

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

BP Pipelines (Alaska) Inc.	Docket No. IS05-82-002
ConocoPhillips Transportation Alaska Inc.	Docket No. IS05-80-002
ExxonMobil Pipeline Company	Docket No. IS05-72-002
Koch Alaska Pipeline Company LLC	Docket No. IS05-96-002
Unocal Pipeline Company	Docket No. IS05-107-001

State of Alaska	Docket No. OR05-2-001
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v.

BP Pipelines (Alaska) Inc
ExxonMobil Pipeline Company
ConocoPhillips Transportation Alaska, Inc.
Unocal Pipeline Company
Koch Alaska Pipeline Company

Anadarko Petroleum Corporation	Docket No. OR05-3-001
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v.

TAPS Carriers

BP Pipelines (Alaska) Inc.	Docket No. OR05-10-000
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BP Pipelines (Alaska) Inc.	Docket No. IS06-70-000
ExxonMobil Pipeline Company	Docket No. IS06-71-000
ConocoPhillips Transportation Alaska, Inc.	Docket No. IS06-63-000
Unocal Pipeline Company	Docket No. IS06-82-000
Koch Alaska Pipeline Company	Docket No. IS06-66-000

State of Alaska	Docket No. OR06-1-000
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v.

BP Pipelines (Alaska) Inc.
ExxonMobil Pipeline Company
ConocoPhillips Transportation Alaska, Inc.
Unocal Pipeline Company
Koch Alaska Pipeline Company

Anadarko Petroleum Corporation

Docket No. OR06-2-000

v.

TAPS Carriers

ORDER ON INTERLOCUTORY APPEAL

(Issued November 30, 2006)

1. On November 1, 2006, the Presiding Judge denied the TAPS Carriers'¹ motion to permit an interlocutory appeal of her ruling requiring the public release of certain portions of the TAPS Settlement Methodology (TSM) calculations which the TAPS Carriers had designated as Highly Confidential pursuant to the July 5, 2005 Protective Order in this proceeding. On November 8, 2006, the TAPS Carriers filed an interlocutory appeal. On November 15, 2006, Chairman Kelliher, as Motions Commissioner, referred the matter to the Commission. For the reasons set forth, the Commission grants the appeal as indicated in the text of the order.

Background

2. In 1985 the TAPS Carriers and the State of Alaska (the State) reached a settlement regarding the interstate transportation rates on TAPS, the Interstate Settlement Agreement (the Settlement). Each TAPS Carrier holds an undivided joint interest in TAPS, which entitles it to offer transportation service on its assigned portion of the total capacity of TAPS. Each TAPS Carrier files its own tariff with the Commission and collects its own rates from shippers. Under the Settlement the TAPS Carriers calculate their maximum interstate rate ceilings pursuant to the Settlement's methodology (TSM). This proceeding arises from protests and complaints filed by Anadarko Petroleum Corporation, Tesoro Corporation, and Tesoro Alaska Company (Anadarko/Tesoro), and the State regarding the TAPS Carriers' 2005 and 2006 interstate rates, as well as the TAPS Carriers' petition under section 13(4) of the Interstate Commerce Act requesting an order raising the TAPS Carriers' intrastate rates to the level of the interstate rates.

3. At issue here is the ruling by the Presiding Judge requiring the public release of a small subset of the data contained within the TAPS Carriers' TSM calculations, namely what the TAPS Carriers' claim is the commercially-sensitive cost and throughput

¹ The TAPS Carriers are BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company LLC, and Unocal Pipeline Company.

projections, Net Carryover, and Voluntary Revenue Reduction information contained within their 2005 and 2006 TSM calculations (the TSM Projection Data). They argue that the compelled release of the TSM Projection Data will fundamentally alter the manner in which such data has been handled at this Commission for the past 20 years. Pursuant to the Settlement, the TAPS Carriers have separately filed this information under seal with the State and the Commission in order to further the parties' mutual pro-competitive objectives. The TAPS Carriers assert that it has always been the State's position that the TAPS Carriers file their TSM calculations under seal to facilitate, to the maximum extent possible, inter-Carrier competition, while providing the State with a means of verifying whether an individual TAPS Carrier's projections are reasonable. The TAPS Carriers contend that the Presiding Judge's ruling will unnecessarily undermine these objectives.

4. Each year, the TSM sets a maximum rate ceiling for each TAPS Carrier but the TAPS Carriers may elect to charge tariff rates equal to or lower than that ceiling. The TSM rate ceiling calculation is made annually by each TAPS Carrier based on aggregate TAPS cost and throughput data over a three-year data window. The Settlement also allows each TAPS Carrier to voluntarily discount its interstate rates below the maximum rate ceiling through a mechanism called the Voluntary Revenue Reduction. If a TAPS Carrier takes a Voluntary Revenue Reduction it cannot later recover any resultant revenue deficiency through the Net Carryover Mechanism in the Settlement. A specific TAPS Carrier's Voluntary Revenue Reduction can only be determined by comparing its filed rate with its TSM rate ceiling calculation. Thus, the confidentiality protection set forth in the Settlement prevents each TAPS Carrier from knowing whether the other TAPS Carriers have discounted their rates below the maximum rate ceiling.

5. The TAPS Carriers state that the TSM calculations discussed above are made by each carrier through a process of inputting data into an electronic spreadsheet program known as the TSM Model. Each year, 60 days prior to their annual rate filings with the Commission, the TAPS Carriers individually submit their preliminary, confidential TSM calculations to the State so the State can determine whether to challenge the rate at the Commission. When the TAPS Carriers publicly file their individual interstate rates with the Commission, they also submit their respective TSM calculations to the Commission under seal, as permitted by Settlement.

6. In this proceeding, each TAPS Carrier's TSM calculations were attached to the prepared testimony of TAPS Carriers' witness Dr. David I. Toof, and were designated as Highly Confidential pursuant to the Protective Order. Under the Protective Order "Confidential" information cannot be publicly released but is available to all parties that have signed a non-disclosure certificate under the Protective Order, while "Highly Confidential" information, because of competitive sensitivities, is not only not made

public, but is also not available to internal company personnel of participants that are competitors of the party whose information is involved.

The Interlocutory Appeal

7. On October 30, 2006, Anadarko/Tesoro filed a Motion for Resolution of Confidentiality Disputes (A/T Motion) with the Presiding Judge. The A/T Motion sought, *inter alia*, to remove the Highly Confidential designation from, and to make public the above-referenced pre-filed exhibits to Dr. Toof's testimony which contain the TSM calculations of each TAPS Carrier, as well as other exhibits extracting portions of the Highly Confidential TSM information. On October 31, 2006, after oral argument, the Presiding Judge decided to defer her ruling on the A/T Motion until such time as a party actually sought to use Highly Confidential information in the course of the cross-examination of a witness.

8. The next day, on November 1, 2006, counsel for Anadarko/Tesoro sought to use information within the TSM calculations for purposes of cross-examining Dr. Toof. The TAPS Carriers offered to limit the Highly Confidential designation for the TSM calculations to only the most competitively sensitive portions of those calculations, *i.e.*, the TSM Projection Data. The Presiding Judge granted Anadarko/Tesoro's request and ordered the public release of the entire TSM calculation of each TAPS Carrier. The Presiding Judge stated (TR. at 821):

My ruling is to make these documents public. I do not believe that there's any harm, any competitive harm for the Carriers from making these documents public.

And secondly, if there is any competitive harm, it is *de minimis* vis a vis my obligation to conduct public hearings. I think the public harm of keeping these documents confidential outweighs the – any *de minimis* competitive harm.

9. The Presiding Judge indicated that she would not grant a motion to permit an interlocutory appeal, and directed the TAPS Carriers to file a motion. The TAPS Carriers filed the instant interlocutory appeal on November 8, 2006.² The TAPS Carriers assert in their motion that the standard for permitting an interlocutory appeal under Commission

²The Presiding Judge subsequently issued an order on November 13, 2006, confirming her prior ruling.

Rule 715³ is satisfied here. That standard requires a finding that there are “extraordinary circumstances which make Commission review of the contested ruling necessary to prevent detriment to the public interest or to prevent irreparable harm to any person.” On November 15, 2006, a notice of determination by the Chairman, acting as Motions Commissioner, was issued finding that extraordinary circumstances existed which warranted referring the TAPS Carriers’ appeal to the Commission for consideration. The notice also provided that the material at issue, the TSM Projection Data, would continue in the protected status it was filed under while the Commission considered the merits of the appeal.

10. The TAPS Carriers assert that maintaining the Highly Confidential designation for the TSM Projection Data is consistent with, and does not harm the public interest, and there would be irreparable injury if the information became public. In fact, the TAPS Carriers assert, the State, which is a party to the Settlement and asserts both a direct interest and a public interest in this issue, supported the TAPS Carriers’ position before the Presiding Judge. The State contended that releasing the information could reduce the TAPS Carriers’ incentive to compete as to the rates to be charged since the State views the confidentiality provision as a means of preserving competitive incentives among the TAPS Carriers.

11. The TAPS Carriers argue that if the TSM Projection Data becomes public while it is still current, that objective will be undermined. An individual TAPS Carrier could, for example, utilize the pattern of recent projections and discounts in the TSM Projected Data of other carriers to predict the TAPS tariffs those other carriers would file. It could then, at least in theory, adjust its own TSM ceiling rates to be competitive, but not too competitive, with the other carriers, contrary to the State's interest in unfettered competition. Or, given that the TAPS Carriers compete for throughput in order to fill their respective ownership shares of total TAPS capacity since throughput on TAPS has been less than capacity for a number of years, a TAPS Carrier could use the information to reduce the level of discount it would offer to attract throughput.

12. Apart from these competitive concerns, the TAPS Carriers argue that specific data contained within the TSM Projection Data is highly sensitive information that is developed by most TAPS Carriers in conjunction with their production affiliates. Thus, if those projections become public, it is unlikely that the production affiliates would continue providing this information to their respective TAPS Carrier affiliates, particularly since competitors in the production of Alaska North Slope (ANS) crude oil, such as Anadarko, would have access to this information on an unrestricted basis.

³18 C.F.R. § 385.715 (2006).

Additionally, throughput projection data could be used by buyers of ANS crude, such as Tesoro, to gain an insight into the levels of supply a particular ANS marketing affiliate may have for sale in a particular year. Consequently, these projections would become less reliable.

13. Anadarko/Tesoro, and the Regulatory Commission of Alaska (RCA), which is separately represented from the State, filed answers to the TAPS Carriers' interlocutory appeal. RCA's concern is that whatever ruling is made in this proceeding will apply to the intra-state proceeding before the RCA. The RCA states that it supports the Presiding Judge's ruling because the RCA "strongly favors an open and public record," but the answer does not discuss the merits of the appeal. Anadarko/Tesoro argue that the TAPS Carriers have not shown "with specificity" that they "will be competitively harmed by opening their rate filings to the public."⁴ Moreover, they assert that "The TSM filings were in the public domain for over a decade from 1985 through 1996...and [d]uring this entire period, there was not a single allegation of competitive harm."⁵

14. The State, which has an interest in keeping TAPS rates as low as possible, filed in support of the TAPS Carriers' motion, agreeing that extraordinary circumstances exist in this situation. The State asserts that, as explained at oral argument before the Presiding Judge, if the TSM Projection Data become public "there may be significant anticompetitive effects leading to increased rates on TAPS. Such effects, in turn, could result in substantial harm to both Alaska's interest, and the public interest."⁶

Discussion

15. The reasons presented by the TAPS Carriers for keeping the material "Highly Confidential" have merit, and we conclude that the appeal should be granted because once the information becomes public, the decision to make it public cannot be corrected later on. The TAPS Carriers' have shown that release of the material is likely to have an adverse impact on the existing competitive situation involving TAPS rates and capacity. That the State, which is a party to the Settlement, and has an interest in promoting competitive rates, supports the TAPS Carriers' position, adds further weight to those arguments. Moreover, the Presiding Judge's stated rationale for disclosing to the public the TSM Projection Data, maintaining a public record in this proceeding, is not

⁴Answer at 7.

⁵ *Id.* at 8.

⁶ State's answer at 3.

persuasive. The TAPS Carriers point out that the Presiding Judge has gone into a confidential session, ordering a sealed transcript, with respect to evidence unrelated to TSM data, for which another party sought protected status in this proceeding. Thus, regardless of her ruling on the TSM Projection Data, there will not be an entirely public record in this case.

16. Finally, if we grant the appeal, the number of exhibits that will remain Highly Confidential is *de minimis* in the context of this proceeding, in which hundreds of public exhibits have already been submitted. Only the TSM Projection Data will remain confidential. Preserving the Highly Confidential designation for the TSM Projection Data is unlikely to impact the Presiding Judge's ability to render a public decision in this proceeding, nor is it likely that this information will constitute the only competitively sensitive information that will be handled under seal in this proceeding. In past TAPS rate cases, the Commission has been able to render public decisions while keeping the TSM Projections Data in those cases “Highly Confidential.”

17. Similarly, the reasons advanced by Anadarko/Tesoro for denying the appeal are unconvincing. Contrary to their contention, the TAPS Carriers have shown why releasing the information in public could seriously affect the competitive situation, and thus be a “detriment to the public interest.” That the State, which has a paramount interest in promoting competition in the TAPS market, concurs that the release could impact the existing competition undermines the argument that the TAPS Carriers’ assertions are purely speculative. That the TSM Projection Data did not have confidential status prior to 1995 is irrelevant because until 1995 capacity on TAPS was fully subscribed, and the carriers did not compete for throughput. That is not the situation at present, where throughput on TAPS is less than its mechanical capacity, and the carriers actively compete to fill their portion of the capacity.

The Commission orders:

(A) The interlocutory appeal filed by the TAPS Carriers on November 8, 2006 is granted.

(B) The material at issue shall remain subject to the protection afforded by the July 5, 2005 Protective Order as Highly Confidential material.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.