

Farmland Industries, Inc.,<sup>6</sup> the Commission identified a number of factors for consideration in analyzing the section 1(b) gathering test, and stated that “the ultimate test is whether the primary function can be classified as transportation or gathering.” The primary function test factors included:

- The length and diameter of a pipeline (longer and wider pipe indicating transportation);
- The central point in a field;
- The pipeline’s geographic configuration (a web-like pattern, for example, suggesting a gathering function)
- Location of compressors and processing plants (*i.e.*, the “behind the plant” test);
- The location of wells along all or part of the facilities (typically indicating gathering); and
- Operating pressure of a line, with higher pressure generally associated with the need to propel gas in a transportation function.

The primary function test has been relatively satisfactory for analyzing onshore facilities. Offshore, however, the test has proven more difficult to apply.<sup>7</sup> Thus, in *EP Operating Co. v. FERC*, 876 F.2d 46, 48–49 (5th Cir. 1989), the Commission initially ruled that under the primary function test the offshore platform where initial gas treatment took place constituted a “central point in the field” where the gathering function was complete, and

required no processing, the “central-point-in-the-field” test applied, under which lateral lines that collect gas from separate wells before converging into a larger single line—typically at the point where the gas is compressed for transportation by the pipeline—were classified as gathering facilities. *E.g.*, *Barnes*, *supra*

<sup>6</sup> 23 FERC ¶ 61,063 at 61,143 (1983). The Commission later added a number of “non-physical” criteria, including (1) the purpose, location and operation of a facility; (2) the business of the owner; (3) whether the jurisdictional determination is consistent with the objectives of the NGA and other legislation; and (4) the changing technical and geographic nature of exploration and production. *Amerada Hess Corp.*, 52 FERC ¶ 61,268 at 61,844–45 (1990). Under the primary function test, no one factor is determinative, nor do all factors apply in every situation. *See e.g.*, *Williams Field Services*, 194 F.3d at 116; *Farmland*, 23 FERC at 61,143.

<sup>7</sup> As more new facilities were constructed offshore on the OCS, where the pattern of gathering and distribution differs, the applicability of the factors was questioned. Specifically, it is often not feasible to process raw gas on open water. As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a producing field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS, they construct relatively long lines to carry the raw gas from offshore platforms, where after production only rudimentary gas treatment takes place (primarily to remove water), to the shore or a point closer to shore where it can be processed into “pipeline quality” gas that can be transported by an interstate pipeline.

therefore the 51-mile long, 16-inch diameter OCS pipeline downstream of the platform at issue in that case was a jurisdictional transportation facility. The court reversed that finding, holding that while the length and diameter of pipeline facilities might indicate a transportation function onshore, those factors had less weight in the offshore context because of the longer distances between the point of production in deep water and the nearest connection with an interstate pipeline. The court further questioned the validity of a central-point-in-the-field analysis applied to unitary OCS structures.

In response, the Commission modified its primary function test for the OCS, stating that as drilling operations pushed further offshore from existing interstate pipeline connections, it would apply a sliding scale to allow for the increasing length and diameter appropriate for gathering lines in correlation to the distance from shore and the water depth of the offshore production area.<sup>8</sup> Later, following a conference on offshore gathering in Docket No. RM96–5–000, the Commission issued a policy statement announcing that it would “presume facilities located in deep water [more than 200 meters] are primarily engaged in gathering or production.”<sup>9</sup>

As with onshore facilities, the use of the primary function test, as modified by the policy statement for deepwater facilities, seems to be workable, and there has been relatively little controversy concerning its application in recent years. Efforts to apply the primary function test to offshore facilities in the shallow OCS, however, have been contentious.

### B. The Sea Robin Pipeline

Difficulties applying the primary function test to offshore facilities were highlighted by the Commission’s decision in *Sea Robin Pipeline Company (Sea Robin)*.<sup>10</sup> Sea Robin’s offshore pipeline facilities were certificated as jurisdictional transmission facilities by the Commission in 1969. The system consists of 438 miles of pipeline that transports unprocessed gas from shallow water on the OCS to a processing plant onshore. The system is configured in the form of a “Y”. Along the two arms of the “Y”, 45 lateral lines with diameters ranging from 4.5 to 30 inches are connected to 67 receipt points located on production platforms,

or at subsea taps. Through those upstream arms, Sea Robin moves the gas to a manned platform with two turbine compressor units at the fork of the “Y” closer to shore. The bottom line of the “Y”, from the platform to shore, consists of 66.3 miles of 36-inch pipeline. Along this segment the gas is mingled with additional gas from four platforms.

In response to a request to reclassify the Sea Robin facilities from transmission to gathering, the Commission found that the primary function of Sea Robin’s entire system was and continued to be jurisdictional transportation. In reaching that conclusion, the Commission emphasized the length and size of Sea Robin’s pipeline, and also certain non-physical factors, such as the reliance of shippers in the original jurisdictional determination. The U.S. Court of Appeals for the Fifth Circuit remanded that decision.<sup>11</sup> In doing so the court said the Commission had relied too heavily on the size of Sea Robin’s system as a determinative factor and did not give enough consideration to the different nature of gathering on the OCS. The court also faulted the Commission for reliance on non-physical considerations, such as Sea Robin’s ownership and shipper expectations. The court specifically found that the Commission’s consideration of a “regulatory gap” in the absence of Natural Gas Act jurisdiction was inappropriate: “Need for regulation cannot alone create authority to regulate.”<sup>12</sup>

In its decision, the court suggested that the primary function test could be adapted to the operational characteristics of the OCS, so that portions of its system could be considered to be predominantly gathering and other parts predominantly transportation. On remand, then, the Commission adopted this suggestion and reformulated the primary function test to draw the jurisdictional line at an internal point on the Sea Robin system, at the junction of the “Y”.<sup>13</sup> The Commission concluded that the part of Sea Robin’s pipeline facilities from the platform to shore was a jurisdictional transportation system. Upstream of that point the two legs of the “Y” formed a non-jurisdictional gathering system.

In reformulating its primary function test, the Commission concluded that the “behind-the-plant” factor is not

<sup>11</sup> *Sea Robin Pipeline Company v. FERC*, 127 F.3d 365 (5th Cir. 1997).

<sup>12</sup> *Id.* at 371.

<sup>13</sup> *Sea Robin Pipeline Company*, Order on Remand, 87 FERC ¶ 61,384 (1999) (Comm. Bailey dissenting, rehearing denied, 92 FERC ¶ 61,072 (2000)).

<sup>8</sup> *See Amerada Hess*, 52 FERC at 61,988 (1990).

<sup>9</sup> *See* 1996 Policy Statement, note 1 *supra*.

<sup>10</sup> 71 FERC ¶ 61,351 (1995), reh’g denied, 75 FERC ¶ 61,332 (1996).