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Uncommon Times for Common Carriers

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Uncommon Times for Common Carriers¹

The past three years have brought unprecedented uncertainty to an industry not accustomed to change. A unanimous, landmark decision by the Texas Supreme Court, new political forces, and virtually unprecedented complaint proceedings at the Texas Railroad Commission have raised new and important issues for common carriers of natural gas liquids and other non-crude petroleum products. These changes, and the uncertainty they bring, come at a time when hydrocarbon production in Texas is surging and new investment is needed in pipeline infrastructure. This paper provides an overview of intrastate common carrier regulation in Texas — as it relates to petroleum product pipelines - including important developments since 2012.

A. Common Carriers

1. Natural Resources Code, Chapter 111

For most practitioners and most courts, the starting point for defining a "common carrier" pipeline has been the Common Carrier Act, codified in Chapter 111 of the Natural Resources Code. Section 111.002 (Common Carriers Under Chapter) defines seven types of common carriers.

See. 111.002. COMMON CARRIERS UNDER CHAPTER. A person is a common carrier subject to the provisions of this chapter if it:

- (1) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of **crude petroleum** to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline;
- (2) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of **crude petroleum** to or for the public for hire and the pipeline is constructed or maintained on, over, or under a public road or highway, or is an entity in favor of whom the right of eminent domain exists;
- (3) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of **crude petroleum** to or for the public for hire which is or may be constructed, operated, or maintained across, on, along, over, or under the right-of-way of a railroad, corporation, or other common carrier required by law to transport crude petroleum as a common carrier;
- (4) under lease, contract of purchase, agreement to buy or sell, or other agreement or arrangement of any kind, owns, operates, manages, or participates in ownership, operation, or management of a pipeline or part of a pipeline in the State of Texas for the transportation of **crude petroleum**, bought of others, from an oil field or place of production within this state to

¹ Every effort has been made in this paper to present an accurate and balanced overview of an area of law that is currently unsettled. The views expressed in this paper should not be attributed to the law firm of Baker Botts, L.L.P. or its clients. They are solely the views of the author. (And could change before the ink is dry.)

any distributing, refining, or marketing center or reshipping point within this state;

(5) owns, operates, or manages, wholly or partially, pipelines for the transportation for hire of **coal** in whatever form or of any mixture of substances including coal in whatever form;

(6) owns, operates, or manages, wholly or partially, pipelines for the transportation of **carbon dioxide or hydrogen** in whatever form to or for the public for hire, but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter; or

(7) owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of **feedstock for carbon gasification, the products of carbon gasification., or the derivative products of carbon gasification**, in whatever form, to or for the public for hire, but only if the person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter. [Emphasis added.]

There are a few important things to note about TEX. NAT. RES. CODE § 111.002.

The first is the products covered. Subsections 1 through 4 apply to "crude petroleum," a term whose scope has been the source of some debate. Subsections 5, 6, and 7 apply respectively to coal; carbon dioxide and hydrogen; and carbon gasification feedstocks, products, and derivative products.

A second point to note is the curious construction of the first three subsections. Subsection (1) captures any person who "owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire." Subsections (2) and (3) begin with that identical language but tack on additional qualifications. Subsection (2) applies when the crude petroleum pipeline "is constructed or maintained on, over, or under a public road or highway, or is an entity in favor of whom the right of eminent domain exists." Similarly, subsection (3) applies when the crude petroleum pipeline "is or may be constructed, operated, or maintained across, on, along, over, or under the right-of- way of a railroad, corporation, or other common carrier required by law to transport crude petroleum as a common carrier." While it makes perfect sense to treat as common carriers those crude petroleum pipelines that use the public roads or highways, exercise eminent domain, or make use of other carriers' rights-of-way, these two subsections seem unnecessary. Any crude petroleum pipeline that would be subject to subsection (2) or (3) should already be captured by subsection (1).

A third point to note is the phrase, appearing in both subsections (6) and (7), . . . but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter." The phrase allows common carrier pipelines transporting carbon dioxide, hydrogen, and carbon gasification products to acquire the rights granted by the Common Carrier Act only in return for agreeing to become subject to the obligations and duties of the Act. The phrase is included in, and would

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