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Interstate Determinations under the Natural Gas Act and Interstate Commerce Act

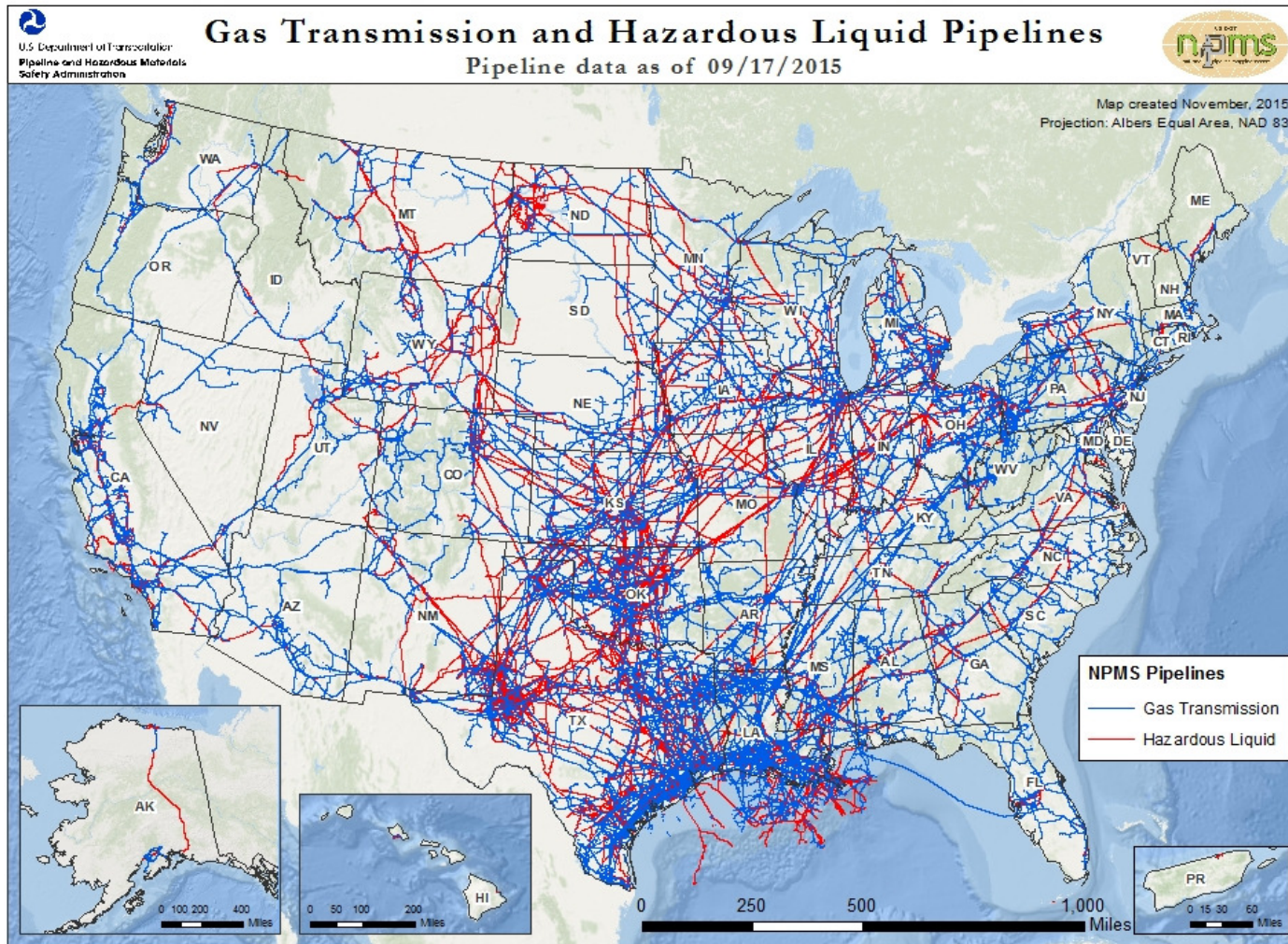


Disclaimer

- The issues discussed in this presentation are complex and in many cases there is not a bright line test that can be applied to a generic set of circumstances when evaluating whether the pipeline is subject to FERC jurisdiction. Proper review of these facts by a qualified professional is recommended before making any final determinations.



Pipeline Map



Why FERC?

- FERC doesn't have jurisdiction over pipeline safety.
- So why are we looking at the NGA and ICA?
- FERC determination of whether a pipeline is interstate is generally the driver for PHMSA/DOT in determining whether the pipeline is interstate for pipeline safety purposes.



PHMSA Pipeline Jurisdiction

- PHMSA has authority to regulate both interstate and intrastate natural gas and hazardous liquids pipelines.
- PHMSA's minimum safety standards “apply to any or all of the owners or operators of pipeline facilities.”
- However, individual states may choose to implement their own pipeline safety programs by complying with certain state safety program certifications requirements.



State Programs

- States seeking certification must, at minimum, adopt PHMSA's federal pipeline safety standards.
- States may also implement their own standards even if they are stricter than federal requirements, as long as there is no conflict.
- PHMSA “**may not** prescribe or enforce safety standards and practices for an intrastate pipeline facility or intrastate pipeline transportation **to the extent that the safety standards and practices are regulated by a State authority.**”



Other Considerations in PHMSA Pipeline Jurisdiction

- What is “Gas”?
- What is a “Hazardous Liquid”?
- What constitutes “transporting gas”?
- What constitutes “transporting hazardous liquids”?
- What exemptions apply?
 - gathering
 - production
 - storage



State Programs

- 51 States and Territories have implemented pipeline safety program and assumed jurisdiction over intrastate **natural gas** pipelines (except Alaska and Hawaii)
- 14 States have implemented pipeline safety programs for intrastate liquid pipelines:

Alabama

Arizona

California

Indiana

Louisiana

Maryland

Minnesota

New York

New Mexico

Oklahoma

Texas

Virginia

Washington

West Virginia



State Programs

Examples of tighter state control:

- **Maine** requires operators to use GPS and record all valves, tees, exposed sections by both depth and location. (65-407, Ch. 420 §3(C))
- **Oregon** has a landslide protection program.
- **Texas** requires all Grade 3 leaks to be repaired within 36 months. (Under federal regulations, a Grade 3 leak can remain indefinitely; there is no corresponding classification system) (16 TAC §8.207)



What is an Interstate Pipeline?

- Natural Gas
 - “interstate gas pipeline facility” means a gas pipeline facility—
 - (A) used to transport gas; and
 - (B) subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717 et seq.);
- If the pipeline is subject to FERC jurisdiction under the Natural Gas Act, then it is considered an interstate pipeline subject to federal pipeline safety regulations



What is an Interstate Pipeline?

- Hazardous Liquids
 - Statutory language does not provide bright line test
 - However, Appendix A to Part 195 provides that when determining which liquid pipeline facilities are interstate pipeline facilities, “DOT will generally rely on the FERC filings”
 - tariff governing transportation of liquids or
 - exemption from the obligation to file tariffs
 - If there is a FERC filing, DOT will, as a general rule, consider the facility to be an interstate pipeline facility within the meaning of the HLPESA.



What is an Interstate Pipeline?

Interstate Pipeline at FERC

=

Interstate Pipeline at PHMSA

(but there are always exceptions, of course)



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Interstate Determinations under ICA

- Based on the “fixed and persistent intent” of the shipper
- Continuous movement
 - Where does the shipment of oil begin
 - Where does the oil “come to rest”
- Across state lines or international border



Interstate Determinations under ICA

- Under ICA – No gathering exemption
- Under the HLPESA the definition of “Transportation of hazardous liquids” specifically excludes:
 - any such movement through gathering lines in rural locations or onshore production, refining, or manufacturing facilities or storage or in-plant piping systems associated with any of such facilities



Interstate Determinations under ICA

- The “fixed and persisting transportation intent of the shipper” considers the final destination point for which a shipper has contracted—even if that point is beyond the terminus of the pipeline.
- Intent of pipeline transporter does not control
- FERC considers:
 - Character of billing
 - Change of ownership during transportation
 - Processing or storage before re-shipment
 - Knowledge/intent of shipper regarding final destination
 - Power of owner to divert shipment after initial movement



Interstate Determinations under ICA

- Factors in favor of interstate determination
 - Through billing across different pipelines or pipeline sections to a final destination for the same shipper
 - Uninterrupted movement
 - Continuous possession of the shipment by the carrier
 - Unbroken bulk of the shipment



Interstate Determinations under ICA

- Factors in favor of intrastate determination
 - Break in the continuity of transportation
 - At the time of shipment
 - No specific order
 - Of a specific quantity
 - Of a given product
 - That is being filled for a particular destination beyond terminal storage between the two pipes

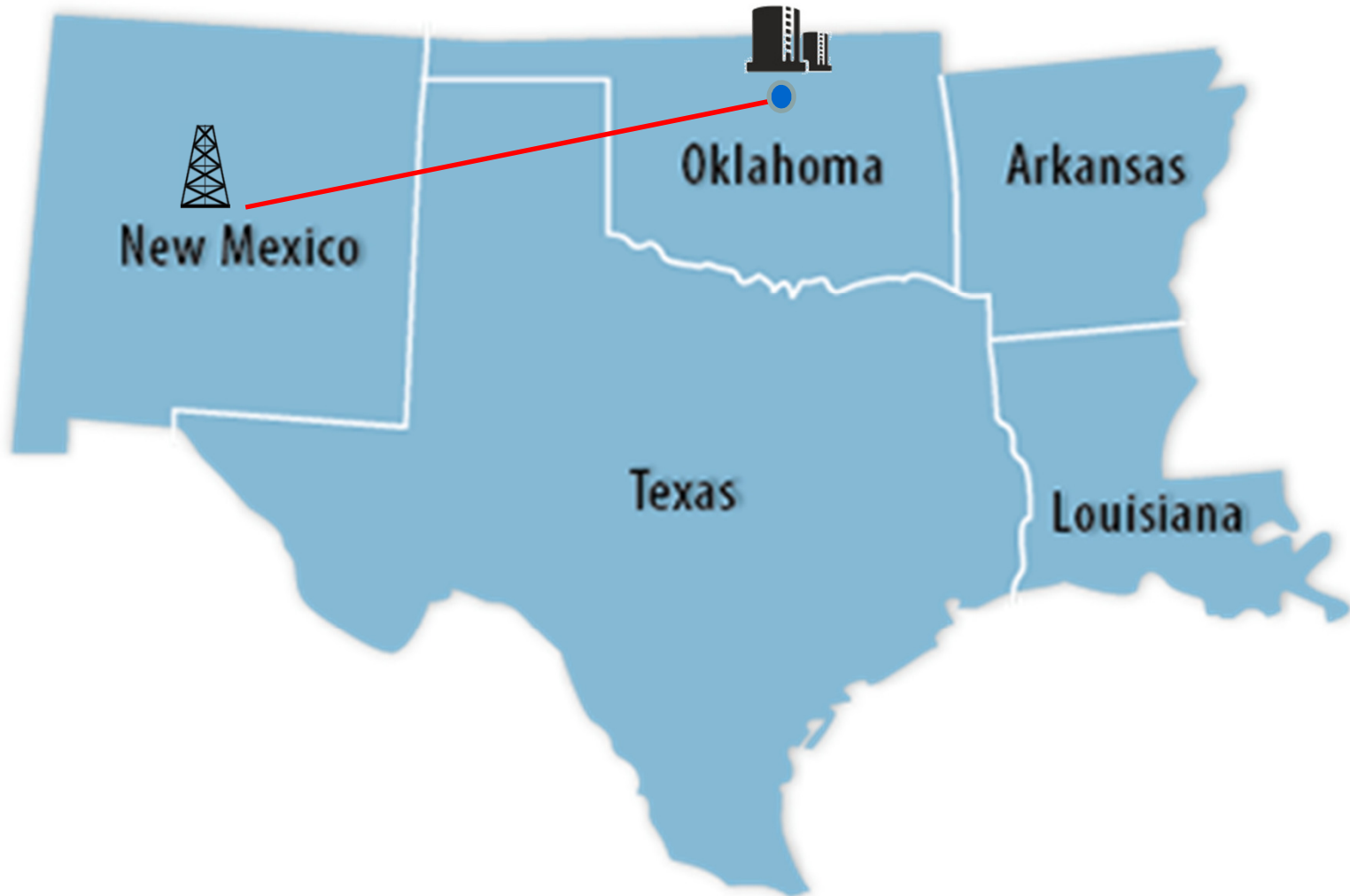


Interstate Determinations under ICA

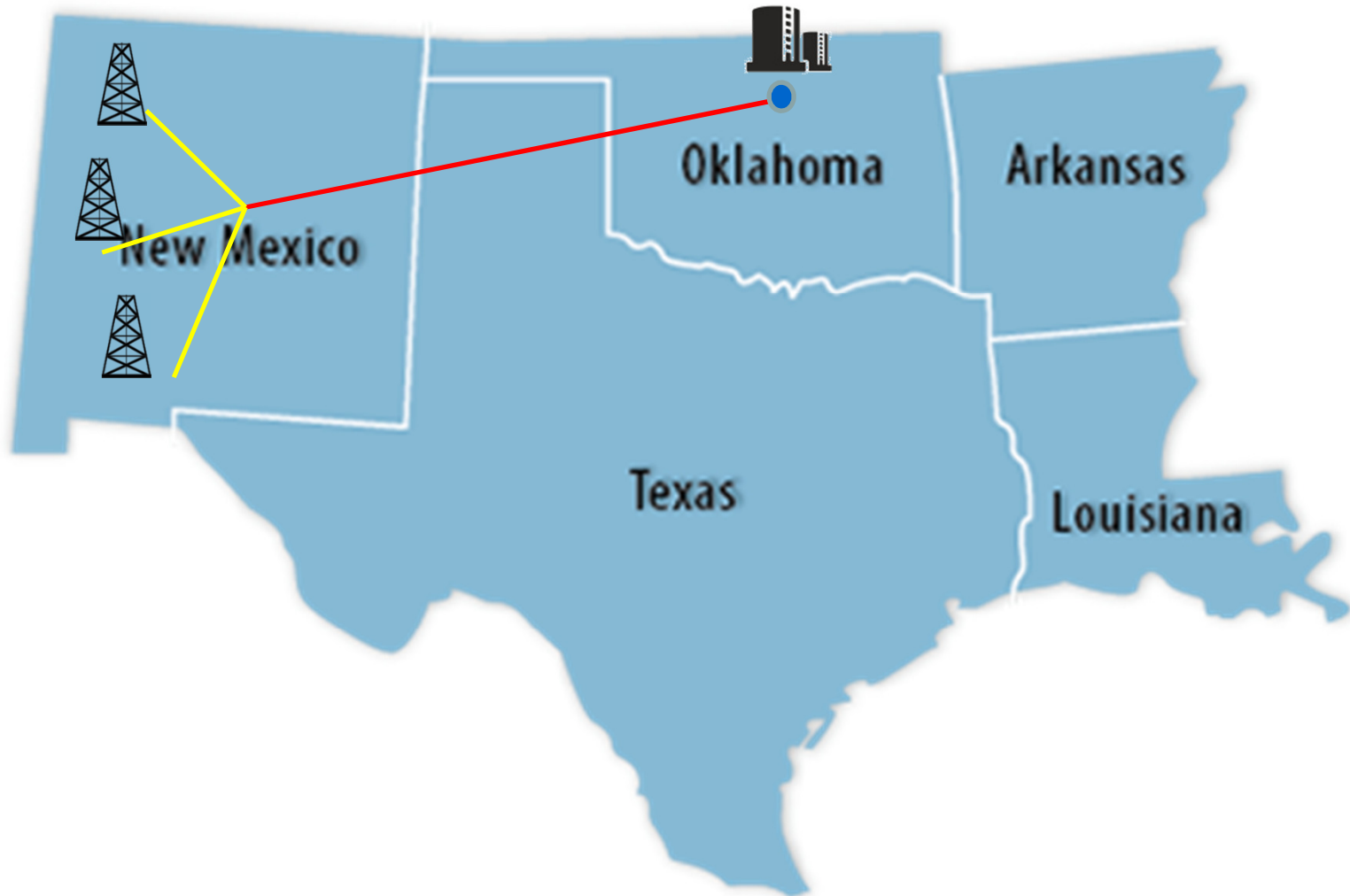
- What constitutes a “break” in the continuous interstate movement?
- Processing
 - constitutes such a significant interruption in the flow of interstate commerce that it creates two distinct movements: (1) a movement of product to the place of processing and (2) a separate movement of product from the point of processing.
- Storage
 - at the time of shipment there is a specific order being filled to a specific destination beyond the terminal storage,
 - is the terminal a distribution point or marketing hub, and
 - is additional transportation specifically arranged only after sale or allocation from storage.



Interstate Determinations under ICA



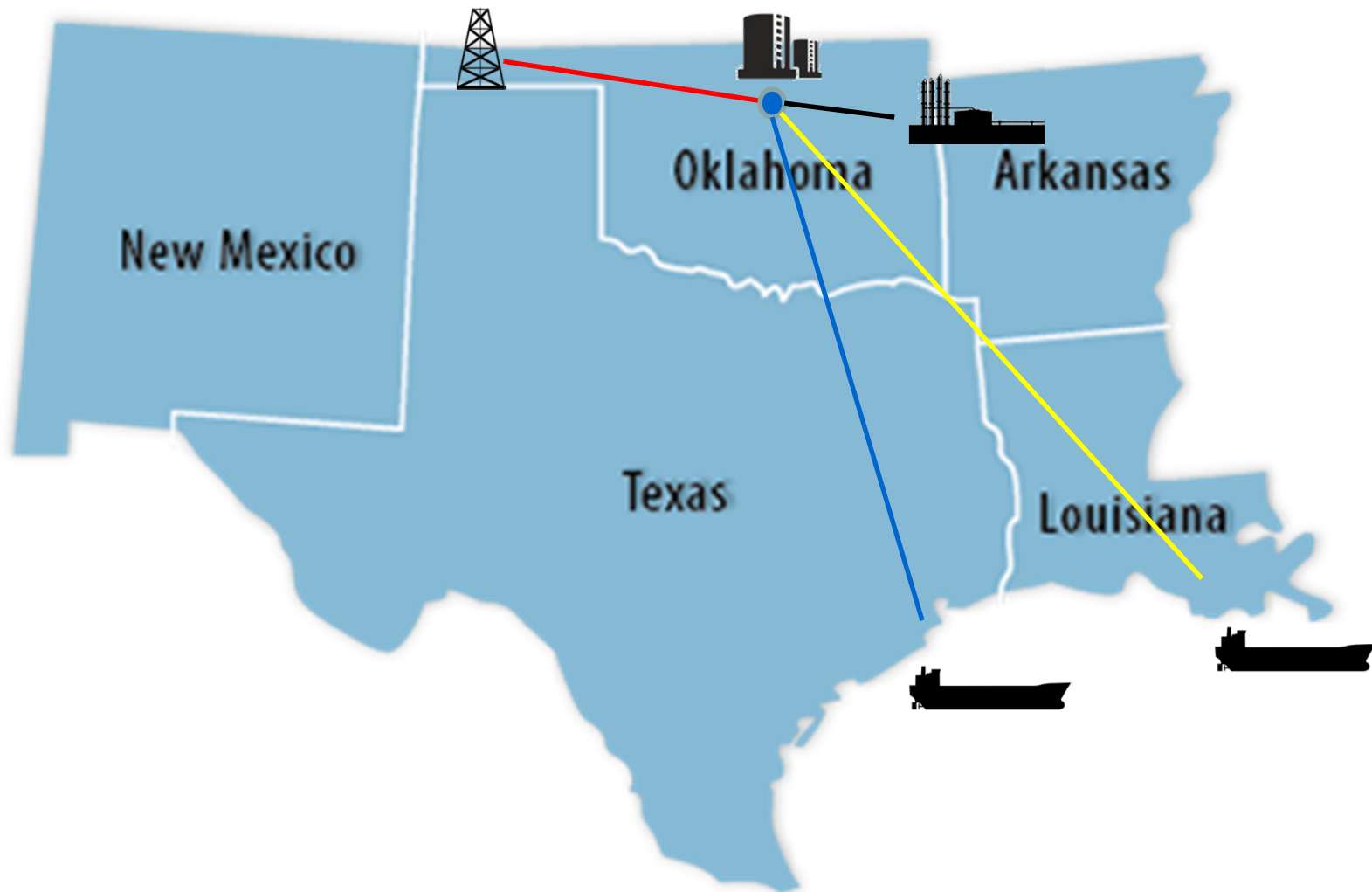
Interstate Determinations under ICA



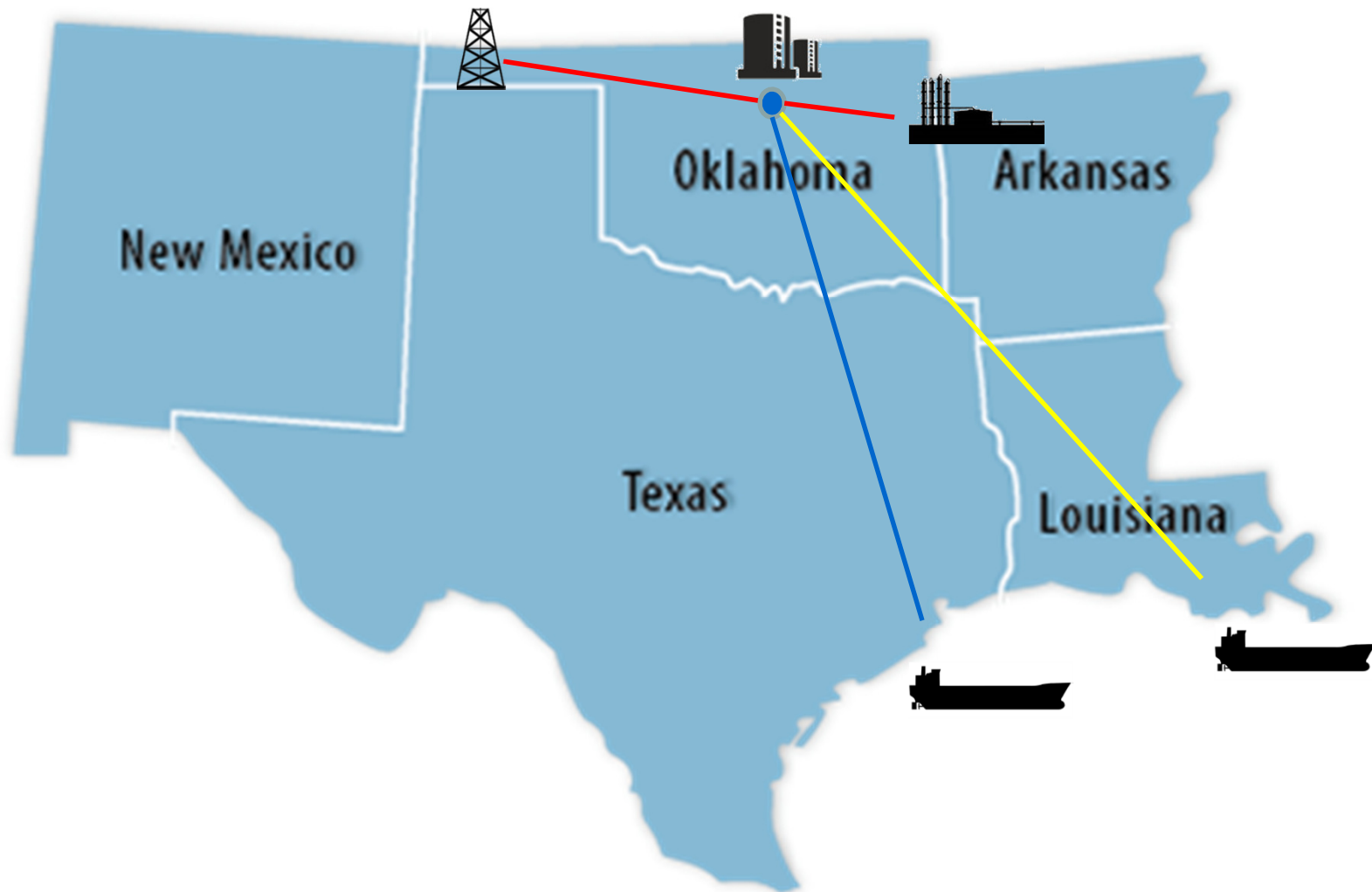
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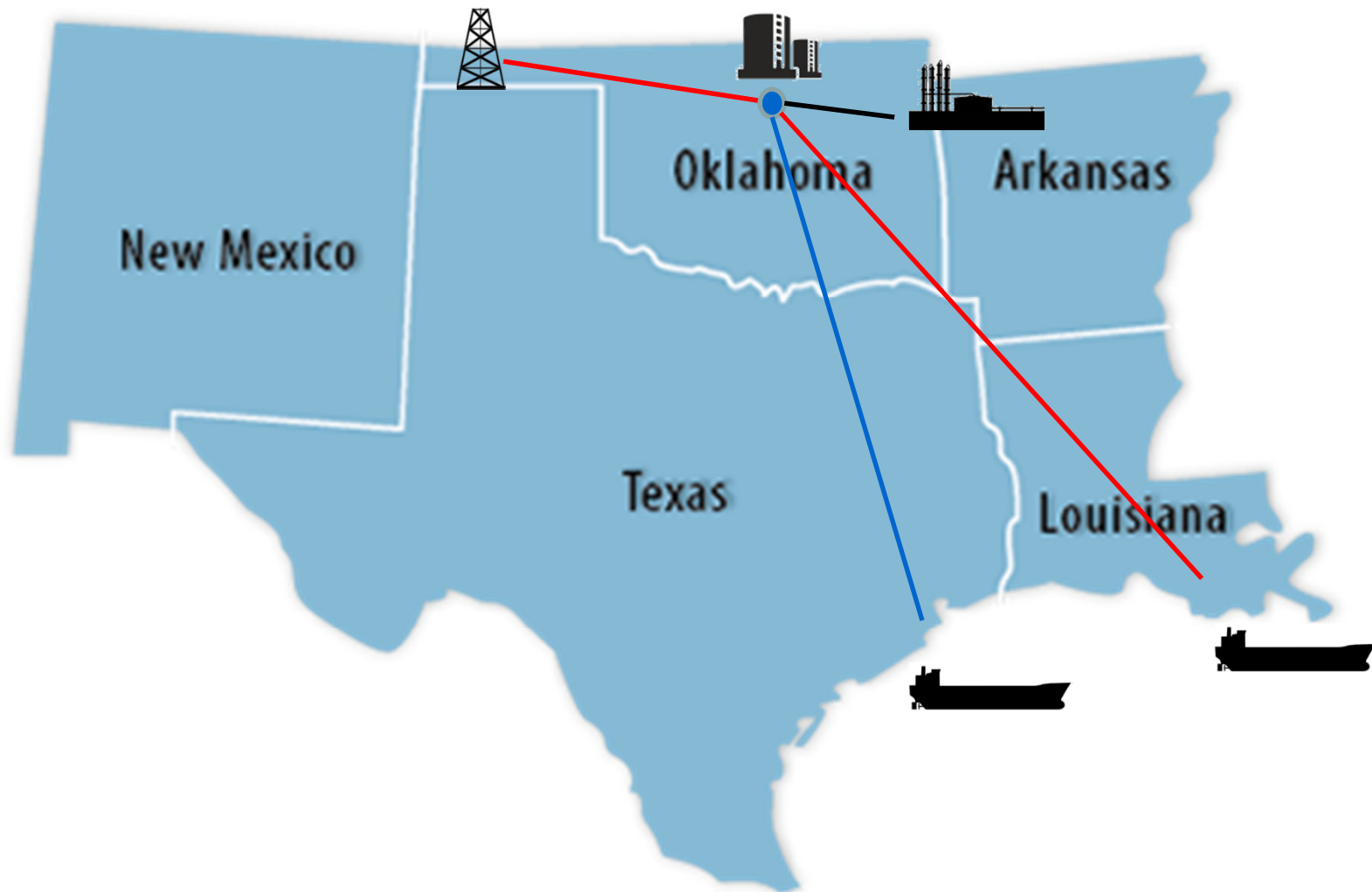
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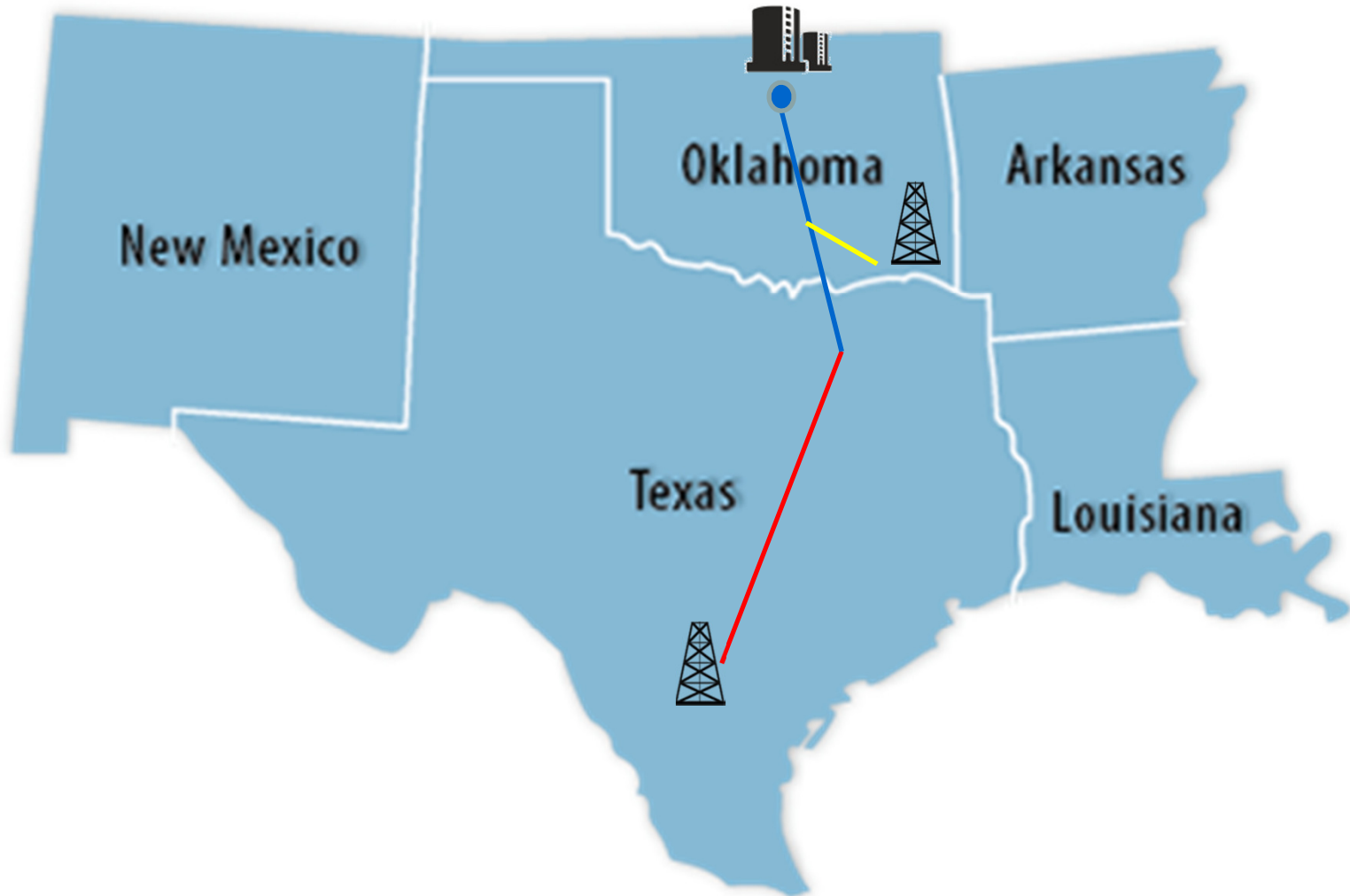
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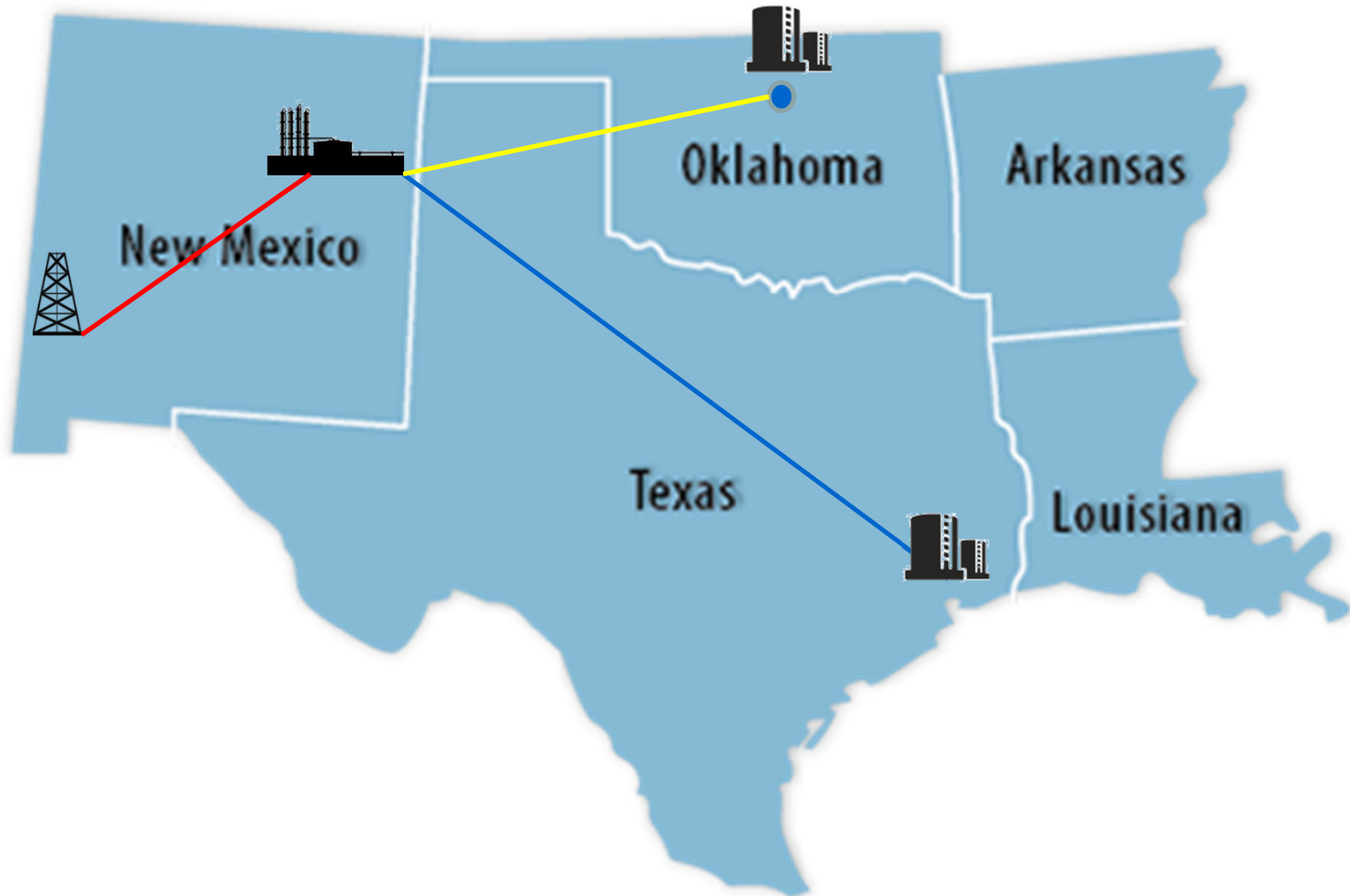
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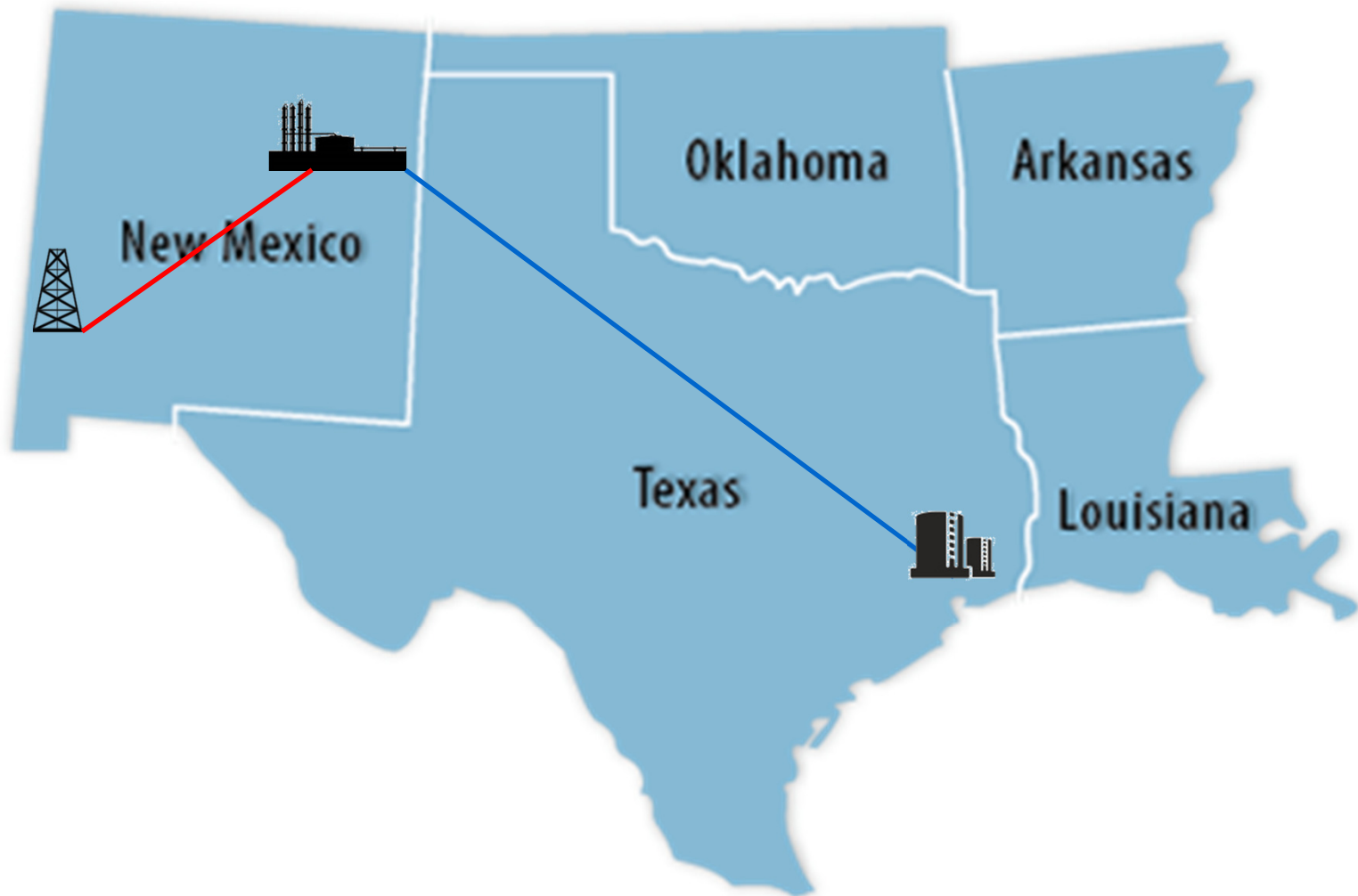
Interstate Determinations under ICA



Interstate Determinations under ICA



Interstate Determinations under ICA



Natural Gas Pipelines

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Interstate Determinations under NGA

- Interstate commerce:
 - “commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.”



Interstate Determinations under NGA

- Interstate
 - NGA focuses on whether gas has crossed a state line at any point during transportation
- Intrastate:
 - Pipeline located wholly within the state
 - Gas consumed within the state, or delivered to another intrastate pipeline that delivers it to an end user
 - Gas has not moved in interstate commerce prior to the upstream intrastate pipeline receiving it



Interstate Determinations under NGA

Exceptions – pipelines not subject to NGA

- Hinshaw Pipelines - §1(c)
 - Gas received from another who is participating in interstate commerce
 - Gas is received within or at the boundary of a State
 - Gas consumed within such State
 - Rates and service subject to regulation by State commission



Interstate Determinations under NGA

Exceptions

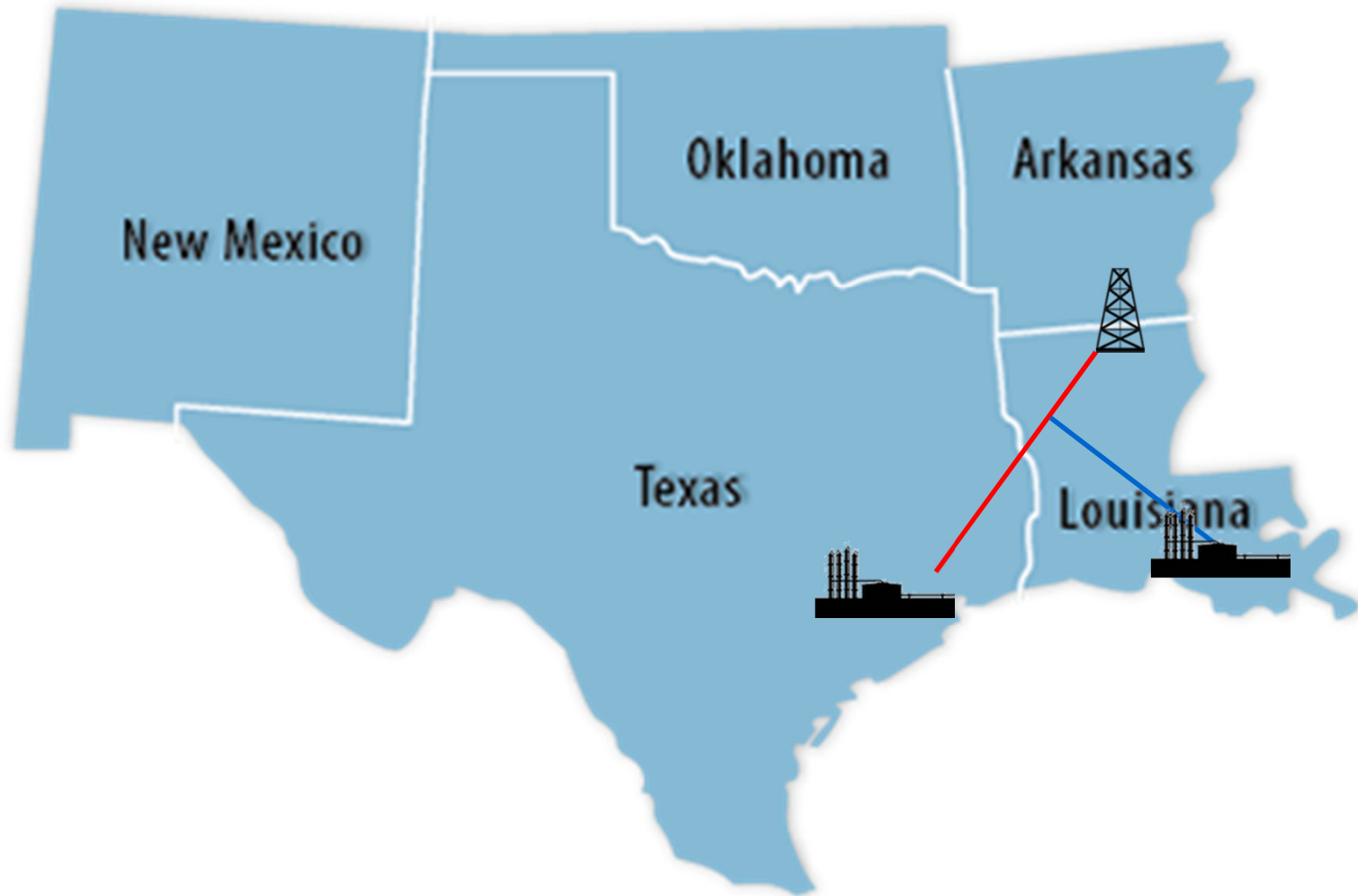
- Section 311 – not subject to the NGA
 - authorizes an intrastate pipeline to operate on behalf of an interstate pipeline
 - authorizes an interstate pipeline to operate on behalf of an intrastate pipeline
- NGPA 601(a)(2)(A)
 - provisions of NGA shall not apply to any transportation in interstate commerce of natural gas if it is authorized under Section 311



Interstate Determinations under NGA



Interstate Determinations under NGA



Interstate Determinations under NGA



Interstate Determinations under NGA

