

121 FERC ¶ 61,235
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.

Nexen Marketing U.S.A., Inc.

v.

Docket No. OR07-13-000

Belle Fourche Pipeline Company

ORDER ON COMPLAINT

(Issued December 6, 2007)

1. On July 5, 2007, Nexen Marketing U.S.A., Inc. (Nexen) filed a complaint against Belle Fourche Pipeline Company (Belle Fourche) alleging that the transportation service agreement (TSA) for expansion capacity that Belle Fourche offered during its June 2007 open season is unlawful. Nexen argues that the first category of unlawful TSA provisions involves the allocation of space on the pipeline when shipper demand exceeds the capacity of the line, *i.e.*, the pipeline is prorated. Nexen asserts that the other category of illegal tariff provisions relates to Belle Fourche's attempt to abrogate rights accorded to shippers by the Interstate Commerce Act (ICA). For the reasons discussed below, the Commission substantially grants Nexen's complaint and finds Belle Fourche's June 2007 open season and certain provisions of Belle Fourche's TSA invalid.

Factual Background

2. Belle Fourche operates an interstate crude oil pipeline system in Montana, North Dakota, and Wyoming. Belle Fourche was founded 50 years ago to serve as a common carrier pipeline gathering production from wells in Wyoming and transporting it to Guernsey, Wyoming, for further transportation by other pipelines. During succeeding years, Belle Fourche built and purchased pipeline in North Dakota, through which it offers common carrier service to Alexander Station, North Dakota for further transportation by other pipelines.

3. Eighty-Eight Oil LLC (Eighty-Eight) is, and has been for more than twenty years, a crude oil marketer. It purchases crude oil throughout Wyoming, North Dakota, and Montana and sells it at various marketing points. Eighty-Eight is an affiliate of Belle Fourche through common ownership. Butte Pipeline Company (Butte) operates a

common carrier oil pipeline in Wyoming and Montana. The majority of Butte's stock is owned by Bridger Pipeline LLC, an affiliate of Belle Fourche through common ownership, and the remainder is held by a minority outside shareholder.

4. A line segment currently operated by Butte runs from Baker, Montana to Sieler Station in Montana. A separate Belle Fourche line segment then runs from Sieler Station to Alexander Station, North Dakota. Crude oil that is delivered to Alexander Station can be transferred to Enbridge (North Dakota) LLC Pipeline. The Enbridge line connects through affiliates to refining centers in the Midwestern United States and Eastern Canada.

5. The North Dakota portion of Belle Fourche's system originally was built to gather barrels in western North Dakota and deliver those barrels south to Fallon County, Montana. The pipeline was used to transport crude oil from the north to the south. The northern portion of the pipeline, which was purchased by Belle Fourche from a third party, has a smaller diameter (6 inches) than the southern end (10 inches). Demand for southbound transportation has substantially decreased over the recent past, so that while the Belle Fourche system is capable of transporting south, shipper requests for southbound service have been minimal or non-existent over the past year.

6. At the same time that demand for southbound transportation was decreasing, in August 2005, shippers began consistently requesting that Belle Fourche transport crude oil from the south to the north, into Alexander Station in North Dakota. Accordingly, starting in January 2006, Belle Fourche began to take receipts from Fallon County, Montana and transport the crude oil to Alexander Station. Belle Fourche also has been delivering gathered barrels from the south to Alexander Station. The demand to transport crude oil from the south to Alexander Station has been increasing rapidly since that time. However, due to the configuration of the pipeline, deliveries to Alexander Station have been constrained by the 6-inch portion of the line. In fact, since January 2007, it has been necessary for Belle Fourche to apportion nominations multiple times.

7. In order to help increase the capacity of its system, Belle Fourche began using a Drag Reducing Agent (DRA) about one year ago, which helped to increase the capacity on the pipeline. In addition, this summer Belle Fourche plans to activate a booster station at the southern end of the 6-inch line to increase the capacity of the line. The activation of the booster station, in addition to the application of the DRA, will increase the capacity of the Belle Fourche pipeline from 10,000 bpd to 17,500 bpd in the summertime. This increased capacity, however, will be reduced significantly, potentially by as much as 40 percent, during the winter months, because the cold weather slows the flow of the crude oil and makes the DRA ineffective. This reduced capacity will severely limit Belle Fourche's ability to provide transportation services to meet current and future demand.

8. The Williston Basin, encompassing portions of North Dakota, Montana and South Dakota, is one of the largest oil producing and trading regions in the United States. Over the past several years, production in the Williston Basin has increased rapidly and

significantly; however, pipeline capacity in the area has not increased at the same rate. Consequently, this increased production has severely strained the capacity of pipelines serving the Williston Basin and has resulted in a larger than normal crude price differential between the Guernsey, Wyoming and Clearbrook, Minnesota markets.

9. Belle Fourche's system has been oversubscribed multiple times since January 2007. Belle Fourche expects that its system will be oversubscribed into the foreseeable future for two overarching reasons: (1) the greatly increased production of crude oil in the Williston Basin; and (2) the substantial price differential for crude oil between the Clearbrook, Minnesota and Guernsey, Wyoming markets. In fact, since production in the Williston Basin is expected to continue to grow, Belle Fourche expects that its system will become increasingly constrained as shippers seek to transport greater amounts of crude oil north to Clearbrook. Even with the activation of the booster station and application of the DRA, Belle Fourche expects it will not be able to meet current and future transportation demands, especially during the winter months.

10. Belle Fourche is considering an expansion to help alleviate some of the constraints on its system and provide shippers with more opportunities to participate in additional markets by transporting their crude oil northbound. The proposed expansion will take place in conjunction with certain changes on the Butte pipeline system. Belle Fourche is proposing to expand the capacity of its existing pipeline by upgrading the pump at its Alexander Station in North Dakota, and "looping" the 35-mile six-inch pipeline segment between its Bicentennial and Alexander Stations.

11. The expansion facilities will not replace the existing Belle Fourche and Butte facilities. Rather, Belle Fourche will use the expansion facilities in conjunction with its existing facilities to provide additional transportation. After completing the proposed expansion in late 2007 or early 2008, Belle Fourche expects to have an additional 20,000 barrels per day (bpd) of expansion capacity on its system, for a total annual average capacity of 30,000 bpd.

12. On June 13, 2007, Belle Fourche issued a notice of an open season to all interested parties, including all current and prospective shippers. The purpose of the open season was to determine shipper interest in committing to ship crude oil to Alexander Station using Belle Fourche's expanded capacity. To support Belle Fourche's capital investment, the open season offered the expanded capacity, 20,000 bpd, as allocated space for those shippers willing to commit to have their crude oil transported from Sieler Station to Alexander Station pursuant to the Transportation Service Agreement (TSA). The shippers were able to request the volume of crude oil to be shipped pursuant to the TSA.

13. The open season notice included a *pro forma* TSA and the tariff amendments Belle Fourche proposes to implement after it completes the expansion. Pursuant to section 8.01(a) of the TSA, in the event that interested shippers offered to commit

volumes in excess of the expected 20,000 bpd expansion capacity, Belle Fourche would, in its sole discretion, determine whether further capacity increases were economically viable. If Belle Fourche determined that further expansions were not economically viable, Belle Fourche would “apply the pro-rationing procedures set forth in its Rules Tariff FERC No. 83” to allocate the expansion capacity among the shippers tendering commitments.

14. At the close of the open season period, Belle Fourche received valid commitment offers from six shippers, including shippers who: (a) currently ship on Belle Fourche’s system and qualify as “Existing Shippers” pursuant to Belle Fourche’s currently-effective prorationing policies; (b) currently ship on Belle Fourche’s system but do not qualify as Existing Shippers; and, (c) are not currently shipping crude oil on Belle Fourche’s system. Since the six shippers offered, in aggregate, to commit volumes in excess of the expected 20,000 bpd expanded capacity, pursuant to the TSA, Belle Fourche applied the currently-effective prorationing procedures set forth in its rules tariff, FERC No. 83, to allocate the expanded capacity among the shippers tendering commitments. All six of the shippers that submitted valid offers received capacity on Belle Fourche’s expanded capacity. Belle Fourche accepted the entire volume requested by five of the six shippers, and awarded half of the expanded capacity to shippers who are considered New Shippers.

Nexen’s Complaint

15. On July 5, 2007, Nexen filed a complaint requesting the Commission issue an order prohibiting Belle Fourche from accepting or shipping crude oil on the basis of the TSA it transmitted to prospective shippers on June 27, 2007. Nexen asserts that the TSA violates the ICA, is discriminatory, unjust and unreasonable, and unlawfully abrogates shipper rights.

16. Nexen asserts that the TSA establishes prorationing procedures that unlawfully discriminate against certain shippers in the event that interested shippers offer to commit volumes in excess of the 20,000 bpd expansion capacity. Nexen submits that by applying the prorationing procedures of its current tariff to the allocation of expansion capacity, Belle Fourche establishes a preference for Existing Shippers on the existing Butte pipeline segment between Baker and Seiler Station and the expanded Belle Fourche pipeline segment between Seiler Station and Alexander. Nexen argues that these prorationing procedures allocate 90 percent of the capacity to these historic shippers, and accords a preference to Eighty-Eight, Belle Fourche’s marketing subsidiary, who Nexen believes is a very substantial shipper on the subject Belle Fourche/Butte pipeline segments used as the basis for determining Existing Shipper allocation rights.

17. Nexen contends that despite the fact that Belle Fourche first announced the open season for the expansion on June 13, 2007, the TSA establishes December 2006 through May 2007 as the base period for shipments for July 2007. Nexen states that Belle Fourche uses a similar retroactive base period for the remainder of 2007 and 2008.

Nexen asserts that since it will be classified as a “New Shipper” rather than as an “Existing Shipper” under the prorationing procedures, it will be excluded from 90 percent of the expansion capacity even though it subscribed to the open season at the very same time as all other shippers. Nexen contends that by proposing to use a retroactive base period to determine which shippers will have priority for the expansion capacity, Belle Fourche is acting in the very manner that the Commission declared illegal in its decision in *Platte Pipe Line Company*.¹

18. Nexen argues that various provisions of the TSA unlawfully seek to prevent shippers from seeking redress from the Commission. First, Nexen argues that section 8.02 of the TSA appears designed to prohibit any shipper from contesting before the Commission either the rate that Belle Fourche proposes to charge or terms or conditions that are discriminatory. Second, Nexen asserts that in section 4.01 Belle Fourche insists that no shipper ever benefit from a Commission determination that the Base Rate or any increment to the Base Rate is improper. Finally, Nexen contends that Article XIX of the TSA is a clear attempt to prevent any shipper from contesting the rates, terms, or conditions of shipment at the Commission because it states that such issues can only be tried by an arbitrator appointed under Wyoming state statute. Nexen concludes that each of the provisions that seek to bar a person who wishes to ship crude oil on Belle Fourche from resort to the Commission is unlawful.

19. Nexen requests the Commission order Belle Fourche to refrain from shipping any crude oil on its expansion facilities or enforcing the provisions of the TSA that it has requested shippers to sign for its expansion facilities until it conforms the rules of the pipeline to the requirements of law.

Public Notice, Interventions and Answers

20. Public notice of Nexen’s complaint issued on July 9, 2007, providing that the respondent’s answer and any interventions or protests be filed on or before July 25, 2007. On July 25, 2007 Belle Fourche filed an answer to and motion to dismiss the complaint of Nexen. In addition, EAP Energy Services, L.P. (EAP) filed a motion to intervene and initial comments. EAP states that as a participant in Belle Fourche’s open season process, it does not object to the amount of capacity that was allocated to EAP. EAP states that it is eager to have access to the additional Belle Fourche capacity and urges the Commission not to take any action that would delay the proposed in-service date of the expansion facilities. Belle Fourche’s answer is discussed below.

¹ 115 FERC ¶ 61,215 at 61,768 (2006) (*Platte*).

Belle Fourche's Answer and Motion to Dismiss

21. Belle Fourche asserts that the open season was lawfully administered. Belle Fourche argues that the Commission has repeatedly held that a non-discriminatory, and widely-publicized open season, during which all potential shippers had an equal opportunity to become committed shippers does not violate the undue discrimination or undue preference provisions of the ICA, because the open season was made available to all interested shippers.² Belle Fourche states that it issued a notice of its open season on June 13, 2007. Belle Fourche states that this notice was sent to a number of potentially interested parties, including former and current shippers, as well as potential new shippers. Belle Fourche argues that all prospective shippers -- former, existing and new, including Complainant Nexen – had an equal, non-discriminatory opportunity to subscribe to the expanded capacity Belle Fourche offered in the open season. Belle Fourche asserts that all prospective shippers, including Nexen, were equally eligible to obtain expansion capacity by committing to ship barrels pursuant to the TSA terms.

22. Belle Fourche contends that the results of the open season for the expanded capacity clearly confirm that the open season was formulated, as well as administered, in a non-discriminatory fashion in which all shippers had an equal opportunity to obtain committed space on Belle Fourche's expanded capacity. Belle Fourche states that a total of six shippers submitted valid offers and executed the TSA as written. Belle Fourche states that, of these six shippers, only one, Eighty-Eight, is an affiliate of Belle Fourche; the other five are non-affiliated companies. Moreover, Belle Fourche states that of these six shippers, two qualified as an "Existing Shipper" on the Belle Fourche pipeline. Belle Fourche states the other four shippers did not qualify as Existing Shippers, and according to the definitions in Belle Fourche's currently-effective tariff, these four shippers were "New Shippers." Without disclosing shipper-specific information, Belle Fourche can state that it awarded all six shippers that submitted conforming commitments a portion of the expanded capacity. In fact, Belle Fourche states that it accommodated the entire volume requests of five of the six shippers who tendered valid offers pursuant to the open season, and awarded half of the capacity to New Shippers.

23. Belle Fourche asserts that the application of its currently effective tariff provisions to allocate capacity was proper. Belle Fourche argues that consistent with *Mid-America Pipeline Co.*³ it applied its existing prorationing procedures to allocate space on the expanded capacity. Belle Fourche also asserts that any objection that Nexen

²*Citing, Express Pipeline Partnership*, 76 FERC ¶ 61,245 at 62,254 (1996); *Mid-America Pipeline Co.*, 116 FERC ¶ 61,040 (2006); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 at PP 37-38 (2005). *See generally, Express Pipeline Partnership*, 75 FERC ¶ 61,303 (1996), and *Plantation Pipe Line Company*, 98 FERC ¶ 61,219 (2002).

³ 116 FERC ¶ 61,040 at P 23-4 (2006) (*Mid-America*).

may have with respect to Attachment D of the TSA are premature because the prorationing rules in Attachment D are merely proposed amendments to Belle Fourche's tariff which it will not file or implement until later this year. Belle Fourche contends that consistent with the Commission's ruling in *Enbridge Pipelines (North Dakota) LLC*,⁴ the Commission should reject Nexen's objections to Attachment D as premature.

24. Belle Fourche argues that it did not use a retroactive base period to allocate the expanded capacity. Belle Fourche asserts that it applied its currently-effective prorationing procedures which it issued on November 20, 2006, and became effective December 1, 2006. Belle Fourche submits that its prorationing policies did not become effective until February 1, 2007. Thus, Belle Fourche contends that all shippers, including current and prospective shippers, have had notice of Belle Fourche's prorationing procedures since November 20, 2006, and, as such, the base period is not retroactive.

25. Belle Fourche asserts that all shippers have access to its pipeline. Belle Fourche states that it only offered its expanded capacity, not its base capacity, in the open season. Therefore, Belle Fourche states that those shippers who elected not to participate in the open season, or, like Nexen, submitted invalid offers, still have access to the base capacity on the Belle Fourche system during the three-year period the term commitments will be in effect. Belle Fourche contends that the Commission has approved incentive programs reserving capacity on a pipeline's expanded capacity in cases where non-committed shippers are eligible to ship on the base capacity of the pipeline.⁵

26. Belle Fourche argues that both section 8.02 and Article XIX are standard provisions in open season commitment contracts. Belle Fourche asserts that in return for allocated space on Belle Fourche's expansion capacity, it is reasonable to require the shippers to support the project. Belle Fourche contends that it would make no sense for a shipper who voluntarily entered into an agreement to support an expansion project to then take action that indicates a lack of support. In addition, Belle Fourche submits that it is standard practice to require parties to a contract to agree to resolve any disputes concerning the "meaning and enforcement" of any terms of the contract by means of binding arbitration. Belle Fourche asserts that neither of these provisions can be interpreted to require shippers to agree that they will never seek assistance from the Commission in protecting their rights where appropriate, as Nexen alleges.

⁴ 120 FERC ¶ 61,025 (2007) (rejecting Enbridge's tariff filing as premature).

⁵ *Mid-America*, 116 FERC ¶ 61,040 at P 24. *See also Enbridge Pipelines (North Dakota) LLC*, 120 FERC ¶ 61,025 at PP 22-24 (2007).

27. Belle Fourche asserts that Nexen's claims regarding TSA section 4.01 are moot. Belle Fourche states that the continued presence of the language in section 4.01 of the TSA to which Nexen takes exception was an inadvertent error. On June 13, 2007, Belle Fourche states it issued a notice of its open season and attached a TSA which it requested shippers to sign when submitting offers. On June 27, 2007, Belle Fourche states that it informed recipients of the open season materials that it had revised certain sections in the TSA. Belle Fourche states that one of these sections was section 4.01. Belle Fourche states that while it deleted various other provisions in that section, Belle Fourche inadvertently failed to delete the last phrase, to which Nexen now raises an objection.

28. Belle Fourche acknowledges its inadvertent error and has further revised the TSA to delete this phrase. Upon being made aware by the complaint that this phrase was still included in the TSA, on July 12, 2007, Belle Fourche states that it sent to all of the shippers who had subscribed to Belle Fourche's expanded capacity (a) a notice informing them of this deletion, and (b) a copy of the revised TSA. Belle Fourche states that all of the committed shippers have consented to this revision. Therefore, Belle Fourche argues that Nexen's objection to section 4.01 is now moot, and should be disregarded by the Commission.

Nexen's Answer

29. On August 8, 2007, Nexen filed answer to Belle Fourche's answer and motion to dismiss. Nexen recognized that answers to answers are generally not permitted. However, Nexen asserted that since Belle Fourche considered its pleading to also be a motion, it can file an answer pursuant to Rule 213.⁶

30. Nexen asserts that Belle Fourche may not have followed the procedures it announced in its open season for allocating capacity. Nexen states that Belle Fourche stated that it awarded half the expansion capacity to New Shippers. Nexen argues that since the pipeline was oversubscribed, it was, of course, impossible for Belle Fourche to award more than 50 percent of the capacity to New Shippers and still comply with the section 8.01(a) prorating procedures which limit New Shippers to no more than 10 percent in the event of an oversubscription.

31. Nexen argues that Belle Fourche's reliance on the Commission's decision on the *Mid-America* case to support its discriminatory prorating program is misplaced. Nexen asserts that the most significant element of *Mid-America's* prorating proposal for purposes of this case is the fact that 80 percent of the expansion capacity was fully allocated to the shippers that signed TSAs in the open season on an equal, non-discriminatory basis. In other words, Nexen submits that all shippers signing the TSA would share equally in 80 percent of the expansion capacity in the event of prorating.

⁶ 18 C.F.R. § 385.213 (2007).

In contrast, Nexen asserts that Belle Fourche proposes to allocate only 10 percent of the entire expansion capacity on an equal, non-discriminatory basis. Nexen also asserts that in *Mid-America* there were no allegations of preferences to marketing affiliates of the pipeline. Nexen asserts that Belle Fourche never denies that its affiliate, Eighty-Eight, is the largest shipper on its pipeline and that the open season prorationing procedures were designed to confer a preference on Eighty-Eight so that it could remain the largest shipper on the expansion facilities, as well.

32. Nexen asserts that there is no merit to Belle Fourche's argument that it is not using a retroactive base period. Nexen states that Belle Fourche announced its open season for the expansion capacity on June 13, 2007. According to Belle Fourche the likely date for the opening of the expansion facilities is late 2007 or early 2008. Nexen states that Belle Fourche's TSA indicates that the base period for prorationing for December 2007 to February 2008 begins on December 2006, regardless of whether the shipment month is December 2007, January 2008, or February 2008. Nexen contends that it is at a loss to understand how the use of a base period in 2006 for an open season that was announced on June 13, 2007, does not directly violate the Commission's decision in *Platte* that a retroactive base period is impermissible. Moreover, Nexen submits that, under the Commission's *Platte* decision, a pipeline that conducts an open season for an expansion line is required to give all shippers an opportunity to establish a record of historic shipments on that expansion line, not some other pre-existing pipeline.

33. Nexen states that Belle Fourche concedes that it was improper to include in its open season TSA a provision requiring every shipper that subscribes to the TSA to agree to waive its right to benefit from any order of the Commission reducing the uncommitted rate. Nexen states that it is pleased that Belle Fourche conceded that this provision in its TSA was inappropriate. Nexen asserts, however, that it was inappropriate to remove the provision after the open season and not give the revised TSA to all prospective shippers. Nexen argues that these defects significantly affected and invalidated the open season and the offer Belle Fourche was ostensibly making to all prospective shippers.

Nexen's Amendment To Complaint

34. On August 10, 2007, Nexen filed an amendment to its July 5, 2007 complaint. Nexen asserts that section 5.04 of the TSA unfairly permits Belle Fourche to achieve a double recovery for the shipment of the same crude oil. Nexen asserts that according to section 5.04, if a shipper is unable to fulfill its shipment commitment in any month, Belle Fourche will be entitled to ship the crude oil of another shipper and charge double for the shipment. In other words, Nexen argues that Belle Fourche can charge the original shipper that could not ship crude oil as well as the shipper that actually ships the crude oil. Nexen submits that section 5.04 can also be read as prohibiting a shipper that has committed to ship crude oil from finding a substitute in the event it is not able to ship crude oil in any month.

35. Nexen also reiterates the argument from its answer that Belle Fourche may not have even correctly implemented the allocation of expansion capacity to which Nexen objected. Nexen argues that since the pipeline was oversubscribed, it was impossible for Belle Fourche to award more than 50 percent of the capacity to New Shippers and still comply with the section 8.01(a) allocation procedures which limit new shippers to no more than 10 percent in the event of oversubscription. Nexen asserts that it believes that section 8.01(a) was illegal from the very beginning. Nonetheless, Nexen asserts that Belle Fourche engaged in improper and discriminatory conduct if it ignored section 8.01(a) after telling Nexen that it would not alter the provision.

Belle Fourche's Answer to Amended Complaint

36. Belle Fourche asserts that section 5.04 of its TSA is lawful. Belle Fourche asserts that its TSA is essentially a throughput and deficiency (T&D) agreement with the expansion shippers. Belle Fourche states, as is common with most T&D agreements, pursuant to Belle Fourche's TSA, each expansion shipper commits to either ship its Daily Volume Commitment (DVC) for three years or pay the shortfall in revenue that arises because the expansion shipper did not provide the agreed-upon volume. Belle Fourche states that Article V of the TSA outlines the procedures it will follow in the event that an expansion shipper does not nominate and ship its DVC during any month. Belle Fourche states that pursuant to section 5.01 of the TSA, if an expansion shipper does not ship its DVC, it will owe Belle Fourche a deficiency payment. Belle Fourche states that the deficiency payment is equal to the difference between the DVC and the number of barrels the expansion shipper actually shipped (the Monthly Deficiency Quantity, or MDQ) multiplied by the Expansion Rate.

37. Belle Fourche states that pursuant to TSA section 5.04, if the nominations of all expansion shippers in any given month are less than the total expansion volume commitments, Belle Fourche is entitled to use the unutilized capacity for volumes nominated by other shippers. Specifically, section 5.04 states that:

Shipper agrees that in the event that nominations by Shipper and all other Expansion Shippers in any Month total less than Expansion Daily Volume Commitments, [Belle Fourche] shall be entitled to use the unutilized capacity of the [Belle Fourche] Expansion for volumes nominated by other shippers without any reduction in the Monthly Deficiency Payment payable by Shipper.

38. Belle Fourche states that the determination of whether there will be any unutilized capacity is made each month after all expansion shippers have submitted their nominations. Belle Fourche states that if the expansion shippers do not nominate the full

amount of their collective DVC for the month, Belle Fourche may sell any unutilized capacity. Belle Fourche asserts that there is no harm to expansion shippers since each will ship the number of barrels it nominated for the month.

39. Belle Fourche states that Nexen's amended complaint also asserts that section 5.04 of the TSA can "be read as prohibiting a shipper that has committed to ship crude oil from finding a substitute in the event it is not able to ship crude oil in any month." Belle Fourche contends that this claim is without merit for a number of reasons. Belle Fourche argues that there is no language in section 5.04, or elsewhere in the TSA, that restricts the source of crude oil a shipper nominates for transportation on Belle Fourche's expansion capacity. Belle Fourche submits that a shipper has the flexibility to obtain crude oil volumes from anywhere it chooses. Belle Fourche states that section 5.04 only becomes applicable after the closing of the nomination period, and even then only in the case where all expansion shippers' nominations total less than the Expansion DVC. Belle Fourche asserts that, by that time, the expansion shippers have already arranged for their crude oil volumes, and have already submitted their nominations, so that section 5.04 in no way affects what a shipper does, or where it obtains its crude oil volumes, prior to the submission of its nomination. Thus, Belle Fourche argues that Nexen's claim regarding section 5.04 has no basis in fact.

40. Belle Fourche also asserts that section 8.01(a) of its TSA is lawful. Belle Fourche's submits that application of its currently-effective tariff provisions to allocate space on the expanded capacity was proper and lawful. Belle Fourche contends that the Commission previously approved a carrier's use of its currently-effective prorationing procedures to allocate expansion capacity among nominating shippers. Belle Fourche asserts that in *Mid-America*,⁷ the Commission determined that MAPL's proposal, including the use of its existing capacity allocation methodology to allocate space on expansion capacity, was not discriminatory. Belle Fourche asserts that the fact that its existing prorationing procedures give a limited preference to historic shippers does not make Belle Fourche's use of its currently-effective prorationing procedures discriminatory or unlawful. Indeed, Belle Fourche submits the Commission stated that the implementation of a prorationing policy based on historic volumes is reasonable.⁸

41. Belle Fourche contends that the results of its application of its prorationing procedures to the open season completely undermine Nexen's claim that the allocation of the expansion capacity was discriminatory. As explained in detail in its answer, Belle Fourche states that it accommodated the entire commitment volumes of five out of the six

⁷ 116 FERC ¶ 61,040 at P 23-24.

⁸ *Platte*, 115 FERC 61,215 at P 30.

shippers who tendered valid commitment offers in response to the open season, and awarded half of the expansion capacity to New Shippers. Belle Fourche states that four of the six committing shippers are New Shippers. Thus, Belle Fourche argues that it is clear that Belle Fourche's prorationing procedures did not unjustly discriminate or provide an undue preference to any shipper, and, thus, are lawful.

42. Belle Fourche asserts that Nexen ignored the results of the open season in its answer and inexplicably continued to maintain that Belle Fourche's affiliate, Eighty-Eight, would receive "the lion's share" of the expansion capacity. Belle Fourche states that in its amended complaint, Nexen finally appears to have understood that Eighty-Eight did not receive any undue preference in the open season. Consequently, in an attempt to explain away the results of the open season, Belle Fourche states that Nexen now suggests that Belle Fourche may not have complied with the allegedly discriminatory open season prorationing procedures because the results of the open season did not confer any undue preference on Belle Fourche's affiliate. Belle Fourche argues that the Commission should reject this baseless and illogical suggestion.

43. Belle Fourche states that pursuant to the terms of the TSA, it used the prorationing procedures in Item No. 48 of Supplement No. 6 to Belle Fourche's FERC No. 83 to allocate the expansion capacity among the shippers that submitted offers to commit to the expansion capacity. Belle Fourche states that Item No. 48(2) states that during periods of prorationing, it would cap New Shippers' nominations initially at ten percent of the capacity. Belle Fourche states that Nexen, however, ignores the language in Item 48(1) that addresses the potential for additional allocations in the event an Existing Shipper is allocated capacity in excess of its nomination.

44. Belle Fourche states that Item No. 48(1) reads, in part:

In the event that the above calculation results in any Shipper being allocated more capacity than its actual nomination, the excess of the calculated allocation over the Shipper's actual nomination will be reallocated per capita among all other New Shippers and Existing Shippers whose nominations would not be fulfilled through the allocations calculated in Paragraphs (1) and (2) of this Item. The Carrier will repeat this reallocation process until all of the available capacity has been allocated.

Thus, Belle Fourche states that in a situation where an Existing Shipper's calculated allocation is greater than its nomination, Belle Fourche must reallocate the excess capacity to the unfulfilled nominations of all other Existing Shippers and New Shippers. Belle Fourche asserts that it is, therefore, possible for it to award New Shippers, in the aggregate, more than ten percent of the capacity allocation.

45. Belle Fourche states that during the open season it allocated the expansion capacity to all Existing and New Shippers pursuant to the provisions Item No. 48, as described above. Belle Fourche states that since Belle Fourche's prorationing procedures permit New Shippers to receive greater than ten percent of the capacity in the event excess capacity exists, there is no question of impropriety, as suggested by Nexen.

Discussion

46. In its complaint, Nexen asserts that the Belle Fourche's TSA violates the ICA, is discriminatory, unjust and unreasonable, and unlawfully abrogates shipper rights. Nexen's major allegation is that by applying its current prorationing procedures to the allocation of expansion capacity during the open season Belle Fourche provided an undue preference to historic shippers and limited new shippers to no more than 10 percent of the expansion capacity. The Commission agrees with Nexen and finds that the method by which Belle Fourche allocated expansion capacity was discriminatory because it provided an undue preference for historic shippers on Belle Fourche. The allocation of expansion capacity during the open season was inconsistent with the principles of common carriage because all shippers were not given an equal opportunity to obtain the expansion capacity. While it is true that all shippers were given the opportunity to make volume commitments during the open season, all shippers were not on an equal footing because in the event that commitments exceeded the amount of expansion capacity, Existing Shippers could obtain up to 90 percent of the expansion capacity and New Shippers limited to only 10 percent of the expansion capacity.

47. The Commission also finds that the *Mid-America* case does not support Belle Fourche method of allocating expansion capacity during its open season. In *Mid-America*, the Commission accepted tariffs instituting a volume incentive program because as the Commission found "[a]ll shippers, both current and new, will be equally eligible to participate in the new volume incentive program."⁹ Clearly, this is not the case here where New Shippers were essentially capped at 10 percent of the expansion capacity and could do nothing about it. Further, the fact that new shippers may have ended up with more than 10 percent of the expansion capacity does not eliminate the discriminatory nature of the allocation process and the fact that existing shippers and New Shippers did not have an equal opportunity to obtain expansion capacity.

48. The Commission also finds that Belle Fourche's proposed amendments to its prorationing rules contained in Attachment D of the TSA also violate the ICA because it would establish a retroactive historical period for the purposes of prorationing the expansion capacity once service commences, therefore creating an undue preference for those shippers classified as Existing Shippers.¹⁰ For example, while the open season was

⁹ *Mid-America*, 116 FERC ¶ 61,040 at P 23.

¹⁰ *See, e.g. Platte*, 115 FERC 61,215 at P 30-31.

just announced in June and service has not even commenced on the expansion facilities, December 2006 would be the beginning of the base period for purposes of prorationing. As the Commission recognized in *Platte*, establishing such a retroactive base period denies “all shippers, both existing and prospective, an equal, nondiscriminatory opportunity to establish a pattern of historical shipments before the historical shipment based proration policy takes effect.”¹¹

49. The Commission’s decision finding Belle Fourche’s allocation of expansion capacity during the open season and proposed prorationing policy unlawful is based on the fact that Belle Fourche required volume commitments for the expansion capacity. Under this approach, all shippers must be given an equal opportunity to obtain the expansion capacity. If, on the other hand, Belle Fourche expanded its pipeline and did not require volume commitments, it could simply sell the capacity as it does all other existing capacity on the pipeline and on any day where demand is greater than available capacity Belle Fourche would apply the existing prorationing policy.

50. The Commission requires Belle Fourche to redo its open season for expansion capacity so that all shippers are given an opportunity to make volume commitments regardless of whether they are Existing or New shippers under Belle Fourche’s currently effective prorationing policy. If there are more volume commitments than expansion capacity, each shipper should receive a pro rata share of the capacity. In addition, if Belle Fourche intends to institute new prorationing rules for the expansion capacity, the base period for calculating prorationing cannot start before shipments commence on the expansion facilities.

51. Section 8.02 of the TSA is titled “Duty to Support” and essentially requires shippers signing the TSA to support the expansion of Belle Fourche and not to take any action that may delay review or approval of the expansion. Nexen argues that section 8.02 of the TSA appears designed to prohibit any shipper from contesting before the Commission either the rate that Belle Fourche is proposing to charge or terms or conditions that are discriminatory. Belle Fourche asserts that the Commission cannot interpret this provision to require shippers to agree that they will never seek assistance from the Commission in protecting their rights where appropriate.

52. The Commission finds that while Belle Fourche asserts that section 8.02 is not designed to limit a shipper’s rights at the Commission, the duty to support provision can be interpreted in a broad manner so as to limit a shipper’s rights before the Commission. section 8.02’s duty to support is written in such a way as to encompass authorizations or approvals before the Commission as well as any other governmental authority. It makes sense for shippers signing the TSA to support Belle Fourche in its attempt to receive authorization for the actual construction of the expansion facilities. By signing up for

¹¹115 FERC ¶ 61,215 at P 30.

service, a shipper obviously would like Belle Fourche to build the facilities. On the other hand, it is reasonable for a shipper to support the actual construction of the expansion pipeline and want to obtain expansion capacity and also have legitimate issues concerning the rates and terms and conditions of service that need to be addressed by the Commission. Accordingly, the Commission finds that section 8.02 is too broad because it could be interpreted to affect a shipper's ability to seek redress at the Commission. If Belle Fourche wishes to continue to have a duty to support provision in its TSA, the provision must be written to permit shippers to exercise their rights at the Commission.

53. Nexen also disputes Article XIX of the TSA which requires binding arbitration according to Wyoming law with respect to any disputes concerning the TSA. Belle Fourche asserts that Article XIX is not designed to limit a shipper's rights at the Commission. The Commission recognizes that there are certain provisions of the TSA that may be matters of state contract law and that parties can voluntarily agree to resolve such disputes through binding arbitration. However, the Commission finds that the arbitration provision is too broad because many of the terms of the TSA concern rates, and terms and conditions of service that are within the Commission's jurisdiction and there appears to be no limitation as the issues to be subject to binding arbitration pursuant to Wyoming law. To allow such provision to stand would be inconsistent with the Commission's policy that we not permit alternative dispute resolution where the matter may significantly affect persons or organizations that are not parties to the proceeding.¹²

54. In its amendment to the complaint, Nexen argues that section 5.04 of the TSA allows Belle Fourche to double charge for the same shipment of crude oil. The Commission denies this aspect of Nexen's complaint. The Commission finds that section 5.04 is simply a throughput-and-deficiency agreement, a standard industry mechanism that allows shippers to provide financial support for a new pipeline investment.¹³ Under such agreements the shipper, making the commitment in exchange for a reciprocal undertaking by the pipeline, pays the rate called for in the pipeline's published tariff for every barrel the shipper moves. If the shipper fails to live up to its end of the agreement, as a matter of contract, the shipper becomes liable to pay a deficiency charge.

55. The Commission finds that Nexen's complaint that section 4.01 of the TSA appears to prevent shippers from benefiting from a reduction in the base rates is moot because, as discussed above, Belle Fourche removed the provision from its TSA. Nexen has also made several general allegations that the open season may not even have been administered in accordance with what it considered the unlawful provisions of the TSA.

¹² See, *Golden Spread Electric Cooperative, Inc. v. Southwest Public Service Company*, 119 FERC ¶ 61,262 (2007).

¹³ See, *Enbridge Energy Company, Inc.*, 110 FERC ¶ 61,211 at P 10 (2005).

The Commission finds that since it is requiring Belle Fourche to redo the open season and modify the TSA in accordance with the discussion above, any concerns about whether the open season was administered improperly are moot.

56. In conclusion, the Commission finds that Belle Fourche's June 2007 open season and the certain provisions of the TSA discussed above are invalid. If Belle Fourche wishes to obtain voluntary commitments for its expansion capacity by having shippers sign a TSA during an open season process, it must conform to the requirements established by this order.

The Commission orders:

Nexen's complaint is granted in part and denied in part as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.