case to show that it is faithful to the statutory mandate of the NGA, and that it was correctly applied to the particular facts and circumstances.

1. The basic statutory requirements

Under section 1(b) of the NGA, the Commission has exclusive jurisdiction over the transportation and sale for resale of natural gas in interstate commerce, as well as of any "natural

gas company" engaged in such transportation or sale. Section 1(b), however, exempts from NGA jurisdiction "the production or gathering of natural gas." 15 U.S.C. § 717(b). Because neither the NGA nor its legislative history provides a definition for the terms "production or gathering," the Commission has developed a standard rooted in experience and in case law to determine whether a facility's primary function consists of the interstate transportation or some other activity. See EP Operating Company v. FERC, 876 F.2d 46, 48 (5th Cir. 1989) (EP Operating). This test "involves a case-by-case consideration of all the facts and circumstances of the particular case rather than the application of any overarching bright line standards." EP Operating, 876 F.2d at 48.

2. The early development of the primary function test

The earliest standard developed by the Commission for determining whether a particular facility was exempt under NGA § 1(b) was a so-called "behind-the-plant" test, i.e., a mechanical test under which classification as gathering or transportation turned on whether the particular facility was located behind (upstream of) the processing plant. See Phillips Petroleum Co., 10 FPC 246 (1951) rev'd on other grounds sub nom., Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). By 1957, the Commission added a new test by which to judge the regulatory status of facilities. This new element, the "central-point-in-the-field" test, involved a different mechanical inquiry into whether gas from separate wells, conveyed over different

several gathering lines, converged at a single location in the producing field into a single line; the facilities which so conveyed the gas were deemed nonjurisdictional. Barnes Transportation Co., 18 FPC 369 (1957). Finally, the Commission introduced a third, more subjective factor into the analysis, i.e., the geographic configuration of the subject facilities. Ben Bolt Gathering Co., 26 FPC 825, 827 (1961), aff'd, 323 F.2d 610 (5th Cir. 1963). 18/

3. The emergence of the Farmland standard

In Farmland Industries, Inc., 23 FERC ¶ 61,063 (1983) (Farmland), the Commission added two more criteria in fashioning a considerably more flexible "primary function" test. The Commission stated in Farmland that, in addition to the factors developed in the early cases, it would assess the "primary function" of facilities in light of the "diameter and length" of the facility, as well as the "location of wells along all or part of the facility." 23 FERC at p. 61,143.

Adopting a flexible approach to its primary function analysis, the Commission has generally found that facilities need not satisfy all of these criteria to be declared exempt as gathering operations. For example, in Farmland itself and in Dorchester Gas Producing Company, Inc., 19 FERC ¶ 61,058 (1982), the Commission found that certain pipelines were exempt gathering

18/ The "primary function" test was established by the Commission in Ben Bolt. The test was subsequently applied equally to both onshore and offshore facilities. See Superior Oil Company, 13 FERC ¶ 61,496 (1980).

lines even though they failed the "central-point-in-the-field" test. Likewise, in Shell Gas Pipeline Company, 41 FERC ¶ 61,032 (1987) (Shell), the Commission found an offshore line, 27 miles long and 16 inches in diameter, to be gathering, even though the line would have been a typical transportation facility under the "diameter and length" criterion of the Farmland primary function test. 19/

4. Subsequent judicial decisions affecting the standard

Less than two years after the Shell decision, the Fifth Circuit rendered its decision in EP Operating Company v. FERC, 876 F.2d 46, 48 (5th Cir. 1989) which precipitated a substantial change in the Commission's Section 1(b) exemption analysis for both offshore and onshore pipelines. In the Commission's decision in EP Operating, 20/ it had determined that "Green Canyon," an offshore pipeline 51-miles long and 16 inches in diameter, was involved in jurisdictional transportation where the line conveyed gas from a floating production rig at pipeline pressure, with no wells located along its length, and where the line did not satisfy either the "central-point-in-the-field" or the "geographical configuration" criteria of the primary function

19/ Despite a diameter and length atypical for gathering facilities, the Commission nonetheless declared the line to be exempt under NGA Section 1(b) because of the distance between the offshore production platform it served and the nearest interconnection with an interstate pipeline, and because of the quantities of gas it would convey. 41 FERC at p. 61,081.

20/ Placid Oil Company, "Declaratory Order," 43 FERC ¶ 61,210 (1988); Placid Oil Company, "Order Denying Rehearing," 44 FERC ¶61,029 (1988).

test. In so ruling, the Commission distinguished the facilities found to be exempt in Shell, pointing out that Green Canyon's 51-mile length and the operating pressure (2160 psig) were significantly greater than the corresponding features of the offshore line involved in Shell. 21/

The Fifth Circuit reversed. The court found that the 51-mile length of the line was not a significant feature distinguishing EP Operating from Shell because in both cases the line was no longer than necessary to connect the point of production with an interstate pipeline. Id. at 49. Likewise, the court found that the much higher operating pressure of Green Canyon was not a basis for distinguishing Shell, because "the gas flows through . . . lines [in both cases] at reservoir pressures without added compression." Id.

Shortly after the Fifth Circuit's decision in EP Operating, the Tenth Circuit held in Northwest Pipeline Corp. v. FERC, 905 F.2d 1403 (10th Cir. 1990), that the Commission had misapplied the "primary function" factors in exercising NGA § 1(b) jurisdiction over onshore gathering operations. There, the Commission had concluded that certain pipelines (owned by Northwest, an interstate pipeline), which conveyed gas from six different gathering subsystems (also owned by Northwest) directly to various interconnections with Northwest's interstate transmission mainline, were primarily performing a jurisdictional

21/ Placid Oil Company, 43 FERC ¶ 61,210 (1988) at p. 61,545.

transportation function. 22/ The Tenth Circuit reversed, however, holding that the Commission "improperly applied its own [primary function] test," stressing that

Northwest's status in interstate transportation cannot alone transform the character of these particular facilities. Some transportation must occur to move gas from the wellhead in some manner.

905 F.2d at 1409-10.

5. The "modified primary function" test applied in this case.

In 1990, following these judicial decisions, which aroused some concern as to the validity of the Commission's approach, the Commission issued an omnibus order addressing 20 different applications for declaratory relief under Section 1(b) of the NGA. In Amerada Hess, et al., 52 FERC at p. 61,988, the Commission announced a policy change that it would adopt with respect to reviewing requests for gathering exemptions for both offshore and onshore facilities. The Commission stated that while it would continue to apply the "primary function" factors as developed in previous cases, it would modify the test to take into account for both offshore and onshore facilities, "the

22/ In reaching its conclusion, the Commission agreed with its ALJ that the lines involved did not satisfy the "behind-the-plant," "central-point-in-the-field," and "operating pressure" standards of the primary function test. The judge had also found that the gathering lines had operated as "mere extensions of Northwest's interstate pipeline system." Northwest Pipeline Corporation, Opinion No. 270, 38 FERC ¶ 61,302 (1987), reh'g denied, Opinion No. 270-A, 43 FERC ¶ 61,263 (1988).

changing technical and geographic nature of exploration and production." 52 FERC at p. 61,988.

Thus, in some of the petitions addressed in Amerada Hess, et al., the Commission applied the "modified primary function" test to find onshore facilities to be exempt gathering lines despite lengths and diameters more typical of transportation facilities, despite the fact that the facilities served as a direct link between the tailgate of processing plants and an interstate mainlines, i.e., they were located "in front" (i.e., downstream) of the plant, and despite the absence of any wells situated along the lengths. 23/ Similarly, in two other cases decided since Amerada Hess, et al., the Commission has ruled that a 21.59 mile long, 12.75-inch diameter pipeline carrying gas at 1,000 psig from the tailgate of a processing plant to an interstate pipeline, 24/ as well as a 26-mile, 12-inch diameter line also linking the tailgate of a processing plant with an interstate pipeline, 25/ were both exempt gathering facilities. This

23/ In Amerada Hess, et al. (Alabama-Tennessee Natural Gas, et al.), 52 FERC ¶ 61,268 at p. 61,989, the Commission declared that a 17-mile long, 8-inch diameter which spanned the distance between the tailgate of a processing plant and an interconnection with an interstate pipeline was an exempt gathering line. Likewise, in Amerada Hess, et al. (West Texas Gathering Company), 52 FERC ¶ 61,268, at p. 62,065, the Commission determined that a 27-mile long, 9-inch diameter pipeline conveying gas from a treatment plant to a sales point on an interstate pipeline (with no wells located along the line) was an exempt gathering facility.

24/ See Peach Ridge Pipeline, 57 FERC ¶ 61,309 (1992).

25/ See Ringwood Gathering Company, 58 FERC ¶ 61,320 (1992).

nuanced approach reflected the Commission's effort, based on ongoing experience to apply

a sliding scale to the length criteria for offshore pipeline situations and even for onshore facilities, the size and length of a line is no longer the major determining factor, where other factors lead us to the conclusion that the primary function of a system is gathering.

Amerada Hess, et al., 52 FERC at p. 62,026.

B. The Commission's Approach Is Consistent With Controlling Precedent And Is Entitled To Deference.

1. As we have just detailed, the Commission has rejected a litmus paper, mechanical rule for ascertaining jurisdiction, and has instead adopted a test which takes into account the myriad of circumstances that can arise. In short, it looks to the "facts and circumstances of the particular case," abjuring "the application of any overarching bright-line standards." EP Operating, 876 F.2d at 48. While petitioner appears to agree that the "modified primary function" test is the proper one to be applied to this case (see, e.g., Pet. Br. 20), it contends that the Commission has misapplied one of its important factors. More precisely, it asserts that the Commission's approach is inconsistent with the Supreme Court's decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) ("Phillips"). According to petitioner, Phillips stands for the proposition that once gas exits a processing plant it may no longer be considered involved in a gathering process. On the contrary, we submit, Phillips suggests no such rigid rule.

The sole support for petitioner's argument is a passing footnote reference in Phillips, supra, referring to an earlier Court decision, Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 164 (1954), which declared that, for tax purposes, the gathering exemption could not apply to the taking of natural gas by purchasing interstate companies at the outlet of processing plants. 347 U.S. at 678-79 n.6.

Both Phillips and Michigan-Wisconsin are readily distinguishable, however, because in both cases the interstate pipelines which purchased the gas owned the facilities immediately adjacent to the outlet of the processing plant, and the dispositive issue accordingly was whether the gas was still in a gathering posture at the time it had been already been received into very large pipelines (ranging from 20-24 inches in diameter) by the interstate pipeline purchasing the gas. 26/ In that factual context, the Court held that the activity was no longer gathering, but transportation and thus subject to NGA jurisdiction. Manifestly, this holding is fundamentally different from the Commission's ruling in the instant case where no party is asserting that Northern Border, or any other

26/ See Michigan-Wisconsin, 347 U.S. at 162-63 ("gas emerging from outlet flows directly into two 26-inch pipelines of Michigan-Wisconsin"); Phillips Petroleum Co., 10 FPC 246, at pp. 252-261 (1951) rev'd on other grounds sub nom., Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) The gas involved in Phillips flowed into two 24-inch pipelines owned by Michigan-Wisconsin, see 10 FPC at 252, into one 24-inch line owned by Panhandle, see 10 FPC at 254, into a 20-inch diameter pipeline owned by Independent, see id. at 256, and into one 24-inch line owned by El Paso, see id. at 260.

interstate pipeline company purchasing gas at an interconnection located at the outlet of a processing plant, should be declared an exempt gatherer.

Moreover, whatever effect this footnote in Phillips may have had on shaping the judicial definition of gathering, it was not the Supreme Court's last word on the subject. In Northern Natural Gas Co. v. Kansas Corporation Commission, 372 U.S. 84 (1962), the Court defined "production" and "gathering" in traditional terms as "the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." 372 U.S. at 90. 27/ See also Northwest Central Pipeline Corp. v. Kansas Corporation Commission, 489 U.S. 493, 510 (1989); Northern Natural Gas Co. v. FERC, 929 F.2d 1261, 1265 (8th Cir. 1991), cert. denied, 112 S.Ct. 169 (1991) (defining "gathering" as "the process of collecting gas at the point of production [the wellhead] and moving it to a collection point for further movement through a pipeline's principal transmission system.")

2. By arguing that Phillips dictates that the gathering process ends when gas reaches the tailgate of a processing plant, Williston is actually mounting an attack on the "modified primary function" test itself which, as we have shown, is a refinement of standards that the Commission has developed over the past thirty

27/ The "first stages of distribution" language of Northern Natural is clearly broad enough to be consistent with the Commission's modified primary function test, which as the Fifth Circuit observed eschews reliance on any overarching, bright-line criteria. EP Operating, 876 F.2d at 48.

years, and which eschews a mechanical application of any one standard.

Petitioner's challenge in this regard should be rejected. Under the Supreme Court's reasoning in Chevron, USA v. NRDC, 467 U.S. 837 (1984), unless the meaning of a statute is unambiguous, courts owe deference to a reasonable interpretation of statute of the agency, as here, charged with its administration. 28/ As noted, neither the NGA nor its legislative history defines what is meant by "gathering" or "production" as used in Section 1(b). Accordingly, this Court should defer to the Commission's interpretation of the gathering exemption of NGA Section 1(b)--as authorizing a case-by-case, nonmechanical analysis of the factors enunciated in Amerada Hess, et al.--as a permissible one. 29/

28/ Petitioner concedes (Pet. Br. 45) that "[t]he Commission as an agency charged by Congress with the administration of the NGA, has a degree of discretion in interpreting . . . the Act."

29/ The U.S. Supreme Court and other lower courts have repeatedly applied Chevron principles of deference to uphold reasonable interpretations by agencies of ambiguous jurisdictional provisions of statutes they are charged with administering. see, e.g., CFTC v. Schor, 478 U.S. 833, 844-45 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985); Transpacific Westbound Rate Agreement v. Federal Maritime Commission, 951 F.2d 950, 953-54 (9th Cir. 1991). See also Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 380-81 (1988) (Scalia, J., concurring).

This Court, however, has thus far declined to take a position on the question whether Chevron deference applies to agencies' interpretations of their own jurisdiction. See, e.g., Central States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099, 1102 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 87 (D.C. Cir. 1991); Otis Elevator Co. v. Sec'y of Labor, 921 F.2d 1285, 1288 (D.C. Cir. 1990); Business Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990).

But even apart from deference, the Commission's interpretation is keyed to all relevant factors and should be affirmed.

C. The Commission Properly Applied The Governing Standard To Find The Activity In This Case To Be Nonjurisdictional.

As the Commission held, the record in this case establishes that the facilities here at issue will be used simply as an expansion of Amerada's current activities in exploration, production, processing, and gathering. The record thus amply supports the Commission's findings that the 60.5-mile long spine of the proposed expansion, which is the main focus of petitioner's appeal, will perform a dual role: 1) convey unprocessed gas (25 Mmcfd/daily) from new wells located along the length of the line to be developed from the Winnipeg strata; and 2) convey processed volumes from the Tioga Plant to the field for lease fuel supply and gas lift operations to facilitate

production of existing wells. 30/ As the Commission correctly recognized, both types of activities performed by the facilities --gathering as well as production--are exempt under Section 1(b), and therefore, the combined effects of both groups of activities were properly considered in determining the primary function of the facilities. 31/

In its declaratory order, the Commission made express findings that, reasonably construed, support a conclusion the expansion mainline will, in effect, satisfy the "behind-the-

30/ As noted, the daily design capacity of the proposed gathering mainline to Cherry Creek is 65 MMcf (see R. 13; J.A. 12, while the design capacity for the proposed interconnection of the expansion spur with Northern Border is 40 MMcf. See R. 10; J.A. 9. As discussed infra, when the Winnipeg wells become fully operational, the expansion spine will still be carrying some volumes (15 MMcf/daily) of gas processed at the Tioga Plant to be tendered to Northern Border. The other 25 MMcf/daily tendered to Northern Border is expected to be comprised of volumes originating from Winnipeg strata wells. See R. 81; J.A. 70.

Given Amerada's projection that as much as 25 MMcf/daily of the spine's capacity will be used for carrying unprocessed gas produced from Winnipeg wells to the amine and dehydration units at Cherry Creek (a gathering function), and its estimate that another 25 MMcf will be devoted to lease fuel and gas lift operations (production functions), see R. 7, J.A. 6, the percentage of the spine's capacity devoted to conveying processed volumes may not exceed 23% (15 MMcf out of 65 MMcf).

31/ Even if "production" activities were excluded from the operation (see note 30, supra), the 25 MMcf/daily of unprocessed volumes flowing from the Winnipeg wells would represent as much as 62% of volumes (40 MMcf) ultimately tendered to Northern Border, while 15 MMcf (or as little as 37.5% of the volumes delivered to Northern Border daily) would represent volumes previously processed at the Tioga Plant. Thus, even these ratios would support a finding that the expansion spine will primarily function as a gathering facility.

plant," "location of wells" and "geographic configuration" factors of the "modified primary function" test. The Commission noted that as Amerada proceeds with its planned development of the Winnipeg strata, increasing volumes of unprocessed Winnipeg gas from Amerada's (and possibly other producers') wells located at various points along the mainline are expected to be delivered, unprocessed, directly into the expansion's mainline. The Commission also observed that once Winnipeg volumes flowing through the expansion increase to the point that the carbon dioxide content in that gas can no longer be sufficiently diluted, the commingled stream of gas flowing south through the mainline will be treated and conditioned in amine and dehydration units to be installed at Cherry Creek approximately 4.4 miles upstream of the planned interconnection with Northern Border. 32/ In these circumstances, the Commission reasonably determined that

while initially the expansion may exhibit some divergence from the usual configuration of a more typical gathering system, as [Amerada] proceeds with the development of the Winnipeg strata the configuration of the expansion and the mainline facilities will exhibit an increasing convergence with the

32/ Thus, to the extent that the expansion carries the anticipated volumes (25 Mmcfd daily) of Winnipeg gas, all but 4.4 miles of the spine (*i.e.*, the expansion spur) will, in essence, be located "behind-the-plant" at Cherry Creek, and thus upstream of treatment facilities. The 4.4 mile length of the expansion spur downstream of the plant is clearly not, under the Amerada Hess, et al. "modified primary function" standard, atypical for a gathering line. See Amerada Hess, et al. (West Texas Gathering Company), 52 FERC ¶ 62,065 (1990); Peach Ridge Pipeline, 57 FERC ¶ 61,309 (1992); Ringwood Gathering Company, 58 FERC ¶ 61,320 (1992).

elements of more typical gathering systems, such as the potential for injections of gas from wells along the mainline, most of the volumes flowing through the line being unprocessed, and necessary treatment and conditioning facilities being located only 4.4 miles from the interconnection with an interstate pipeline.

R. 120; J.A. 107. 33/

The Commission also reasonably concluded that the size and length of the expansion mainline, although unusual for gathering facilities, does not dictate an exercise of jurisdiction under NGA § 1(b). The Commission correctly relied on its prior change in policy, first announced in its 1990 Amerada Hess, et al. order that

even for onshore facilities, the size or length of a line is no longer the major determining factor, where other factors lead us to the conclusion that the primary function of a system is gathering.

R. 215 n.3; J.A. 174 n.3, quoting 52 FERC at p. 62,026. 34/

33/ To be sure, the Commission made no findings with respect to what should be considered the "central-point-in-the-field" with respect to the Winnipeg volumes, which will be developed to the south of the Tioga Plant, flow away from that plant, and eventually be treated at Cherry Creek. But the absence of findings on this "primary function" factor is not critical because in Dorchester Gas Producing Company, 19 FERC ¶ 61,058 (1985), at p. 61,091, the Commission stated, "we do not construe Barnes [Barnes Transportation Co., Inc., 18 FPC 369 (1957)] as requiring that behind the plant facilities be treated as transportation facilities after the gathered gas reaches a central point."

34/ As the Commission correctly noted in its decision, this case is not a deviation from the Amerada Hess, et al. standard; on the contrary, in applying the "modified primary function" test, it has determined that a set of facilities, substantially more extensive than those at issue here, was engaged in gathering. See 57 FERC at p.61,242; R.118-119; (continued...)

The record also supports the Commission's finding that the proposed mainline was no longer than necessary to carry volumes flowing from new Winnipeg wells to the nearest point of interconnection with an interstate pipeline capable of receiving those volumes, since these wells will be located along the expansion. 57 FERC at p. 61,242. R. 215 n.3; J.A. 174 n.3. 35/

The Commission also reasonably concluded that the 10-inch diameter of the mainline, its operating pressure, the application of additional compression near the Tioga Plant for gas lift operations and line pressures, and the compression facility at Cherry Creek (needed to raise line pressure of the expansion spur to meet Northern Border's delivery requirements) are all consistent with the functions of production or gathering. 36/

34/ (...continued)

J.A. 105-06; citing, Southwestern Gas Pipeline, Inc., 53 FERC ¶ 61,418 (1990).

35/ See R. 117; J.A. 105 ("[i]n order to fully develop potential reserves within the Winnipeg strata and to enhance its production operations in the Tioga Fields, [Amerada] finds it necessary to expand TGP's gathering facilities and to connect with the nearest alternate interstate transmission line capable of transporting the projected increased production.") And, as noted (supra, p. 5), the record establishes that Winnipeg wells cannot be economically developed within the confines of Amerada's existing gathering facilities, in part, because of the significant operating costs (\$430,000 annually) associated with that development. R. 6; J.A. 5.

36/ The Commission was correct not to find any significance in the atypical operating pressures of the proposed mainline, given that most of the Winnipeg wells will produce naturally at pressures in excess of 1000 psig (some of which will produce at pressures of up to 1250 psig), R. 167; J.A. 154,
(continued...)

The 10-inch diameter of the line was justified in light of the dual function--production or gathering--to be performed by the expansion spine. As noted, 25 MMcf daily of the spine's capacity will be devoted to conveying unprocessed Winnipeg volumes (clearly, a gathering function), while another 25 MMcf of that capacity will be utilized to convey gas to the field wells for lease fuel and gas lift operations (production functions). Thus, 50 MMcf of the expansion spine's throughput (out of the design capacity of 65 MMcf daily), or 77% of the spine' capacity, will be used for production or gathering functions. 37/

D. Petitioner's Claims To The Contrary Have No Merit.

We have so far urged that the Commission employed a correct legal standard to the critical facts here involved, and lawfully concluded that the expansion facilities will not be involved in transportation under Section 1(b) of the NGA. We now show that

36/(...continued)

and given Amerada's explanation that its existing gathering spine cannot withstand those pressures. R. 79; J.A. 68. Thus, the expansion spine will operate at pressures that can accommodate the wellhead pressure of Winnipeg production, without the costly duplicative steps of decompression and recompression. R. 79; J.A. 68.

37/ The Commission also reasonably found that Amerada's proposal to install compression facilities near the Tioga Plant, as well as near the Cherry Creek processing facilities did not compel a different result. As the Commission noted, compression near the Tioga Plant would be used to supply volumes in the field for gas lift (a production function) as well as for moving volumes southward from the Tioga Plant, while compression near Cherry Creek would simply raise the operating pressure in the expansion mainline to enable volumes treated at Cherry Creek to be received by Northern Border. R. 119; J.A. 106.

petitioner has failed to submit any argument justifying rejection of the Commission ruling.

1. Williston argues (Pet. Br. 43) that the Commission's analysis of the primary production or gathering functions of the expansion cannot be reconciled with the abundant applicable Commission precedent "which, if properly applied here, would lead to the inescapable conclusion that the subject facilities perform a transmission function." In attempting to portray a "conflict" between the result in this case and what Williston characterizes as precedent (see, e.g., Pet. Br. 22), Williston relies almost exclusively on cases pre-dating the Commission's announcement of its policy change in Amerada Hess, et al.. However, as explained below, the pre-Amerada Hess, et al. cases can no longer be considered "binding precedent" for this case.

Petitioner is correct that in Amerada Hess, et al., the Commission stated that it would continue to apply the Farmland factors for determining the primary function of facilities. Yet, petitioner ignores the policy changes for onshore pipelines wrought by Amerada Hess, et al.. In Amerada Hess, et al. (West Texas Gathering Co.), 52 FERC ¶ 61,268 (1990), at p.62,065, a case involving onshore facilities, the Commission announced that the EP Operating decision had "expanded the definition of what can be determined to be a gathering facility exempt from the Commission's jurisdiction under section 1(b) of the NGA." Thus, it must be emphasized that for both offshore and onshore facilities, not simply offshore as suggested by petitioner (Pet.

Br. 18), the primary function test was modified to take into account the "changing technical and geographic nature of exploration and production." Amerada Hess, et al., 52 FERC at p. 61,988. Indeed, as noted, the West Texas Gathering Company order of Amerada Hess, et al. made clear that, as is the case for offshore facilities, the size and length of onshore facilities are no longer a major determining factor. 52 FERC at p. 62,026. 38/ Thus, Williston's reliance on pre-Amerada Hess, et al. cases is misplaced. 39/

Williston attempts to distinguish the West Texas Gathering Company order of Amerada Hess, et al. on the grounds that it involved facilities that were:

- (1) upstream of processing plants, (2) not directly connected to any interstate pipeline, (3) of relatively small diameter, and (4) employing compression processes only

38/ Williston seeks to downplay the significance of Amerada, et al., itself arguing that "in none of the 21 cases decided in Amerada, et al., did the Commission find that an onshore line even approaching 60 miles long and 10 inches in diameter would perform a gathering function." Pet. Br. 26. This is true, but simply because the Commission in Amerada, et al. was not called upon to decide whether a line as long as Amerada's expansion spine would be exempt under NGA § 1(b), since no petition involved such a line.

39/ Williston cites one case, TEX/CON Gas Pipeline Co., 53 FERC ¶ 61,316 (1990), decided after Amerada, et al., for the proposition that the Commission still considers a seven-mile line to be longer than a "typical gathering line." Pet Br. 27. The significance of this finding is questionable because the Commission in Amerada, et al. stated that size and length of facilities are no longer major determining factors. In any event, the TEX/CON case is consistent with the result here inasmuch as the Commission in TEX/CON, as in this case, found the line to be nonetheless exempt.

to a level considered standard for producing and gathering fields (up to 500 horsepower).

Pet. Br. 19 n.12. This analysis of West Texas Gathering Company cannot be sustained. In truth, West Texas Gathering Company supports the result here because the Commission in that case found nonjurisdictional a 27-mile long, 8.62 inch diameter pipeline carrying gas away from the tailgate of a processing plant to a sales point with an interstate pipeline, despite the fact that the processing plant was located only 0.3 miles from the interstate pipeline's mainline.

Similarly, Williston's analysis of Southwestern Gas Pipeline, Inc., 53 FERC ¶ 61,418 (1990), see Pet. Br. 23-24, fails to mention features of facilities involved that support the result in this case. In Southwestern, the Commission found to be exempt a 25-mile long, 8-inch diameter line that, like the (future) configuration involved here, had numerous wells located along its length. Although the gas in Southwestern was to be processed immediately downstream from where it was delivered by the gatherer, this distinction is not significant as the Winnipeg volumes will flow without processing over the 60.5 miles of the expansion spine (except the 4.4 mile expansion spur south of the Cherry Creek treatment facilities).

2. Equally specious is Williston's claim of error flowing from the Commission's decision, because "[t]he location of the mainline facilities downstream of the processing plant is highly indicative of a jurisdictional transmission facility." Pet. Br. 24. In making this argument, Williston has completely

disregarded the substantial volumes of Winnipeg gas (25 MMcf) that are projected to flow into the spine upstream of the amine and dehydration units at Cherry Creek. Insofar as the expansion mainline will carry these volumes upstream of this treatment facility, it would satisfy the "behind-the-plant" test.

In any event, Williston's brief fails to cite a single case issued since Amerada Hess, et al., in which the Commission has concluded that lines located downstream from a processing plant are not exempt. To the contrary, as noted, in two cases decided since Amerada Hess, et al., the Commission ruled that a 21.59 mile long, 12.75-inch diameter pipeline carrying gas at 1,000 psig from the tailgate of a processing plant to an interstate pipeline, see Peach Ridge Pipeline, 57 FERC ¶ 61,309 (1992), as well as a 26-mile, 12-inch diameter line also linking the tailgate of a processing plant with an interstate pipeline, see Ringwood Gathering Company, 58 FERC ¶ 61,320 (1992), were both exempt gathering facilities.

3. Williston also takes issue with the Commission's finding that, as Winnipeg wells spread along the length of the expansion mainline come into production, the expansion will increasingly resemble a typical gathering operation. Williston argues that the receipt of gas from wells spread far apart does not transform a transmission line into a gathering line, stating "[i]f that were the case, there would be no jurisdictional facilities in the United States, given that virtually all interstate pipelines, including Williston, receive their gas from

multiple points." Pet. Br. 35. This claim cannot withstand scrutiny.

As is clear from the color-coded map of the expansion mainline which is part of the record in this case (see Supplemental Appendix), Amerada's expansion spine will be restricted to a single, prolific producing region, the Tioga Fields, and will not traverse any fields not already crossed by Amerada's existing gathering spine. 40/ Williston has already conceded that Amerada's "existing operational network" (which, of course, necessarily includes the existing gathering spine) is "characteristic of a gathering system." R.82 n.10; J.A. 71 n.10. 41/ The Commission's finding that the receipt of gas from wells located in several fields situated along the expansion is indicative of gathering is consistent with the "location of wellr" criterion of the "modified primary function" test. 42/ Accordingly, it should not be disturbed.

40/ As is also demonstrable from the map, neither terminus of the expansion spine extends beyond the ends of Amerada's existing gathering spine. Though the two lines are virtually parallel between the Tioga Plant and Cherry Creek, they diverge from Cherry Creek southward. Even so, the last 4.4 miles of the expansion spine south of Cherry Creek (i.e., the expansion spur) appears shorter than the continuation of the existing line south of Cherry Creek, which veers away from the spur in a southwesterly direction. See Supplemental Appendix.

41/ Thus, Williston's comparison of the expansion line with interstate pipelines that traverse multiple production regions (Pet. Br. 35) is pure hyperbole.

42/ See also Amerada, et al. (El Paso Natural gas Company), 52 FERC ¶ 61,268 (1990), at p. 62,004 (location of wells along line suggests gathering); Amerada, et al. (Shell Western

(continued...)

4. Finally, Williston asserts (Pet. Br. 40-42) that the Commission erroneously considered Amerada's history and past activities in exploration, production, processing, and gathering, in predicting the primary function of the facilities under review. To be sure, the Commission agreed with Williston that the modified primary function test applies to facilities, not companies. Nonetheless, the Commission correctly adhered to its long-held view that the past activities of facility operators are relevant. 43/

Amerada's past experience is highly relevant to the Commission's analysis of what the primary function of future facilities is likely to be. In seeking an exemption for the facilities involved here, Amerada has made projections and representations to the Commission as to the future use of the expansion mainline, i.e., 25 MMcf/daily (or 38% of capacity) for lease fuel and gas lift operations, and as much as 25 MMcf/daily for conveying unprocessed Winnipeg volumes southward to treatment units at Cherry Creek. 44/ Amerada has also made representa-

42/ (...continued)

E&P, Inc.), 52 FERC at p.62,023 (same); Amerada, et al.
(Pennzoil Company, et al.), 52 FERC at p. 62,015 (same).

43/ See Tom Brown, 57 FERC ¶ 61,103, at p. 61,400 n.9 (1991); Amerada Hess, et al., 52 FERC ¶ 61,268, at p. 61,987 (1990); Beacon Gasoline Co., 30 FERC ¶ 61,041, at 61,066 (1985); Superior Oil Co., 13 FERC ¶ 61,218 at p. 61,497 (1980).

44/ Although Williston has attempted to impeach the veracity of these projections, see, e.g., R. 100, they remain un rebutted. As noted (supra, note 11), the data on which petitioner sought to rely to impeach Amerada's projections are not part of the administrative record. In any event,
(continued...)

tions on this record as to the anticipated benefits of Winnipeg well production and reactivation of Hawkeye Field wells, as well as the economies and efficiencies to be achieved from the lease fuel supply, gas lift operations, and compressor replacement. In these circumstances, common sense compels rejection of the claim that Amerada's past specialization in exploration and production has no bearing on the predictability of the primary function of these future facilities, and on the credibility of Amerada's technical projections.

In any event, contrary to Williston's suggestion, no court has ruled that the Commission may not weigh the past activities of the owner/operator of facilities in determining their primary function. Despite an opportunity to do so, the Tenth Circuit did not rule that the Commission's consideration of an operator's business activities was legally irrelevant to the primary function test. In Northwest Pipeline Corp. v. FERC, 905 F.2d at 1411, the court stated that "[t]he gathering exemption was not meant to attach only to certain owner/operators but to facilities." (Emphasis added.) As the Commission's Section 1(b) analysis did not rest entirely on Amerada's past activities, but

44/ (...continued)

petitioner has not established that even if Amerada's projection that 100 Bcf of dry gas reserves existing in the Tioga producing region amounted to one-third of the non-associated gas reserves in North Dakota, the projection is implausible.

also on the anticipated production or gathering activities of the expansion facilities, Williston's claims must be rejected. 45/

The essence of the Commission's ruling in this case is that the primary function of the expansion facilities will, in the future, be production or gathering. These findings were necessarily based on projections, forecasts, and plans proffered by Amerada, rather than on actual performance, because most of the facilities did not exist when Amerada filed its declaratory order petition. In effect, the Commission's orders are based in large part on the expectation that the exempted facilities will be utilized to perform expanded production operations, as represented by Amerada, and that Amerada's plans to develop new Winnipeg wells will be pursued in good faith. 46/ As noted

45/ Thus, Williston's reliance on Black Marlin Pipeline Co., 21 FERC ¶ 61,008 (1982) is unavailing. In Black Marlin, the Commission simply ruled that a company's purpose cannot override an otherwise jurisdictional facility. In this case, the Commission found that the expansion facilities will serve primarily production and gathering functions on the basis of the activities they will perform.

46/ In its brief, petitioner raises no specific challenge to the Commission's observation that the primary function of the expansion facilities as "production or gathering" would not be affected even if development of the Winnipeg wells along the expansion mainline ultimately proves unsuccessful. As noted (supra, note 16), under these circumstances, the Commission explained that the spine would be regarded as simply a second means of egress for Tioga Field volumes to the nearest point of interconnection with another interstate pipeline that is adjacent to the production area. R. 117, 119-20; J.A. 104, 106-07. This reasoning is, of course, dicta because it is based on an eventuality that may never occur.

Insofar as its decision was rested in significant part on Amerada's anticipated development of the Winnipeg strata,
(continued...)

supra, the Commission stated: "should the primary function of the subject facilities change in the future, we would 'examine that issue in the event a complaint were filed with respect to such a change of use of the facilities.'" R. 216; J.A. 175. Thus, if Amerada has misrepresented its intentions or otherwise fails to implement the production and gathering activities attributed to its expansion, the Commission may revisit this issue in a future proceeding.

* * * *

In sum, the Commission rested on firm ground in concluding that, as things now stand, Amerada's facilities will be used for production or gathering, and thus are not subject to Commission jurisdiction under Section 1(b) of the NGA.

46/ (...continued)

the Commission expects Amerada to pursue development of the Winnipeg wells in line with its projections in this case. If Amerada fails to follow through with Winnipeg development, the Commission has made clear that its disclaimer of jurisdiction over Amerada's planned use of the expansion facilities is neither permanent nor irrevocable.

CONCLUSION

The petition for review in this case should be denied.

Respectfully submitted,

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Williston Basin Interstate Pipeline
Co. v. FERC
D.C. Cir. No. 92-1206

Docket No. CP91-1314-000
and CP91-1314-002

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing
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