UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Notice of Proposed Rulemaking:	)	
Establishing Oil Value for Royalty Due on	)	63 F.R. 6113
Federal Leases	)	

SUPPLEMENTAL COMMENTS OF CHEVRON PIPE LINE COMPANY ON REVISED PROPOSED RULES

Pursuant to the Notice published in the Federal Register on February 6, 1998, 63 F.R. 6113, Chevron Pipe Line Company ("CPL") hereby submits its Supplemental Comments on the rules proposed in the Notice of Proposed Rulemaking on Establishing Oil Value for Royalty Due on Federal Leases ("Revised NOPR"). These Supplemental Comments are in addition to Comments CPL filed on May 28, 1997 regarding the proposed rules published at 62 F.R. 3742 ("Initial Comments").

In its Initial Comments CPL addressed MMS' proposal to amend 30 C.F.R. § 206.105 by removing current paragraph (b)(5), which would eliminate the use of tariffs filed with the Federal Energy Regulatory Commission ("FERC" or "Commission") or State regulatory agencies as a basis for transportation allowances for oil transported under non-arms' length contracts. CPL opposed this proposal because it (1) was based on a flawed interpretation of decisions issued by the FERC concerning its jurisdiction over oil pipelines originating on the Outer Continental Shelf ("OCS") and (2) would create a significant and unnecessary burden on pipelines with affiliates producing oil from Federal leases.

The Revised NOPR maintains the deletion of Section 206.105(b)(5), leading CPL to the conclusion that MMS has already made the determination to delete that section. This is a matter of great importance to CPL because of the significant burden which it would place on CPL. Therefore, CPL is submitting these Supplemental Comments in reference to the deletion of Section 206.105(b)(5) and new provisions proposed in the Revised NOPR.

In sum, CPL submits that the MMS and the Department of Interior are still misinterpreting FERC Orders regarding that agency's view of its jurisdiction over OCS pipelines under the Interstate Commerce Act ("ICA"). That misinterpretation is evident in a recent Letter Order sent to CPL's affiliate, Chevron U.S.A. Production Company ("Chevron Production"), ruling on two requests for Chevron Production to utilize tariff rates as transportation allowances under the currently effective regulations. CPL further submits that MMS should follow the course specified by its Assistant Director for Policy and Management Improvement in January 1997, which is to petition the FERC for jurisdictional findings. In that manner, all parties with an interest in the jurisdictional issue can address their positions, concerns and legal arguments to the agency with the expertise in the jurisdictional matter, with recourse to the courts if necessary.

I. CORRESPONDENCE AND COMMUNICATIONS

Correspondence and communications with regard to these Comments should be addressed to:

Ruth A. Bosek
Bosek Law Firm
1090 Vermont Avenue, N.W., Suite 800
Washington, D.C. 20005
202/326-5256

II. MMS CONTINUES TO MISCONSTRUE FERC ORDERS REGARDING THAT AGENCY'S ICA JURISDICTION OVER OCS PIPELINES.

MMS has proposed removing Section 206.105(b)(5) because, in two Orders issued in 1992, FERC stated that it does not have jurisdiction pursuant to the ICA over pipelines that operate solely on or across the OCS. NOPR, 62 F.R. at 3746, citing Oxy Pipeline, Inc., 61 FERC ¶ 61,051 (1992) ("Oxy"), and Bonito Pipe Line Co., 61 FERC ¶ 61,050 (1992) ("Bonito"). As CPL stated in its Initial Comments, that rationale overlooks the fact that FERC's disclaimer of jurisdiction, even if correct, was limited, by ignoring that FERC considers an oil pipeline transporting oil from the OCS onshore for further movement in interstate commerce to be subject to its jurisdiction. Subsequent to CPL's Initial Comments, FERC issued an Order clarifying that it does maintain that it has jurisdiction over OCS pipelines in those circumstances, in Ultramar, Inc. v. Gaviota Terminal Co., 80 FERC ¶ 61,201 (1997) ("Ultramar").

In Ultramar, the Commission held that certain shipments were not in interstate transportation because the OCS crude came onshore in California and was refined in that state. 80 FERC at 61,810. What is important to MMS' consideration, however, is FERC's restatement in that Order that it does have ICA jurisdiction over a pipeline transporting from the OCS onshore when the crude is transported to another state without any break in the transportation. The FERC referred to its earlier Order in South Timbalier Pipeline System, 29 FERC ¶ 61,345 (1984) (an Order discussed in CPL's Initial Comments at 5), in which the Commission asserted jurisdiction over the South Timbalier Pipeline which transports crude from the OCS to Louisiana. In Ultramar, the FERC said that the movements on the South Timbalier Pipeline from the OCS were subject to its jurisdiction because the crude was transported to another state, Mississippi, without any break in transportation. The

FERC expressly stated that the South Timbalier transportation met the test it enunciated in Oxy and Bonito for establishing ICA jurisdiction over an OCS pipeline, that is, a pipeline that starts on the OCS and transports oil through the seaward boundaries of a state for further movement in interstate commerce. 80 FERC at 61,810. The FERC's discussion of South Timbalier in the Ultramar Order has confirmed CPL's earlier argument to the MMS that the FERC has not disclaimed ICA jurisdiction over all OCS pipelines under all circumstances.

The recent Letter Order from the Assistant Secretary, Land and Minerals Management, to Chevron Production (attached as Exhibit A) discusses the Ultramar Order. It implicitly recognizes that FERC has claimed jurisdiction over shipments from the OCS that come onshore and move to a second state without a break in transportation. Exhibit A at 3. It then proceeds to a faulty conclusion, however, in stating that, since Chevron Production did not demonstrate that any specific shipments under the tariffs moved to a second state, "FERC was without jurisdiction to accept or approve any tariff on any of the pipelines involved in these appeals." Id. This is simply wrong. Assuming, arguendo, that none of Chevron Production's shipments met the standard FERC has articulated,[1/] there are other shippers on CPL's pipelines whose shipments may meet those criteria. Under the ICA, CPL has the obligation to file tariffs for the FERC for such interstate movements.

CPL is addressing the Letter Order in these Supplemental Comments because it underscores the need for MMS to do what the Associate Director for Policy and Management Improvement directed in her January 1997 Letter Order in Docket Nos. MMS-94-0655-OCS, et al.,[2/] which is to

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1/ CPL cannot comment on whether any of Chevron Production's shipments moved to a second state without a break in transportation.

2/ See Initial Comments at 4-5.

petition the FERC for jurisdictional determinations. CPL continues to question FERC's view of its ICA jurisdiction over OCS pipelines, which is based upon a very narrow reading of the statute and is at odds with decades of precedent regarding what constitutes interstate transportation. FERC's assessment of its jurisdiction is open to challenge on at least two fronts: first, whether transportation from the OCS to onshore is in itself enough to constitute interstate transportation; and second, whether a pipeline located wholly on the OCS is subject to ICA jurisdiction if it transports crude that moves further in interstate commerce under FERC's current view of what constitutes interstate transportation of OCS crude.[3/] FERC's jurisdictional interpretation has not been endorsed by the

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[3/] The traditional test of whether a carrier is engaged in interstate transportation subject to the ICA is not merely whether the carrier's physical facilities cross state or national boundaries but whether that carrier transports goods that are moving in interstate commerce--it is the movement of goods in interstate commerce that is subject to the ICA and consequently makes certain activities of the carrier subject to the ICA. The FERC reaffirmed the continuing validity of that traditional test in Orders issued in August and December 1997 in Texaco Refining and Marketing v. SFPP, L.P, Inc., 80 FERC ¶ 61,200 (1997), aff'd on rehrg., 81 FERC ¶ 61,388 (1997). In those Orders, the FERC found subject to its jurisdiction under the ICA a short pipeline located wholly within California because the oil transported on that pipeline eventually was transported outside California without a break in the transportation. On rehearing, the Commission stated as follows:

> Under the ICA, the interstate movement of oil is jurisdictional from its origin to its destination. Thus, so long as the oil movements along [the pipeline] are part of an interstate movement, these movements are jurisdictional.

81 FERC at 62,804. Under this traditional test and FERC's current view of its OCS jurisdiction, even a pipeline located entirely on the OCS should be subject to the ICA if it transports crude that, through connection with one or more other pipelines, is transported onshore and then to another state without a break in the transportation.

courts[4] and CPL submits that, due to the ramifications of MMS' proposal on pipelines, MMS should formally approach the FERC before taking the drastic action of deleting Section 206.105(b)(5).

III. DELETION OF SECTION 206.105(b)(5) WILL IMPOSE A SIGNIFICANT BURDEN ON BOTH CPL AND THE MMS.

In its Initial Comments, CPL described the significant burden that will be imposed upon it, and the MMS, if Section 206.105(b)(5) is deleted. CPL also noted that the strictures of the ICA may create legal difficulties for CPL in providing the information necessary to substantiate Chevron Production's transportation allowance. CPL will not repeat those concerns here, but wishes to remind the MMS that its proposal will create substantial additional work and raise potential legal liabilities for pipelines with affiliated production companies. Such burdens and potential legal liabilities should not be lightly imposed, particularly since the rationale for deleting the use of FERC and State tariffs rests first upon FERC's dubious interpretation of its ICA jurisdiction over OCS pipelines and secondly upon MMS's flawed analysis of even that dubious interpretation.

IV. AT A MINIMUM, PROPOSED SECTION 206.105 SHOULD BE MODIFIED.

Section 206.105 in the Revised NOPR requires that the lessee be able to show how it calculated the value of the transportation allowance. At a minimum, this section should be modified to provide that either the lessee or its affiliate must be able to make that showing. As CPL explained in its Initial Comments, Chevron Production does not own or operate the tariffed pipelines and does not have the data necessary to compute the transportation allowance in accordance with MMS

4/ The FERC's Bonito Order was appealed to the Court of Appeals for the District of Columbia Circuit, while the Oxy Order was not appealed. The Court of Appeals, however, dismissed the portion of the appeal pertaining to the issue of ICA jurisdiction "without reaching the merits of the Commission's decision that it lacks jurisdiction under the ICA." Shell Oil Co. v. Federal Energy Regulatory Commission, 47 F.3d 1186, 1190 (D.C. Cir. 1995).

regulations. This suggested modification would also make proposed Section 206.105 compatible with proposed Section 206.117(b), which provides that MMS may require the lessee or its affiliate to submit the data used to calculate the transportation allowance.

V. CONCLUSION

CPL opposes the deletion of paragraph (b)(5) from Section 206.105 because it is based upon a misinterpretation of Orders issued by the Federal Energy Regulatory Commission, prejudices pipelines due to MMS' failure to seek formal guidance from the FERC as discussed in the Order issued by MMS on January 18, 1997 in Docket Nos. MMS-94-0655-OCS, et al., and could create a significant and unnecessary burden on both MMS and OCS pipelines, including CPL. For these reasons, Chevron Pipe Line Company respectfully requests that the Minerals Management Service retain paragraph (b)(5) of 30 C.F.R. § 206.105.

Respectfully submitted,

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Counsel for Chevron Pipe Line Company

Dated: March 20, 1998

EXHIBIT A

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB - 4 1998

CERTIFIED MAIL--
RETURN RECEIPT REQUESTED

Ms. Coleen B. Naff
Counsel, Law Department
Chevron U.S.A. Production Company
P.O. Box 3725
Houston, Texas 77253-3725

Dear Ms. Naff:

The Royalty Valuation Division (RVD) of Minerals Management Service (MMS) denied your requests under 30 CFR § 206.105(b)(5) (1995) for the use of Federal Energy Regulatory Commission (FERC) tariffs in lieu of calculating actual expenses for transportation of oil production on or across the Outer Continental Shelf (OCS). The denials were based on Oxy Pipeline, Inc., 61 FERC ¶ 61,051 (1992) (Oxy) (Enclosure 1). You appealed each of these denials to the Director, MMS (Director).

On January 18, 1997, the Associate Director for Policy and Management Improvement issued an appeals decision remanding numerous appeals to RVD for a proper FERC jurisdictional determination and/or an analysis of the data required to make an excessive tariff rate determination (Enclosure 2). Included in the remand were Chevron U.S.A. Production Company (Chevron) Appeals Docket Nos. MMS-94-0677-OCS and MMS-96-0294-OCS.

The remanded appeals decision reads as follows:

> The MMS's process of granting or denying exceptions for requests to calculate OCS transportation allowances by using FERC oil transportation tariffs in lieu of actual costs is dependent upon FERC's determination of whether the pipeline through which production is being transported is under [Interstate Commerce Act (ICA)] jurisdiction. Once the jurisdictional question is resolved, the tariff rate may or may not be established as "FERC-approved" within the meaning of 30 CFR 206.105. Thereafter, MMS will be able to determine the merits of the allowance exception request using the approved tariff criterion or that the tariff rate exceeds actual transportation costs.

> In the instant cases, because the jurisdictional question has not been resolved, MMS cannot establish the merits of the Appellant's allowance exception requests. Therefore, the MMS's orders are remanded to MMS for a proper jurisdictional determination and/or an analysis of the data required to make [an] excessive tariff rate determination.

Since Oxy, FERC has issued Ultramar, Inc. v. Gaviota Terminal Company, 80 FERC ¶ 61,201 (1997), (Enclosure 3), which is relevant to the jurisdictional issue. In Ultramar, FERC held that under Oxy and another case, Bonito Pipeline Company, 61 FERC ¶ 61,050 (1992), aff'd sub. nom., Shell Oil Co. v. FERC, 46 F. 3d 1186 (D.C. Cir. 1995), transportation starting on OCS ". . . through the seaward boundary of [a State] to shore for further movement [within the State] . . . is not subject to ICA jurisdiction." Ultramar, 80 FERC ¶ 61,201. See also Bonito, 61 FERC ¶ at 61,221 n. 22; Oxy 61 FERC ¶ 61,051.

In the Bonito, Oxy, and Ultramar decisions FERC examined Section 1 (1) of the ICA, 49 U.S.C. app. § 1 (1) (1988). Section 1 (1) states that the ICA:

> . . . shall apply to common carriers engaged in . . . the transportation of oil . . . by pipeline . . . from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States.

The FERC decisions concluded that because the OCS is not a State or territory of the United States, the ". . . OCS does not come within ICA's jurisdictional language and, thus, ICA 'does not expressly cover pipelines transporting oil solely on or across OCS.' " Ultramar, 80 FERC ¶ 61,201 (quoting Bonito, at 61,221.) See also Oxy, 61 FERC ¶ 61,051.

In Ultramar, the transportation at issue started on the OCS and continued across the OCS and through the seaward boundary of California to shore for further movements within California to Los Angeles. FERC stated that ". . . ICA jurisdiction [would] attach, if at all, only at the point where the oil crosses the seaward boundary between the OCS and an adjacent state and enters that state, here California." Ultramar, 80 FERC ¶ 61,201. However, FERC concluded that because the subsequent movement of the oil after it crossed the seaward boundary into California was ". . . wholly within the State of California," the transportation was intrastate and thus not subject to ICA jurisdiction. Id.

FERC rejected Ultramar's argument that subsequent movement of the refined products interstate conferred ICA jurisdiction. FERC stated that any movement of refined products across State lines after refining was "distinct" from transportation to the refinery. Id. Thus, any subsequent interstate movement from the refinery is ". . . not a continuous movement across State lines that would establish jurisdiction." Id.[1]

FERC also rejected Ultramar's claim that commingling of its oil with other oil moving interstate conferred ICA jurisdiction. FERC stated that:

> . . . commingling of oil is not determinative of whether transportation is interstate or intrastate and does not alter the jurisdictional nature of the shipments. The Commission looks to each shipper's individual shipments to determine whether a particular shipper's oil commingled with others' oil, is moving interstate or intrastate. Ultramar's oil, though it may be commingled with oil moving interstate, still is moving intrastate.

Ultramar, 80 FERC ¶ 61,201 (citing Amoco Pipe Line Company, 62 FERC ¶ 61,119 (1993), reh'g denied, 67 FERC ¶ 61,378 (1994)) (footnotes omitted).

The FERC decisions discussed above clearly define the criteria for determining whether FERC has jurisdiction over crude oil pipelines on the OCS. In your submissions for Appeals Docket Nos. MMS-94-0677-OCS and MMS-96-0294-OCS for the OCS pipelines involved in those appeals, you did not demonstrate that the crude oil moved beyond the adjacent State. Therefore, under Ultramar, Oxy, and Bonito, the transportation of your crude oil does not constitute interstate transportation, and, thus, is not subject to ICA jurisdiction.

Consequently, FERC was without jurisdiction to accept or approve any tariff on any of the pipelines involved in these appeals. Accordingly, the FERC tariff exception at 30 CFR § 206.105(b)(5), to the requirement to calculate transportation allowances based on actual costs does not apply. Therefore, you are hereby ordered to calculate your non-arm's-length transportation allowance for the pipelines and for the time periods involved in Appeals Docket Nos. MMS-94-0677-OCS and MMS-96-0294-OCS based on your actual costs as prescribed in 30 CFR § 206.105(b)(1)-(4) (1997). You must also retain any and all documentation supporting your actual cost calculations so that MMS may verify your compliance with this order. You must comply with this order within 120 days of your receipt of this letter.

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[1]FERC distinguished the movement in South Timbalier Pipeline System, 29 FERC ¶ 61,345 (1984). In that case, the oil was moved from OCS onshore to Louisiana, and to a refinery in Mississippi ". . . without any break in the transportation to Mississippi." Ultramar, 80 FERC ¶ 61,201.

Because this order is signed by an Assistant Secretary for the Department of the Interior, it is not subject to appeal to the Interior Board of Land Appeals (IBLA) and is the final action of the Department. Blue Star, Inc., 41 IBLA 333 (1979); and Marathon Oil Co., 108 IBLA 177 (1989).

Appropriate late payment charges pursuant to 30 CFR § 218.150 (1997) or 30 CFR § 218.102 (1997) will be computed and billed to Chevron upon receipt of payment of any additional royalties due as a result of this order. After the period covered by this order, you should continue to calculate your non-arm's-length transportation allowance for OCS leases in accordance with regulations discussed in this order.

Section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), promulgated in 30 CFR § 241.51 (1997), authorizes MMS to assess civil penalties for failure or refusal to comply with the requirements of FOGRMA or any statute, regulation, rule, order or permit. Consequently, your failure to comply with the terms of this order may be considered a violation pursuant to 30 CFR § 241.51 and could subject you to penalties of up to $5,000 per violation per day for each day such violation continues and up to $10,000 per violation each day if the violation is considered to be willful.

If you have any questions, please call Ms. Deborah Gibbs Tschudy of MMS at (303) 275-7200.

Sincerely,

Bob Armstrong

Bob Armstrong
Assistant Secretary, Land
and Minerals Management

Enclosures