



## Fifth Circuit Vacates FERC Rule Regarding Intrastate Pipeline Postings

By: James Moriarty and Jennifer Brough

On October 24, 2011, the U.S. Court of Appeals for the Fifth Circuit issued an opinion vacating Federal Energy Regulatory Commission ("FERC") Order Nos. 720 and 720-A which required major intrastate pipelines to post information regarding scheduled volumes and design capacity ("Posting Rule").<sup>1</sup> Following the issuance of Order Nos. 720 and 720-A, the Texas Pipeline Association and the Railroad Commission of Texas filed petitions for review with the Fifth Circuit arguing that the Posting Rule exceeds the authority granted to FERC by the Natural Gas Act ("NGA").

### FERC Authority Under the NGA

Through the Energy Policy Act of 2005, Congress amended the NGA to add section 23 which directs FERC to "facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce."<sup>2</sup> This section also allows FERC to disseminate "information about the availability and prices of natural gas sold at wholesale and in interstate commerce" and provides that the Commission may obtain such information from "any market participant."<sup>3</sup> It was pursuant to this authority that FERC promulgated the Posting Rule.

### The Court Finds FERC Exceeded Its Statutory Authority

The Court reviewed whether FERC's section 23 authority permits it to compel owners and operators of *intrastate* pipelines to post flow, capacity and scheduling information on the Internet.

FERC argued that the term "any market participant" should be construed broadly to include major intrastate pipelines as they effectively participate in the interstate natural gas market. The Court disagreed noting that the term "any market participant" refers only to participants in the *interstate* natural gas market.

The Court cited section 1(b) of the NGA<sup>4</sup> which states that the NGA "shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or the facilities used for such distribution or to the production or gathering of natural gas."<sup>5</sup> According to the Court, this section places a jurisdictional limitation on FERC and "unambiguously denies FERC the power to regulate entities . . . including wholly-intrastate pipelines."<sup>6</sup> The Court rejected each of FERC's



attempts to demonstrate that section 1(b)'s jurisdictional limitation does not limit the scope of FERC's authority under section 23.

The Court found that "Congress did not intend to regulate 'the entire natural-gas field to the limit of constitutional power' but chose instead to leave regulation of certain entities, including intra-state transactions and pipelines, to the states."<sup>7</sup> In conclusion, the Court found "the challenged orders unambiguously exceed the authority granted to FERC under the NGA" and are vacated.

#### *Endnotes*

1 *Texas Pipeline Association v. FERC*, No. 10-60066 (5th Cir. Oct. 24, 2011) ("Opinion").

2 15 U.S.C. § 717t-2(a)(1).

3 15 U.S.C. § 717t-2(a)(2)-(3).

4 15 U.S.C. § 717(b).

5 *Id.*

6 *Opinion* at 6.

7 *Id.* at 8-9 (*internal citation omitted*).

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

**James Moriarty** | T: 202-220-6915 | [jmoriarty@lockelord.com](mailto:jmoriarty@lockelord.com)

**Jennifer Brough** | T: 202-220-6965 | [jbrough@lockelord.com](mailto:jbrough@lockelord.com)