

132 FERC ¶ 61,175  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects     Docket No. RM05-1-003

ORDER DENYING CLARIFICATION AND REHEARING

(Issued August 26, 2010)

1.     On April 19, 2010, the State of Alaska filed a request for clarification, or in the alternative, rehearing of Order No. 2005-B.<sup>1</sup> In its request, Alaska requests the Commission to clarify, or alternatively to provide on rehearing, that the Standards of Conduct that the Commission has incorporated into the Commission's Open Season regulations<sup>2</sup> will continue to apply after the end of the initial bidding period of an open season and through the pipeline's commencement of transportation service under the jurisdiction of the Natural Gas Act (NGA). For reasons discussed below, we are denying the State of Alaska's request.

**Background**

2.     In 2005, the Commission issued Order No. 2005,<sup>3</sup> establishing requirements governing the conduct of open seasons for proposals to construct Alaska natural gas

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<sup>1</sup> *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, Order No. 2005-B, 75 Fed. Reg. 15,356 (March 29, 2010), FERC Stats. & Regs. ¶ 31,304 (2010).

<sup>2</sup> 18 C.F.R. §§ 157.30-157.39 (2010).

<sup>3</sup> *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, Order No. 2005, FERC Stats. & Regs. ¶ 31,174 (2005), *order on reh'g*, Order No. 2005-A, FERC Stats. & Regs. ¶ 31,187 (2005).

transportation projects. Among other things, in order to further the Commission's goal of a non-discriminatory open season, Order No. 2005 applied certain of the Standards of Conduct requirements of Order No. 2004, several of which incorporated Order No. 2004's "energy affiliate" concept.

3. In 2008, in response to the U.S. Court of Appeals for the D.C. Circuit decision in *National Fuel Gas Corporation v. FERC*,<sup>4</sup> the Commission issued Order No. 717.<sup>5</sup> Order No. 717 eliminated the concept of "energy affiliates" in connection with the application of the Commission's Standards of Conduct established in Order No. 2004. Additionally, Order No. 717 eliminated the corporate functional approach taken in Order No. 2004's Standards of Conduct in favor of an employee functional approach and revised the Commission's Standards of Conduct accordingly.

4. On March 18, 2010, the Commission issued Order No. 2005-B, for the purpose of clarifying and reconciling the Commission's Open Season regulations in response to the changes to the Standards of Conduct resulting from Order No. 717. Specifically, Order No. 2005-B amended sections 157.34 and 157.35 of the Open Season regulations<sup>6</sup> to eliminate references to the Order No. 2004-based "energy affiliates" concept. Additionally, Order No. 2005-B reconciled references in section 157.35(d) to the specific Standards of Conduct with which a project sponsor conducting an open season for an Alaska natural gas transportation project must comply, as they have been revised and now appear in the Commission's open season regulations as a result of Order No. 717.

### **The State of Alaska's Request**

5. Alaska contends that in order to fulfill its responsibility under the Alaska Natural Gas Pipeline Act (ANGPA)<sup>7</sup> to promote competition and ensure a non-discriminatory allocation of capacity on Alaska natural gas transportation projects, the Commission must provide that the Standards of Conduct that Order No. 2005-B incorporated into the Commission's Open Season regulations continue to apply after the end of the initial

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<sup>4</sup> 468 F.3d 831 (D.C. Cir. 2006).

<sup>5</sup> *Standards of Conduct for Transmission Providers*, Order No. 717, 73 FR 63796 (Oct. 27, 2008); FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g and clarification*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 (2009), *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009).

<sup>6</sup> 18 C.F.R. §§ 157.34 and 157.35 (2010).

<sup>7</sup> 15 U.S.C. §§720 (2006), *et seq.*

bidding period of an open season and through the time that the pipeline commences transportation service under the jurisdiction of the NGA.

6. Alaska states that in Order No. 2005-B, the Commission refers alternatively to “open season” and the “open season process.”<sup>8</sup> On this basis, Alaska distinguishes between the 90-day “open season” during which prospective shippers must submit their bids, and the “open season process” which, according to the state, includes the period after the initial 90-day open season when the project sponsors will be negotiating precedent agreements with potential shippers, including negotiated rates and conditions of service.<sup>9</sup> Alaska asserts that the actual transportation service agreements will not be executed until a considerable time thereafter, and that ongoing negotiations between the pipeline and potential shippers regarding the process of allocating capacity, negotiating precedent agreements, negotiating transportation service agreements, and discussing and filing tariff terms and conditions of service will occur from the initial bidding process through the time at which an Alaska natural gas pipeline goes into service. Thus, Alaska contends that the Standards of Conduct must apply throughout this time period, in order to ensure no undue preference is provided to affiliated shippers concerning allocations of capacity, rates or other terms and conditions of service.

7. Alaska asserts that the Commission has variously indicated, in both Order No. 2005 and in the open season regulations, its intent that the Standards of Conduct extend beyond the 90-day “open season” period. The state cites to the requirement that project sponsors must consider bids tendered after the expiration of the open season, as well as the provision in the open season regulations that the Commission may require

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<sup>8</sup> Specifically, Alaska cites to Order No. 2005-B, FERC Stats. & Regs. ¶ 31,304 at P 8, wherein the Commission states that its “goal in promulgating §§ 157.34 and 157.35 of its regulations was to prevent unduly discriminatory behavior and limit the ability of a project applicant for an Alaska natural gas transportation project to unduly favor its affiliates in the open season process.”

<sup>9</sup> In the case of the open season plan recently approved by the Commission in *TransCanada Alaska Company LLC*, 130 FERC ¶ 61,263 (2010), for example, the 90-day “open season” ends on July 30, 2010. The project sponsor will then notify each bidder whether it has submitted a conforming bid within 5 days, and notify potential shippers whether it intends to go forward with a project by September 1, 2010. Conforming bidders are to be notified of the total aggregated capacity for conforming bids for the selected route by October 31, 2010. In the time period between September 1, 2010 and November 30, 2010, the sponsor and shippers will negotiate the terms of their precedent agreements, and bidder must execute final versions of their respective precedent agreements by December 31, 2010.

design changes when considering a proposed voluntary expansion of an Alaska natural gas transportation project as indications that the Commission intended its regulations apply to post-open season activities. In particular, Alaska states that section 157.35(a) of the Open Season regulations, providing that “[a]ll binding open seasons shall be conducted without undue discrimination or preference in the rates, terms or conditions of service and all capacity allocated as a result of any open season shall be awarded without undue discrimination or preference of any kind,” reflects an intent that the Standards of Conduct must apply during the entire open season and capacity allocation process.

### **Answers to the Request**

8. Both TransCanada Alaska Company, LLC and Alaska Pipeline Project (together referred to as APP), and Denali –The Alaska Pipeline LLC (Denali) filed motions for leave to answer and answers to Alaska’s filing. As the parties recognize, Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure<sup>10</sup> prohibits answers to request for rehearing unless otherwise permitted by the decisional authority. The Commission grants APP’s and Denali’s motions for leave to file answers to the State of Alaska’s rehearing request since the answers provide a better understanding of the issues and have assisted us in the decision-making process.<sup>11</sup>

9. First, both APP and Denali contend that Alaska’s request is both untimely and unrelated to Order No. 2005-B because the issue of the time period during which the Standards of Conduct were to apply was not changed by Order No. 2005-B. APP and Denali maintain that if the issue existed at all, it existed when Order No. 2005 was issued five years ago and Alaska failed to raise it at that time.

10. Second, APP argues that ANGPA section 103(e)(1) directs the Commission to “issue regulations governing the conduct of open seasons for Alaska natural gas transportation projects (including procedures for the allocation of capacity).” APP asserts that the Commission was not authorized by ANGPA to extend the open season regulations beyond the open season to regulate conduct up to the pipeline’s in-service date.<sup>12</sup>

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<sup>10</sup> 18 C.F.R. § 213(a)(2) (2010).

<sup>11</sup> See, e.g., *PSM Interconnection, LLC*, 126 FERC ¶ 61,030, at P 15 (2009); *BP West Coast Prods., LLC*, 121 FERC ¶ 61,239, at P 34 (2007).

<sup>12</sup> While we need not address this matter in detail, given our denial of Alaska’s request for rehearing, we note that ANGPA simply required us to establish Alaska open season regulations, but in no way prohibited us from exercising our plenary NGA

(continued...)

11. Third, APP claims that there is no real distinction between the “open season” and the “open season process,” and, therefore, Alaska’s requested clarification is unnecessary. APP states whether that period is called the “open season” or the “open season process” makes no difference because the allocation of capacity is not final until precedent agreements are executed and submitted to the Commission and the Standards of Conduct are obviously intended to apply until that point. APP states that the purpose of the Open Season regulations has been fulfilled once capacity has been allocated. Denali, on the other hand, claims that Commission’s Open Season regulations are focused on the discrete period during which an Alaska natural gas transportation project will conduct an open season. In this regard, Denali refers to the Commission’s discussion in Order No. 2005 and 2005-A regarding the various parties’ positions on the duration of the open season and the initial establishment of a 210-day open season process,<sup>13</sup> and the subsequent reduction of that process to 180 days.<sup>14</sup> However, states Denali, if the Commission agrees with APP’s view, then the Standards of Conduct should apply only up to the deadline established for the execution of precedent agreements, which under Denali’s plan, would be March 3, 2011.

12. Finally, Denali states that Alaska’s claimed need for assurance that no undue preference is provided to affiliated shippers concerning allocations of capacity, rates or other terms and conditions of service is provided by the Commission’s existing statutory and regulatory authority when it addresses the application for a certificate under section 7 of the NGA for authorization to construct and operate an Alaska natural gas transportation project. Specifically, Denali asserts that under NGA section 7, the Commission has the authority to impose reasonable conditions on a certificate, and that through this conditioning authority, the Commission may direct entities that are not “natural gas companies” under the NGA to modify proposed tariff provisions, eliminate sections of service agreements, and remove provisions from contracts between a pipeline and a shipper or make those provisions available on a non-discriminatory basis to other shippers.<sup>15</sup>

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authority to impose whatever conditions we deemed appropriate regarding Alaska projects.

<sup>13</sup> Order No. 2005, FERC Stats. & Regs. ¶ 31,174 at PP 49-51.

<sup>14</sup> Order No. 2005-A, FERC Stats. & Regs. ¶ 31,187 at PP 70, 72.

<sup>15</sup> As examples of cases in which the Commission has used this authority, Denali cites *Bison Pipeline LLC*, 131 FERC ¶ 61,013, at PP 32-52, 60-63 (2010) and *Fayetteville Express Pipeline LLC*, 129 FERC ¶ 61,235, at PP 32-47 (2009).

### **Commission's Response**

13. The Commission imposed certain specified Standards of Conduct upon any sponsor of a prospective project conducting open seasons when it issued Order No. 2005 in February 2005. No parties sought rehearing of that aspect of the Open Season regulations. One party, the North Slope Producers,<sup>16</sup> sought clarification of the requirement in section 157.35(c) of the Open Season regulations that the project applicant “create or designate a unit or division to conduct the open season that must function independent of the other divisions of the project applicant as well as the applicant’s Marketing and Energy affiliates.” The Commission, in Order No. 2005-A, clarified that requirement to make clear that a functionally independent project sponsor created for the purpose of conducting the open season would not need to create yet another entity to be in compliance with this requirement.<sup>17</sup> No party suggested that the Commission revise the regulations to state that the Standards of Conduct provisions should apply for an extended period.

14. Alaska’s assertion that the Commission should clarify that the Standards of Conduct apply after the initial bidding period and up to and through the pipeline’s commencement of transportation service is being raised for the first time in response to the issuance of Order No. 2005-B. However, Order No. 2005-B in no way altered or affected the affected period during which the Standards of Conduct imposed under section 157.35(d) was to apply. As described above, Order No. 2005-B merely amended sections 157.34 and 157.35 of the Commission’s Open Season regulations<sup>18</sup> to eliminate references to “energy affiliates” and to reconcile references in section 157.35(d) of the Open Season regulations to the specific Standards of Conduct with which a project sponsor conducting an open season for an Alaska natural gas transportation project must comply, as they were revised and now appear in the Commission’s regulations as a result of Order No. 717. For these reasons, the Commission denies rehearing since the issues raised by Alaska are an untimely collateral attack on Order No. 2005 on an issue that was not raised in Order No. 2005-B, and therefore are beyond the proper scope of rehearing.

15. Alaska’ alternative request for clarification is premised on the notion that the Open Season regulations reflect an intent that the Standards of Conduct must apply not only during the entire open season and capacity allocation process, but also all the way up to

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<sup>16</sup> The North Slope Producers is comprised of BP Exploration (Alaska), Inc., ConocoPhillips Company, and ExxonMobil Corporation.

<sup>17</sup> See Order No. 2005-A, FERC Stats. & Regs. ¶ 31,187 at PP 107, 108.

<sup>18</sup> 18 C.F.R. §§ 157.34 and 157.35.

time that the pipeline goes into service. The Commission made clear in Order No. 2005 that the Open Season regulations represented an effort to balance a project sponsor's need for flexibility to design and finance a viable project with the "equally compelling needs to ensure fair competition in the transportation and sale of natural gas, promote the development of natural gas resources in addition to those in the North Slope, and consider Alaskan in-state requirements."<sup>19</sup> To provide project sponsor flexibility, the Commission chose not to impose prescriptive rules that included such details as when opens seasons were to occur and precise criteria to be used in evaluating bids and allocating capacity.<sup>20</sup> Instead, the Commission concluded that a level playing field was needed to ensure fair competition and promote development of all Alaskan gas resources. The Commission chose to accomplish this by imposing strict requirements on all project proposals, and on affiliate-owned projects in particular, with respect to the public disclosure of detailed information as to project design, how capacity is to be allocated, and the proposed rates, terms and conditions.<sup>21</sup>

16. To this end, the Commission imposed the functional separation, information access, and disclosure provisions of the Standards of Conduct during an open season for an Alaska natural gas transportation project for the purpose of ensuring that the open season is conducted in a manner that provides equal access to all participants, particularly those not affiliated with the project applicants.<sup>22</sup> In short, the Commission strove for providing "an open season process that will provide reasonable flexibility to pipeline sponsors, while ensuring sufficient exchange of information and regulatory oversight to ensure that the goal of fair, open competition in the transportation and sale of natural gas is met."<sup>23</sup>

17. Additionally, the Commission sought in Order No. 2005 to broadly prohibit discrimination by a project applicant conducting an open season and limit its ability to unduly favor an affiliate by imposing some of the non-discrimination requirements of Order No. 2004 on project applicants. Specifically, under section 157.35(d), the non-

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<sup>19</sup> Order No. 2005, FERC Stats. & Regs. ¶ 31,174 at P 11.

<sup>20</sup> *Id.* Throughout Order No. 2005, the Commission made clear that it was not taking a prescriptive regulatory approach in developing the Open Season regulations, *see, e.g.*, Order No. 2005, FERC Stats. & Regs. ¶ 31,174 at P 46, 47, 50, 51.

<sup>21</sup> *See* Order No. 2005, FERC Stats. & Regs. ¶ 31,174 at P 12.

<sup>22</sup> *See* Order No. 2005, FERC Stats. & Regs. ¶ 31,174 at PP 74, 81.

<sup>23</sup> *Id.* P 17.

discrimination provisions of the Standards of Conduct contained in sections 358.5(c)(3) and (5) were made to apply to project applicants.<sup>24</sup> The Commission felt that these provisions would ensure that a project applicant will not provide any preferences to affiliated participants in the context of an open season. These prohibitions remain intact under new sections 358.4(c) and (d), as promulgated in Order No. 717, and are incorporated into the Open Season regulations pursuant to Order No. 2005-B.<sup>25</sup>

18. The non-discrimination requirements of the Standards of Conduct imposed on project applicants pertain to the processing of requests for transportation service and the prohibition against any preference to affiliates in matters relating to the sale or purchase of transmission service. These requirements apply to activities which in the context of an open season occur during the negotiations between prospective bidders and the project sponsor regarding the terms of any precedent agreements. In the Commission orders approving the Open Season plans of APP and Denali,<sup>26</sup> the Commission recognized that these negotiations, which may occur beyond the 90-day open season during which prospective shippers must submit conforming bids, are a key element of the open season process.<sup>27</sup> According to APP's and Denali's open season plans, bidders must execute final versions of their precedent agreements by December 31, 2010, and March 3, 2011. Once the terms of a final precedent agreement have been reached, the goal sought to be achieved through the Open Season regulations will have been met and there is no basis

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<sup>24</sup> Section 358.5(c)(3) required a Transmission Provider to process all similar requests for transmission in the same manner and within the same period of time; and section 358.5(c)(5) prohibited transmission providers from giving their Marketing or Energy Affiliates any preference over any other wholesale customer in matters relating to the sale or purchase of transmission service.

<sup>25</sup> Moreover, separate from the non-discrimination provisions of the Standards of Conduct incorporated into the Open Reason regulations by virtue of section 157.35(d), section 135.35(a) also provides that “[a]ll open seasons shall be conducted without undue discrimination or preference in the rates, terms or conditions of service and all capacity allocated as a result of any open season shall be awarded without undue discrimination or preference of any kind.”

<sup>26</sup> See *TransCanada Alaska Energy LLC (TransCanada)*, 130 FERC ¶ 61,263 (2010) and *Denali – The Alaska Pipeline LLC (Denali)*, 131 FERC ¶ 61,226 (2010).

<sup>27</sup> *TransCanada*, 130 FERC ¶ 61,263 at P 39; *Denali* 131 FERC ¶ 61,226 at P 31.

for requiring that a project applicant must comply with the specific Standards of Conduct beyond that time.<sup>28</sup>

19. The Open Season regulations provide transparency to ensure that negotiations during the open season will be conducted without undue discrimination or prejudice. The Commission has ample oversight and enforcement authority to resolve disputes over the conduct of the open season through a variety of its resources and procedures, including the Enforcement Hotline, Dispute Resolution Service, as well as the Commission's Fast Track Complaint processing procedures.<sup>29</sup> The Commission made clear in its orders approving APP's and Denali's open season plans that parties are not foreclosed from raising rate and tariff issues at a later stage and that the Commission would address these issues in the future. The Commission has sufficient authority under the NGA to direct any applicant for a section 7(c) certificate authorizing the construction and operation of an Alaska natural gas transportation project to modify proposed tariff provisions, eliminate sections of service agreements, and remove provisions from contracts between a pipeline and a shipper or make those provisions available on a non-discriminatory basis to other shippers. We were not convinced when we issued Order No. 2005, and we are not convinced now, that restrictions beyond those we have imposed are necessary to ensure fair and open competition during open seasons for Alaska natural gas pipeline projects. Therefore, we reject Alaska's request for clarification and note that as discussed above, the Standards of Conduct apply from the beginning of the open season until precedent agreements are executed.

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<sup>28</sup> The Commission is not persuaded that the provision allowing late bids suggests a different result. Not only does section 157.34(d)(2) of the Open Season regulations provide the bases on which a prospective applicant can reject late bids by qualifying bidders, it also allows the applicant to seek Commission approval to reject any further bids.

<sup>29</sup> The Commission's *Interpretive Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, PL08-2-000, 123 FERC ¶ 61,157 (2008), provides informative discussion of any of these processes.

The Commission orders:

The State of Alaska's request for clarification, or in the alternative rehearing, of Order No. 2005-B is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.