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## FERC Issues Order Asserting Jurisdiction over Ethane Pipelines Under the Interstate Commerce Act

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On December 31, 2013, the Federal Energy Regulatory Commission (“FERC”), in a case of first impression, confirmed its jurisdiction over and its intention to regulate the economic and operational aspects of the interstate pipeline transportation of purity liquid ethane regardless of the intended use of the ethane being transported. In light of the burgeoning development of ethane infrastructure in the Marcellus and Utica Shale regions, as well as throughout other shale-producing basins in the United States, FERC’s use of the Interstate Commerce Act (“ICA”) in this context confirms an additional level of regulatory supervision -- and potential cost -- to the transportation of purity liquid ethane, an indispensable commodity for a variety of petrochemical facilities currently in operation and in the development phase.

FERC’s Declaratory Order<sup>1</sup> responded to an August 6, 2013 petition (“Petition”) filed by Williams Olefins Feedstock Pipelines, LLC (“Williams”). In the Petition, Williams requested that FERC issue a declaratory order finding that FERC’s jurisdiction under the ICA does not apply to Williams’ proposed unbatched, interstate pipeline transportation of purity liquid ethane, which the company stated will be used entirely for non-energy purposes.

In its declaratory order, FERC denies the Williams Petition and finds that FERC does, in fact, have jurisdiction over the transportation of the purity liquid ethane because that natural gas liquid is “a naturally-occurring hydrocarbon product with current energy uses and future undeveloped energy uses.” Importantly, FERC for the first time states that it will not consider an applicant’s assertion of the intended end-use of the purity liquid ethane when making a jurisdictional determination related to the pipeline.

### FERC Test

The declaratory order arguably refines FERC’s test in this area of FERC’s ICA jurisdiction. Williams argued that prior case law generally centered on whether the product being transported served an energy-related function, as opposed to merely being a feedstock. In its declaratory order, FERC explains that this characterization of its test is incomplete and restated the test for whether it has jurisdiction over the transportation of a particular hydrocarbon product under the ICA as turning on “whether the product being transported is a naturally-occurring hydrocarbon that is used or can be used for energy-related purposes, as opposed to having only a non-fuel, feedstock function.”

Also, FERC explicitly states in the declaratory order that it will not disclaim jurisdiction over interstate ethane transportation based on an applicant’s assertion of the intended end-use of the ethane. FERC states that it believes this will avoid a “balkanized ethane pipeline system” in which some ethane pipelines are considered jurisdictional where others are not. FERC also is wary of basing its jurisdiction on an applicant’s stated intended use because it perceives this to be an environment where the intended use of the product could change rapidly. Using Williams as an example, FERC notes that (1) Williams does not have title to

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the ethane in its pipeline, so Williams cannot be certain of the ultimate use of the ethane it transports; and (2) some of the ethane Williams delivers will be placed into storage from which the product could be delivered to serve a variety of energy purposes.

### Additional Points

In analyzing the Petition under this test, FERC rejects the assertion that, although purity liquid ethane theoretically could be burned, the product's practical or commercial use is not an energy or fuel use. Instead, FERC focuses on several current energy uses for purity ethane, as well as future undeveloped energy uses for the product. It is worth noting that FERC restates and confirms that it has disclaimed jurisdiction over the transportation by pipeline of anhydrous ammonia, polymer-grade propylene, and chemical-grade propylene.

### Next Steps

Under FERC regulations, Williams will have 30 days from the date of the declaratory order to file a request for rehearing with FERC, which is a prerequisite to filing an appeal in federal court. No other entities intervened in the proceeding and, therefore, Williams is the only entity that will have a legal right to file such a request.

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<sup>1</sup> *Williams Olefins Feedstock Pipelines, LLC*, 145 FERC ¶ 61,303 (2013).