

130 FERC ¶ 61,263
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

TransCanada Alaska Company LLC

Docket No. PF09-11-001

ORDER APPROVING PLAN FOR CONDUCTING AN OPEN SEASON

(Issued March 31, 2010)

1. On January 29, 2010, TransCanada Alaska Company LLC (TC Alaska) filed, pursuant to section 157.38 of the Commission's regulations, a request for Commission approval of its detailed plan for conducting an open season for the purpose of making binding commitments for the acquisition of initial capacity on TC Alaska's Alaska Pipeline Project. As discussed below, we approve the open season plan, with certain modifications.

I. Background

2. In 2005, the Commission issued regulations in Order Nos. 2005 and 2005-A¹ (Open Season regulations) to establish requirements governing the conduct of open seasons for proposals to construct Alaska natural gas transportation projects.² These

¹ *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), Order No. 2005-B, 130 FERC ¶ 61,196 (2010).

² An "Alaska natural gas transportation project" is defined in section 157.31(a) of the Open Season regulations to be "any natural gas pipeline system that carries Alaska natural gas to the international border between Alaska and Canada (including related facilities subject to the jurisdiction of the Commission) that is authorized under the

(continued...)

regulations fulfilled the Commission's responsibilities under section 103(e) of the Alaska Natural Gas Pipeline Act (ANGPA).³ Specifically, section 103(e)(1) of ANGPA directed the Commission, within 120 days from enactment of ANGPA, to promulgate regulations governing the conduct of open seasons for Alaska natural gas transportation projects, including procedures for allocation of capacity. As required by ANGPA section 103(e)(2), the Open Season regulations promulgated by the Commission (1) include the criteria for and timing of any open season, (2) promote competition in the exploration, development, and production of Alaska natural gas, and (3) for any open seasons for capacity exceeding the initial capacity, provide for the opportunity for the transportation of natural gas other than from the Prudhoe Bay and Point Thomson units.

3. Section 157.38 of the Open Season regulations requires that "[n]o later than 90 days prior to providing its notice of open season, a prospective applicant for an Alaska natural gas transportation project must file for Commission approval a detailed plan for conducting an open season in conformance with [the Open Season regulations]."⁴ TC Alaska's January 29, 2010 request for approval of its open season plan is the first request that has been filed with the Commission under section 157.38 of the Open Season regulations.

4. The Alaska Pipeline Project is a joint undertaking advanced on behalf of TC Alaska⁵ by TransCanada Alaska Development Inc. and its affiliate in Canada (together, TransCanada) and ExxonMobil Alaska Midstream Gas Investments, LLC and its Canadian affiliate (together, ExxonMobil).

II. TC Alaska's Open Season Plan

5. TC Alaska's contemplated project will consist of (1) a jurisdictional gas treatment plant near Prudhoe Bay, Alaska, to treat North Slope gas for pipeline transportation, and (2) a jurisdictional natural gas pipeline from the outlet of the Point Thomson producers' field treatment plant to the jurisdictional gas treatment plant and, from there, to either the Alaska/Canada border, where it will interconnect with a new pipeline in Canada that the project sponsors plan to construct (Alaska-Canadian Pipeline), or an interconnection

Alaska Natural Gas Transportation Act of 1976 or section 103 of the Alaska Natural Gas Pipeline Act.

³ Public Law 108-324, October 13, 2004, 118 Stat. 1220.

⁴ 18 C.F.R. § 157.38.

⁵ TC Alaska, and its Canadian affiliate are holders of the license issued by the State of Alaska on December 5, 2008, pursuant to the Alaska Gasline Inducement Act.

point with liquefied natural gas (LNG) export terminal facilities (to be built by third parties) near Valdez, Alaska (Valdez Pipeline).

6. TC Alaska states that the Alaska Pipeline Project and the related open season are being jointly advanced on behalf of TC Alaska by TransCanada and ExxonMobil, pursuant to the terms of a series of agreements among the parties executed on June 10, 2009.

7. Included in TC Alaska's filing is a proposed open season notice which is intended to provide potential shippers with information about the open season. The notice includes various attachments which are required by the Commission's Open Season regulations,⁶ including a study of Alaska in-state natural gas needs and the project and project sponsor information specified in sections 157.34(c)(1) - (21). In response to comments on its open season plan, the project sponsors in their reply comments filed a revised notice.

8. Also attached to the open season notice is a form of precedent agreement, which directs potential shippers to provide information which will indicate the nature of the services they seek and any conditions which would require further negotiations.

9. The project sponsors contemplate that each open season bid will be for service on one of the two potential pipeline routes described above. The Alaska-Canada Pipeline would provide approximately 4.5 billion cubic feet (Bcf) per day of transportation service to North American markets through the Alberta Hub. The Valdez Pipeline would be able to transport 3.0 Bcf per day of gas to an LNG export terminal for delivery to either North American or world markets.

10. Both pipeline projects will include an appropriately-sized natural gas treatment plant, to be built on Alaska's North Slope, wherein the project sponsors intend to provide a FERC-jurisdictional gas treatment service to remove carbon dioxide and other impurities that could be converted into acids that would damage the pipeline. However, potential shippers will not be required to take service at the gas treatment plant: they will have the option to bypass this gas treatment plant if their gas is otherwise treated to meet pipeline specifications or does not contain carbon dioxide and other impurities.

11. The project sponsors describe the current design for each of these pipeline project routes and have developed cost estimate ranges for each project. Various illustrative rate scenarios are presented for services from Point Thomson to Prudhoe Bay (Zone 1), at the gas treatment plant (Zone 2), and on either of the mainlines to Canada or Valdez (Zone 3).

⁶ See 18 C.F.R. § 157.34

12. Based on the in-state natural gas needs study,⁷ the project sponsors have included a design for in-state delivery points and volumes with separately-stated rates based upon a weighted average volume-mile cost allocation and rate design methodology for each route. The initial in-state market is projected to be about 350,000 cubic feet (Mcf) per day (0.35 Bcf per day) and the project sponsors have designed both of the routes to provide for this estimated market, although the specific delivery points on the two routes differ.

13. The project sponsors state that once the Commission approves the open season plan, they intend to issue the open season notice no later than April 30, 2010. They state that the open season will run for the minimum of 90 days required by the Commission's regulations and, thus, is expected to close on July 30, 2010. The project sponsors will notify the public of the issuance of the open season notice through press releases, direct mail solicitations, and other advertising sufficient to ensure that all parties interested in the open season will be put on notice of its terms. The notice will be accessible on the project's web site, www.thealaskapipelineproject.com, and copies will be made available to any interested party. In addition, the project sponsors state that actual notice of the open season will be provided to the Commission, the State of Alaska and to the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects, as required by the Commission's Open Season regulations.

14. The Commission's Open Season regulations require that the notice of open season contain all information that a prospective applicant has in its possession pertaining to the service to be offered, projected pipeline capacity and design, proposed tariff provisions, and cost projections, or that the prospective applicant has made available to, or obtained from, any potential shipper, including affiliates of the project sponsor, prior to the issuance of the public notice of open season. However, recognizing that the scope of this information will be extensive, the Commission stated it would not require that the published notice contain copies of all the documents that would be covered by the requirement. Rather, it is sufficient that the notice identify a "public reading room" where such information is available.⁸ The project sponsors propose four reading room locations,⁹ provisions regarding the availability of electric and hard copy information, requirements for treatment of confidential information based on three levels of confidentiality, and appointment and data room review procedures.

⁷ The in-state natural gas needs study has been endorsed by the appropriate governmental officials of the State of Alaska, as required by the Commission open season regulations.

⁸ Order No. 2005-A at P 106.

⁹ The rooms will be located in Houston, Texas; Anchorage, Alaska; Whitehorse, Yukon and Calgary, Alberta.

15. The project sponsors state that, during the open season, any party interested in contracting for firm transportation service on either the Alaska-Canada Pipeline or the Valdez Pipeline alternative must execute and return the form of precedent agreement attached to the open season notice. To be considered a bona fide bid, the precedent agreement must be signed by an authorized representative of the bidding company or entity. Each potential shipper must meet and continue to meet the creditworthy requirements appended to the precedent agreement. In the precedent agreement, the potential shipper must state the maximum daily quantity that it wants to transport on the pipeline and, if desired, the maximum treatment quantity that it might want to process at the gas treatment plant. The potential shipper must also name the primary receipt and delivery points it seeks to use and whether it intends to pay recourse rates or seek negotiated rates. The potential shipper can also request a primary term for such services (20-25, 30, or 35 years for negotiated rates and 25 years for recourse rates).

16. A potential shipper may include as an attachment to the precedent agreement other conditions that it seeks. The project sponsors reserve the right to reject, on a not unduly discriminatory basis, an otherwise conforming bid that includes conditions or modifications to the precedent agreement that they find unacceptable. At that time, the project sponsors will notify any bidder whose bid is rejected and provide a written explanation for the rejection. The project sponsors state that shippers that make commitments to use capacity of at least 200,000 British thermal units (MMBtu) per day (about 200,000 Mcf per day) will be considered foundation shippers. Foundation shippers, who will be subject to a more stringent creditworthiness standard, will be provided certain rights concerning negotiated rates, line pack costs and a one-time termination right exercisable after a Natural Gas Act (NGA) section 7 certificate has been accepted, subject to a reimbursement of project development costs.

17. Within five business days after the close of the open season, the project sponsors will notify each bidder whether it has submitted a conforming bid and will provide a written explanation to those bidders whose bids have been rejected as non-conforming.

18. Potential shippers will be notified by September 1, 2010, whether the project sponsors intend to proceed to design, permit and construct either of the alternative projects. There will be no continuing obligations with respect to a alternative route not selected by the project sponsors. In the event that the chosen alternative is oversubscribed and the project cannot be reasonably and economically re-designed to accommodate all bids, the project sponsors reserve the right to reduce bidders' requested quantities pro rata, based solely on each bidder's proportion of the total quantity of firm transportation capacity and firm treatment capacity, without regard to whether a shipper would qualify as a foundation shipper, has selected recourse rates or negotiated rates, or has specified in-state or export deliveries.

19. On or before October 31, 2010, the project sponsors will notify conforming bidders of the impact on the project of the total aggregated capacity from conforming

bids for the selected route. After the close of the open season, the project sponsors plan to seek mutual agreement with potential shippers on negotiated rates and other conditions proposed to the precedent agreements. On or before November 30, 2010, the project sponsors will provide conforming bidders with the final version of the precedent agreement and each bidder will be expected, no later than December 31, 2010, to execute a final, binding version of the agreement, if acceptable, and to secure all board approvals and internal authorizations necessary to undertake the agreed-upon obligations.

20. As required by the Open Season regulations, within 10 days after precedent agreements have been executed by both parties, the project sponsors will make public on their web site (www.thealaskapipelineproject.com) and through press releases the results of the open season, including at least the name of the prospective shipper(s), the amount of capacity awarded, and the term of the agreement(s). As also required, within 20 days after precedent agreements have been executed by both parties, the project sponsors will submit to the Commission copies of each precedent agreement and copies of any relevant correspondence with bidders who were not allocated capacity, identifying why such bids were not accepted. The project sponsors reserve the right to request confidential treatment of the precedent agreements.

21. TransCanada and ExxonMobil have also established compliance procedures and standards of conduct for the purpose of complying with the requirements of sections 157.35(c) and (d) of the Open Season regulations. The project sponsor's Compliance Procedures and Standards of Conduct are posted at www.thealaskapipelineproject.com/docs/ferc/ferc-order-2005.pdf.

III. Notice, Interventions, and Comments

22. Pursuant to section 157.38 of the regulations, on February 1, 2010, the Commission issued a notice of TC Alaska's request for pre-approval of its open season plan, which notice was published in the *Federal Register* on February 8, 2010 (75 FR 6199). The notice established February 24, 2010 as the comment due date, and March 9, 2010, as the date reply comments were due. The notice also established March 29, 2010, as the date on which the Commission would act on TC Alaska's request.

23. In response to the notice, motions to intervene and comments were filed by BG Alaska E&P, Inc. (BG Alaska), BP Exploration (Alaska) Inc. (BP Exploration), ConocoPhillips Alaska, Inc. and ConocoPhillips Company (ConocoPhillips), ExxonMobil Gas & Power Marketing Company a Division of ExxonMobil Corporation (ExxonMobil Gas & Power), and the State of Alaska. In addition, reply comments were filed by BP Exploration, ConocoPhillips, Denali-The Alaska Gas Pipeline LLC (Denali), and TC Alaska. The State of Alaska filed additional comments in answer to TC Alaska's and Denali's reply comments. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.

IV. Standard of Review

24. Noting that this is the first request for pre-approval of a plan to conduct an open season for an Alaska natural gas transportation project, TC Alaska states that the only guidance from the Commission regarding the standard of review for such a plan comes from Order No. 2005 itself. All discussion there, states TC Alaska, describes a process that is limited to examining whether the open season process is being conducted “in conformance with the open season rules,”¹⁰ rather than examining substantive issues more appropriate for NGA section 7 and section 4 proceedings.

25. TC Alaska contends, therefore, that the Commission should be reviewing the plan to determine whether it satisfies the following four requirements, namely: (1) section 157.34(b), concerning the need for an Alaska in-state gas need study; (2) section 157.34(c), which lists the 21 items of information deemed necessary for prospective bidders to determine whether to bid for capacity; (3) section 157.35(a), which requires that the open season be conducted without undue discrimination or preference; and (4) sections 157.35(c) and (d), which impose separation of function and certain standards of conduct on the prospective applicant in conducting an open season. Beyond that, TC Alaska suggests that the pre-filing review of the open season plan should be similar to the Commission’s review of tariff filings or certificate applications, in which cases the Commission rejects those filings only where they are “patently either deficient in form or a substantive nullity.”¹¹ TC Alaska asserts that its January 29, 2010 plan is in full conformance with all four regulatory requirements and should be approved.

26. ExxonMobil Gas & Power agrees, and stresses the importance of allowing the participants sufficient flexibility in the open season process to negotiate precedent agreements that are tailored to their specific commercial objectives and requirements, reserving resolution of substantive issues a subsequent section 7 certificate proceeding.

27. The State of Alaska also concurs that the Commission’s pre-approval review is not a section 7 certificate proceeding, nor a section 4 proceeding to determine just and reasonable rates or terms and conditions of service. The State of Alaska asserts that the Commission’s pre-approval of an open season plan now will not pre-judge any issues that may be presented in those later proceedings. Similarly, BG Alaska comments that the focus of the pre-approval procedures is not to closely examine the costs and indicative tariff to be presented in the open season, but to ensure that the open season plan meets the requirements of section 103(e)(2) of ANGPA, as discussed above.

¹⁰ See Order No. 2005-A, at P 64, 71.

¹¹ Citing *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971).

28. Denali, too, argues for a limited, narrow review of the open season plan that does not include reviewing claimed tariff deficiencies and related commercial issues. Additionally, Denali disputes BP Exploration's contention (discussed below) that "there will be no other time to correct the deficiencies."¹² Denali asserts that shippers are free to negotiate changes to the proposed precedent agreement, and if they cannot negotiate changes, they may submit conditional bids, or decide not to bid.

29. BP Exploration, on the other hand, contends that in order to meet the specific objectives of ANGPA and the Commission's Open Season regulations, the Commission must engage in a much more comprehensive review of TC Alaska's filing. Specifically, BP Exploration argues that the Open Season regulations' intent "to design an open season process that provides non-discriminatory access to capacity on any Alaska natural gas transportation project and, at the same time, allows sufficient economic certainty to support the construction of the pipeline and thereby provide a stimulus for the exploration, development, and production of Alaska natural gas,"¹³ cannot be met unless the Commission resolves a host of issues regarding the rates, terms, and conditions of service. BP Exploration contends that, left unresolved, these issues create economic uncertainty of such magnitude that prospective bidders will be unable or unwilling to make informed bids.

30. BP Exploration includes among the topics which must be addressed: (1) the lack of provisions for securing increased winter capacity due to variations in ambient temperature; (2) the absence of a Gas Component Tracking System to allow shippers to retain value of natural gas liquids; (3) proposed gas quality standards that do not reflect or account for shipper needs and requirements; (4) clarification that shippers will not be bound until the five-month condition precedent process has concluded, the pipeline size and rates are adjusted based on bids received, and the rates are adjusted based on designed capacity; (5) a valuation methodology for valuing non-conforming bids is provided; and (6) provisions for informing accepting bidders about status of project development.

31. BP Exploration adds to this list of items requiring the Commission's attention at this time a number of provisions of TC Alaska's indicative tariff that it claims are facially discriminatory. These matters include: (1) proposed depreciation rates that are not justified by figures regarding estimated gas reserves; (2) rates of return for recourse rate shippers that track Treasury note rates and for negotiated rate shippers that are allegedly at levels inconsistent with level of risk that TC Alaska proposes to accept; (3) an intent to assess full rate charges during start-up, when facilities will not be fully available;

¹² BP Exploration's initial comments at p. 8.

¹³ Order No. 2005-A at P 2.

(4) tariff provisions that allegedly remove TC Alaska's obligation to maintain facilities, but require reservation charge payments despite service interruption; (5) one-way indemnification provisions; (6) allegedly facially discriminatory creditworthiness provisions that are standardless and subject to TC Alaska's unrestricted discretion, discriminate within classes of similarly situated shippers, and also against Foundation shippers in connection with releases of capacity; (7) a rate design inconsistent with Commission policy regarding new pipeline construction; and (8) revenue sharing provisions that fail to return full value to shippers. The importance of resolving all these matters now, states BP Exploration, is underscored by the fact that the precedent agreement prohibits shippers from challenging pipeline size and configuration, rates, terms and conditions of service,¹⁴ so there is no other opportunity for shippers to address these deficiencies.

32. In its reply comments, ConocoPhillips states that it shares some of the concerns BP Exploration raises in its initial comments. Notably, ConocoPhillips joins BP Exploration in asserting that the Commission should require that TC Alaska's open season plan address how the additional ambient incremental capacity expected to be available during cold months can be made available to shippers.¹⁵ ConocoPhillips also suggests that enhancements to TC Alaska's authorized overrun service, such as allowing a pro rata priority to overrun service on a given day, would enhance the economic certainty prospective bidders need to tender bids in TC Alaska's open season.

33. ConocoPhillips also shares BP Exploration's assertion that TC Alaska's proposed method for sharing interruptible services revenue is inequitable, and that firm shippers should receive 100 percent credit for revenue derived from interruptible services.

Commission Response

34. It was not the Commission's intent in establishing the open season procedures to create a forum in which to pre-litigate issues that may arise during certificate and rate proceedings. Rather, the intent of the pre-open season review is to determine whether potential bidders will be treated in a non-discriminatory manner. Consequently, we agree with those parties who urge a relatively limited review of TC Alaska's filing.

35. Section 157.38 of the Open Season regulations does not expressly delineate the standard of review that the Commission will employ in its pre-approval process. However, when that section is read in the context of the Open Season regulations as a

¹⁴ See PA, Section III.d(3).

¹⁵ ConocoPhillips estimates that this additional capacity could range as high as 300,000 to 400,000 Mcf/d during a period of 4-5 months a year.

whole, and the purposes and goals of those regulations as expressed in Order Nos. 2005 and 2005-A, the intended scope of review is clear.

36. Section 157.38 requires the prospective applicant to “file, for Commission approval, a detailed plan for conducting an open season in conformance with [the Open Season regulations]” and that such “plan shall include the proposed notice of open season.” The requirements for the notice of an open season, including informational content requirements such as the inclusion of Alaska’s in-state gas consumption needs, and the timing for receipt of bids, notice of open season results and filing of precedent agreements and other documents, are spelled out in section 135.34. Section 157.35 of the Open Season regulations prohibits, in the conduct of an open season, any undue discrimination or preference in the rates, terms or conditions of service and allocation of capacity,¹⁶ and requires that the prospective applicant adhere to independent functioning requirements¹⁷ as well as certain specified Standards of Conduct.¹⁸ The Open Season regulations also provide that pre-subscription agreements are allowed, subject to similar offerings being made available in the open season.¹⁹

37. 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.”²⁰ 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.²¹ 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

¹⁶ See section 157.35(a), 18 C.F.R. § 157.35(a).

¹⁷ See section 157.35(c), 18 C.F.R. § 157.35(c).

¹⁸ See section 157.35(d), 18 C.F.R. § 157.35(d).

¹⁹ See section 157.33(b), 18 C.F.R. § 157.33(b). TC Alaska states that there are no such pre-subscription agreements.

²⁰ Order No. 2005 at P 11.

²¹ *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 at P 46, 47, 50, 51.

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.²² 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.”²³

38. The Commission’s reluctance to take a prescriptive approach is clearly reflected in the Open Season regulations. For instance, while the notice of open season must include detailed methodologies for determining (a) the value of bids (section 157.34(c)(14)) and (b) how capacity will be awarded in the case of oversubscriptions (section 157.34(c)(15)), prospective applicants are allowed to establish the details of those methodologies so long as they are not unduly discriminatory.²⁴ Also, despite the fact that the Commission was given broad authority to establish “such regulations as are necessary”²⁵ for the conduct of open seasons, the only instances in which rate criteria were established involve projected rates for in-state deliveries of gas and the presumption for rolled-in rate treatment for future expansions.²⁶

39. As several commenters recognize, negotiations between prospective bidders and the project sponsor regarding the terms of any precedent agreements are a key element of the open season process. Through these negotiations, prospective shippers are provided an opportunity to address their particular needs and objectives. If those commercial objectives can be reached through negotiation, the prospective bidder can submit a bid. If they cannot be met during the open season period, the prospective shipper can either submit a conditional bid, or decide not to bid at all. It is important to note in this regard, that the Open Season regulations provide ample transparency to ensure that negotiations during the open season will be conducted without undue discrimination or prejudice. Moreover, the Commission is in a position to resolve disputes in this area through a variety of its resources and procedures, including the Enforcement Hotline, Dispute

²² See Order No. 2005 at P 12.

²³ *Id.* P 17.

²⁴ *Id.* P 42 and 43; Order No. 2005-A at 6.

²⁵ ANGPA, section 103(e)(i).

²⁶ See Rule 2005-A at P 47; see also sections 157.34(c)(8) and 157.39.

Resolution Service, as well as the Commission's Fast Track Complaint processing procedures.²⁷

40. In addition, we do not agree with BP Exploration's claim that section III.d(3) of the proposed precedent agreement prohibits shippers from challenging pipeline size and configuration, rates, terms and conditions of services in a subsequent section 7 certificate proceeding or section 4 rate case. In a March 11, 2010 data request, TC Alaska was asked to explain its understanding of the impact of section III.d(3) in connection with situations where potential shippers who execute precedent agreements agree to pay recourse rates and where they agree to pay negotiated rates. As TC Alaska made clear in its March 16, 2010 data response, Article III.d(3) states that a "Shipper may challenge Transporter's recourse rates and tariff filing before the FERC so long as Shipper does not contest the provisions set forth in this [agreement] or the FTSA [firm transportation service agreement]." TC Alaska explains that "[a]ccordingly, all shippers' rights to challenge . . . recourse rates (including cost allocation and rate design) and any tariff elements are preserved, as long as any recourse rate and/or tariff challenges by shippers electing [negotiated rates] are not inconsistent with, or do not serve to reduce in any fashion, such shippers' obligations to abide by their agreements to negotiated rates and the terms and conditions of service in any nonconforming FTSA."²⁸

41. Finally, we observe that potential shippers who elect negotiated rates and/or a non-conforming FTSA are likely to be Foundation Shippers, as described in the proposed precedent agreement. As such, those shippers have a special transportation agreement termination right which can be exercised after a final Commission certificate is issued (which might contain rate making rulings that such a Foundation Shipper cannot accept).

42. In any case, BP Exploration's objections do not demonstrate discrimination and are thus not within the scope of our review here. The Commission has previously noted that a private agreement between parties that would preclude filings before us may be enforceable as a matter of contract law, but cannot preclude an entity from making any arguments it chooses before us. Thus, the cited provisions do not present a matter that we need resolve here.²⁹

²⁷ 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.

²⁸ TC Alaska's March 16 data response at 3.

43. Moreover, we are not persuaded by BP Exploration's assertion that unless the issues it raises regarding the rates, terms, and conditions of service are resolved during the pre-approval process, the resulting economic uncertainty will render prospective bidders either unable or unwilling to make informed bids. We will not prescribe in our pre-approval process what we chose not to prescribe in the Open Season regulations themselves. There is no basis to question TC Alaska's interest in resolving any issues that would preclude prospective shippers from bidding on its proposal, given the time, effort and expense involved.³⁰ TC Alaska is also mindful, no doubt, that another prospective applicant has announced its intention to soon file its request for pre-approval of an open season plan. Thus, if TC Alaska is unable or unwilling to satisfy the informational requirements of any prospective bidders, those potential bidders will be presented with another option to consider for meeting their needs.

44. Based on the foregoing, we conclude that our pre-approval of a prospective applicant's plan for conducting an open season pursuant to the Open Season regulations does not contemplate a close examination of the prospective applicant's costs and tariff. Rather, our task is to ensure that the plan conforms to the Open Season regulations' provisions regarding transparency and non-discrimination. As we explained in Order No. 2005, it is through those requirements that the Commission sought to ensure that fair, open competition in the transportation of Alaskan gas would be achieved.³¹ In the absence of a showing that specific elements of an open season plan violate those key principles, we will not examine matters best resolved at a later date.

V. Alleged Discriminatory Provisions

45. Notwithstanding our determination that it would be inappropriate at this time to undertake a full examination of TC Alaska's proposed tariff provisions in the absence of any indication that they will not be applied on a not-unduly discriminatory basis, in the interest of clarity we will take this opportunity to comment on two of the specific provisions highlighted by BP Exploration and ConocoPhillips.

³⁰ TC Alaska claims that it "has spent \$80 million to date and will spend approximately \$150 million by the close of the open season to develop the engineering designs, cost estimates, commercial terms and other information necessary to present a complete and credible commercial offering." TC Alaska's reply comments at p. 2.

³¹ As this pre-approval process involves an open season for the purpose of making binding commitments for the acquisition of initial capacity, our review does not include whether the prospective applicants have provided for the opportunity for the transportation of natural gas other than from the Prudhoe Bay and Point Thomson units.

A. Creditworthy Standards

46. BP Explorations claims that the creditworthiness tariff provisions are facially discriminatory because they involve standardless and unrestricted exercises of discretion by the project sponsor, they discriminate within classes of similarly situated shippers, or they discriminate against Foundation Shippers in connection with releases of capacity.

Commission Response

47. Clearly, creditworthiness standards can impact a prospective bidder's ability to obtain initial capacity through the open season, and can, therefore, be unduly discriminatory. While the creditworthiness provisions in Exhibit B to the precedent agreement state that the project sponsor will determine a shipper's creditworthiness in its sole discretion, the Commission does not believe this to be discriminatory since Exhibit B provides clear criteria for determining whether a shipper is creditworthy. In addition, TC Alaska has stated in its reply comments that it will provide a detailed explanation for any bid that is rejected. Although the creditworthiness provisions in Exhibit B provide different criteria depending on the shipper's relationship with the state of Alaska, this differentiation does not amount to discrimination as long as similarly situated shippers are treated the same. Finally, any tariff provisions addressing creditworthiness will not apply to the initial creditworthiness for Foundation Shippers. Therefore, these provisions should not alter a bidder's ability to participate in the open season.

B. Ambient Incremental Capacity

48. BP Exploration claims that the Commission should require TC Alaska to include a means for shippers to include in their bids the volumes of incremental firm capacity that will be available along with any firm capacity awarded in the open season. BP Exploration states that due to inherent characteristics of natural gas pipelines, actual capacity quantities available for system throughput will increase seasonally in the colder, winter months during periods of lower ambient temperature.

49. BP Exploration asserts that TC Alaska has neither provided information to enable bidders to assess the amount of seasonal capacity other than their MDQ, nor provided a way for shippers to include that seasonal capacity in their bids. BP Exploration requests that the Commission should confirm that seasonal incremental capacity is inextricably part of any firm transportation capacity to be awarded in the TC Alaska open season, and order TC Alaska to produce information about seasonal capacity and establish procedures for bidders to obtain such capacity as part of their maximum daily quantity and maximum treatment capacity. BP Exploration suggests that the Commission should require TC Alaska to allow for bids for firm capacity to include the ambient capacity available in winter months on a firm basis, requiring that the winning bid capacities will automatically increase as ambient capacity increases.

Commission Response

50. This is clearly an issue that fall outside the scope of the open season pre-approval process, as is reflected by our treatment of a similar question in *Alliance Pipeline, L.P.*³² There, the Commission considered seasonal capacity in the determination of Alliance's recourse rates and determined that the volume that a pipeline can consistently deliver on year-round basis should be used to determine available pipeline capacity and rates.³³ The Commission further determined that Alliance could not physically transport its maximum winter day capacity throughout the year because compressors operate less efficiently at higher ambient temperatures. Only operational experience can determine the volume that a pipeline can consistently deliver on year-round basis to determine available pipeline capacity.

VI. Open Season Process Issues

51. In its initial comments, ConocoPhillips states that while TC Alaska's plan raises many issues, most can be resolved through negotiations during the open season. However, ConocoPhillips identified several issues involving TC Alaska's open season process that it feels needed to be addressed by the Commission in order to "enable potential shippers to make informed and reasoned bidding decisions."³⁴

52. First, states ConocoPhillips, TC Alaska reserves the right, in its sole discretion, to make the route selection for the project, and to inform shippers of its decision when commercial circumstances dictate. Instead, ConocoPhillips asserts, the Commission should clarify when shippers will be notified of that selection and that, to eliminate any potential for undue discrimination or preference, TC Alaska should be required to notify all bidders at the same time regarding the results of the open season.

53. Second, ConocoPhillips states that TC Alaska reserves the right, on a not unduly discriminatory basis, to reject a non-conforming bid or a bid that modifies the precedent agreement's substantive terms, and that TC Alaska will submit to the Commission "any relevant correspondence with bidders who were not allocated capacity that identifies why such bids were not accepted" to the Commission. ConocoPhillips maintains that, in order to ensure transparency in TC Alaska's bid process, TC Alaska should be required to provide prospective shippers with timely, detailed explanations of any rejected bids.

³² *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149 at 61,597 (1997); *Alliance Pipeline L.P.*, 84 FERC ¶ 61,239 at 61,213 (1998).

³³ *Id.*

³⁴ ConocoPhillips' initial comments at p. 4.

54. TC Alaska states in its reply comments that it has been its intent all along to act in the manner requested by ConocoPhillips and agrees to the above requested clarifications. Those clarifications are made in the revised proposed open season notice filed with TC Alaska's reply comments.

55. Third, ConocoPhillips asserts that TC Alaska's methodology for awarding capacity in case of over-subscription requires revision. As proposed, states ConocoPhillips, TC Alaska reserves right to reduce a bidder's capacity pro rata, based on the bidder's proportion of firm capacity bid, and bidders will be required to execute amended precedent agreements reflecting their proportionately reduced capacity. ConocoPhillips claims that by forcing bidders to accept reduced capacity awards in case of oversubscription, bidders may be forced to accept capacity award that is insufficient to meet its business needs or regulatory obligations. ConocoPhillips states that the Commission should direct TC Alaska to permit shippers to decline such reduced capacity awards.

56. TC Alaska states in its reply comments that, while it believes the board approval provisions of its proposed procedures implicitly provide bidders with this option, it has no objection to making more explicit a bidder's opportunity to decline a prorated capacity award, and has revised its proposed open season notice accordingly.

VII. Timing of Access to Information

57. BP Exploration claims that TC Alaska's open season plan is deficient in both the timing and substance of the information that it is required under the Open Season regulations to be made available to prospective shippers. On the issue of timing, BP Exploration asserts that under the Open Season regulations TC Alaska was required to disclose "[a]ll information that the prospective applicant *has in its possession* pertaining to the proposed service to be offered, projected pipeline capacity and design, proposed tariff provisions, and cost projections, or that the prospective applicant *has made available to, or obtained from*, any potential shipper, including any affiliates of the project sponsor and any shippers with pre-subscribed capacity, prior to the issuance of the public notice of open season"³⁵ on January 29, 2010, when it filed its request for approval of the open season plan. Instead, states BP Exploration, TC Alaska proposes to make this information available when it opens its "data room" on April 30, 2010, the date it proposes to commence its open season. BP Exploration states that as a result, the amount of time prospective shippers have to thoroughly evaluate the adequacy of the information on which they must base their bids is substantially reduced.

³⁵ Section 157.34(c)(18), 18 C.F.R. § 157.34(c)(18).

58. In support of its position, BP Exploration states that section 157.38 requires that TC Alaska's open season plan include the proposed notice of open season and that section 157.34(c) lists the items that the notice must contain. BP Exploration then points to Order No. 2005-A, in which the Commission stated that due to the extensive amount of information required under section 157.34(c)(18), the notice could identify a "public reading room" where the information was available. It follows, states BP Exploration, that the information covered under section 157.34(c)(18) should have been available to prospective shippers in TC Alaska's data rooms if it was not found in the notice of open season attached to TC Alaska's January 29, 2010 plan. BP Exploration requests that the Commission direct TC Alaska to make the information immediately available.

59. In its reply comments, Denali disagrees with BP Exploration's claim that reading room materials are required to be made available at the time a request for approval of an open season plan is filed. Denali claims that the Commission squarely addressed this issue in Order No. 2005, where the Commission stated that "ninety days is proposed as an adequate amount of time in which to conduct a reasoned evaluation of the [section 157.34(c) materials] and to help level the playing field."³⁶ Moreover, Denali contends that, even if BP is correct, allowing a 90-day period prior to the commencement of TC Alaska's open season would "cause unnecessary and costly delays." ConocoPhillips, in its reply comments, shares the view that certain information should be made available to potential bidders before the open season commences in order for them to sufficiently assess the risks associated with a 20-year commitment on project as large as TC Alaska proposes.

60. In its reply comments, TC Alaska argues that while section 157.38 of the Open Season regulations requires its proposed open season notice be filed as part of its detailed plan, the Commission clearly stated in Order No.2005-A that the open season notice does not have to contain "copies of all the documents which would be covered under section 157.34(c)(18)."³⁷ In lieu of publishing all section 157.34(c)(18)-based documents, the applicant's notice may identify data rooms where the documents will be available for inspection.³⁸ As TC Canada reads Order No. 2005-A, for purposes of the pre-approval process, the proposed notice need only identify where and how the section 157.34(c)(18)-based documents will be available for inspection once the open season commences; it does not require that the documents themselves must be available for review when the notice is filed in the pre-approval process.

³⁶ Order No. 2005 at P 41.

³⁷ Order No. 2005-A at P 106.

³⁸ *See id.*

61. TC Alaska asserts that its proposed notice provides all the information required for the Commission to determine whether the informational requirements of section 157.34(c)(18) have been met. Specifically, the notice fully describes the data rooms, identifies the four locations where data rooms will be available, and describes the procedures governing access to the data rooms, as well as the restrictions that will be in effect to protect the confidentiality of various categories of documents.

Commission response

62. Section 103(e)(2) ANGPA expressly directed the Commission to include in the open season regulations criteria for and timing of any open season. In its NOPR, the Commission proposed a 30-day prior notice period, followed by a 90-day open season. In Order No. 2005 the Commission explained that “[t]his minimum 90-day period for prospective shippers to examine the open season materials is intended to establish some parity among the shippers . . . [and] is proposed as an adequate amount of time in which to conduct a reasoned evaluation of the open season materials and to help level the playing field.”³⁹ However, in response to the NOPR, a number of parties commented that due to the magnitude of the commitment and to offset informational advantages that certain prospective shippers might have, a much longer period of time to review and assess the open season information was needed, ranging from 210 to 120 days. In adopting the 30-day prior notice period and clarifying that this period would precede the minimum 90-day open season period (and also clarifying that the open season notice is to contain all of the required open season information),⁴⁰ the Commission stated that ⁴¹“all interested persons will have a period of a minimum of 120 days in total to examine the information pertaining to any open season in order to assess whether they are willing and able to participate in the process and proffer bids.” The Commission added that it “on balance, believes a 120-day period is adequate to substantially level the playing field, particularly given the extensive information requirements imposed in the open season regulations.”⁴²

63. In Order No. 2005-A, the Commission revisited the subject of the duration of the whole open season process, acknowledging that by adding the 90-day mandatory pre-approval period to the 120-day open season period (comprised of the 30-day prior notice period and minimum 90-day open season), the whole process would take 210 days.

³⁹ Order No. 2005 at P 41

⁴⁰ Order No. 2005, at P 49.

⁴¹ *Id.*

⁴² *Id.* P 50.

Consequently, in Order No. 2005-A, the Commission made some changes. First, section 157.38 was revised to “make clear that the plan to be filed by a prospective applicant shall include the information required in a notice of open season under Section 157.34. Second, we are eliminating the 30-day prior notice requirement in Section 157.34(a).”⁴³ As the Commission made clear in Order No. 2005-A, the 30-day prior notice was no longer necessary because prospective applicants would now have actual notice of the proposed open season notice for 90 days prior to the open season. From all this, it is clear that, as BP Exploration contends, the Open Season regulations require that all the information identified in section 157.34(c)(18) must be available to prospective shippers at the time the section 157.38 request for pre-approval is filed, whether the information be published in the notice or accessible by way of a reading/data room.

64. Based on the foregoing, the Commission will require that TC Alaska immediately open its data rooms to allow inspection of documents and information. We will not require that TC Alaska change its planned open season commencement date of April 30, 2010. Should TC Alaska promptly open the data rooms, there will be no reason to alter the proposed open season schedule. If, however, there is an undue delay in opening the rooms and any party makes a showing that it has been significantly disadvantaged as a result, we will consider requiring an appropriate delay in the commencement date of the open season or extending its closing date.⁴⁴

VIII. Sufficiency of Information

65. BP Exploration asserts that TC Alaska is withholding disclosure of much information BP Exploration claims is necessary for prospective bidders to assess the viability of the proposed project and to make an informed bid, including: (a) certain pipeline technical data, compressor station data, and gas treatment plant technical data; (b) cost information needed for prospective bidders to undertake a cost estimate review process, such as cost estimate plan, methodology and basis, cost estimate technical packages, summaries, manpower plan, investment phasing, operating costs; (c) additional information regarding the Canadian portion of the proposed pipeline; and (d) TC Alaska’s position regarding the inclusion of costs of the Dempster Lateral, a contemplated 746-mile expansion to transport Mackenzie Delta gas.

66. ConocoPhillips, in its reply comments agrees with BP Exploration that TC Alaska should be required to provide additional information respecting the TC Alaska’s costs

⁴³ Order No. 2005-A, at P 72.

⁴⁴ If the data room is opened immediately upon issuance of this order, prospective bidders will have 120 days to review the information, a period deemed adequate in Order No. 2005.

and rates, stating that, without such data, potential bidders cannot assess the risks attached to making a 20-year capacity commitment on a project of this magnitude. Moreover, ConocoPhillips claims that TC Alaska provided only limited information regarding possible designs for expanded capacity beyond the initial capacity. ConocoPhillips states that TC Alaska should be directed to include a complete analysis of a broad range of detailed expansion alternatives, together with associated costs and rate impacts. Finally, ConocoPhillips states if during the open season process any issues related to sufficiency arise, the Commission should resolve them.

67. TC Alaska states that all of the underlying engineering, cost, rate and commercial information specified by § 157.34(c)(18) will be available for review in its data rooms throughout the open season period. TC Alaska also states in its reply comments that technical, cost and rate information about the Canadian portion of the Alaska Pipeline Project will be included in the available data.

Commission response

68. As discussed above, we are requiring that TC Alaska open its data rooms forthwith. Once the data rooms are opened, “the vast majority of information within TransCanada’s control [that] has been withheld”⁴⁵ will be made available to BP Exploration and all other prospective shippers.

69. The informational requirements of any notice of open season are clear and they are extensive. In the event BP Exploration or any other prospective shipper cannot find information required in section 157.34(c)(18) that they believe necessary, then the Commission can, at that time, determine whether the Open Season regulations require disclosure of the specific information requested.

70. In addition, we believe that BP Exploration’s requests for additional information regarding the Canadian portion of the proposed pipeline and possible inclusion of costs of the Dempster Lateral have been adequately addressed in TC Alaska’s March 16, 2010 response to a March 11, 2010 Commission staff data request. There, TC Alaska states that the Canadian open season process will be conducted simultaneously and similarly to the TC Alaska open season, and that Canadian open season documents are being made available in data rooms set up for both open seasons.⁴⁶ Further, regarding the Dempster Lateral, TC Alaska states that neither it nor its affiliated company in Canada “has [any]

⁴⁵ EP Exploration’s initial comments at p. 5.

⁴⁶ TC Alaska’s March 16, 2010 data response at p.1

further outstanding obligations or liabilities with respect to pursuing a Dempster Lateral” and that at present, [t]he need for the Dempster Lateral has yet to be established.”⁴⁷

IX. Standards of Conduct

71. Included in TC Alaska’s plan for conducting an open season is a copy of the Alaska Pipeline Project Order No. 2005 Compliance Procedures and Standards of Conduct (Compliance Procedures) as well as Item Nos. 19, 20, and 21 of the notice as required by section 157.34(c)(19), (20), and (21).⁴⁸ TC Alaska states that these procedures were implemented in May 2009 for the purpose of complying with the Open Season regulations. The Compliance Procedures detail the procedures TC Alaska developed to comply with the non-discrimination and independent functioning requirements of Order No. 2005.

72. Based on the premise that a project applicant conducting an open season must function independently from any affiliated organizational units involved in the production of natural gas in the State of Alaska and/or the marketing or sales of natural gas from the State of Alaska, the Compliance Procedures’ independent functioning requirements and standards of conduct apply only to ExxonMobil. The Compliance Procedures spell out ExxonMobil’s structural separation, as well as the firewalls⁴⁹ and standards of conduct that are in place. In addition, the Compliance Plan also states that open season will be conducted by an identified working group, the Alaska Pipeline Project Commercial Team, which is also within the Alaska Pipeline Project Firewall. The Compliance Procedures also detail physical and informational access restriction measures in place.

73. The Compliance Procedures state that as to TransCanada, both inter-affiliate and Order No. 717-based Standards of Conduct are in place to ensure that the Commission’s no-conduit, independent functioning, non-discrimination and transparency rules are

⁴⁷ *Id.* at 2.

⁴⁸ The Compliance Procedures are posted on the Alaska Pipeline Project Internet web site, www.thealaskapipelineproject.com.

⁴⁹ There are three firewall domains: (1) the Alaska Pipeline Project Firewall, within which are all personnel with responsibility for conducting the open season, (2) the Production/Marketing Firewall, within which are ExxonMobil personnel who work-full time for affiliates involved in the production of natural gas in the State of Alaska and/or the marketing or sales of natural gas from the State of Alaska and others actively involved in such production or marketing activities, and (3) those personnel outside the firewalls, which include the Offices of Presidents and certain general corporate/business support personnel.

followed. Finally, the Compliance Procedures describe the implementation procedures, including training, dissemination of the Compliance Procedures, and identification of a Chief Compliance Office.

A. Producer Exemption

74. The State of Alaska's concerns regarding the Compliance Procedures center on TC Alaska's statements regarding the uncertainty as to whether the Order No. 2004-based Standards of Conduct adopted in Order No. 2005 still apply as a result of the new Standards of Conduct promulgated in Order No. 717, and the impact of the new Order No. 717-based Standards of Conduct on the requirements imposed in Order No. 2005.

75. Specifically, TC Alaska asserts that by applying the new Standards of Conduct promulgated under Order No. 717, the independent functioning requirements of section 157.35(c) will have no application to TransCanada's conduct during the open season. TC Alaska asserts that the independent functioning regulations do not require separation of TC Alaska from ExxonMobil's production or marketing affiliates because Order No. 717 eliminated the "energy affiliates" concept and restored the "producer exemption" to the definition of marketing affiliate. Since ExxonMobil will be marketing natural gas from its own production, TC Alaska claims the "producer exemption" reinstated by Order No. 717 would apply to ExxonMobil.

76. The State of Alaska contends that, confronted with the unique circumstances surrounding any Alaska natural gas pipeline, including the relationship between any likely Alaska pipeline sponsors and Alaska natural gas producers, the Commission clearly intended in Order No. 2005 that there would be no "producer exemption" in the case of an Alaska pipeline. Consequently, the State of Alaska asks that the Commission clarify that for the sole purpose of conducting an open season for an Alaska natural gas transportation project, the producer exemption does not apply.

Commission Response

77. The Commission so clarifies. On March 18, 2010, in Docket No. RM05-1-002, the Commission issued Order No. 2005-B. In that Final Rule, the Commission amended the Open Season regulations governing the conduct of open seasons for Alaska natural gas transportation projects. To be consistent with Order No. 717, in which the Commission eliminated the concept of "energy affiliates," the Commission, in Order No. 2005-B, removed references to "energy affiliates" in sections 157.34 and 157.35. However, the Commission also recognized that one of the purposes of Order No. 2005 was to ensure that when conducting the open season production affiliates will not be treated in an unduly preferential manner. Therefore, in Order No. 2005-B, the Commission explicitly stated in that the "producer exemption" in the definition of

marketing function does not apply to a prospective applicant conducting an open season pursuant to Subpart B of Part 157 of the Commission's regulations.⁵⁰ Consequently, the definition of marketing affiliate, for purposes of Order No. 2005, includes a production affiliate selling from its own production

B. Scope of Separation of Function Restrictions

78. The State of Alaska requests that the Commission clarify that transportation function employees of an Alaska gas pipeline must be separated from any affiliated marketing or production employees, whether they are involved only in the marketing or production of Alaska natural gas or are involved in the marketing and production of gas produced outside of Alaska.

79. In response to this request, TC Alaska contends that the State of Alaska's requests not a clarification, but rather an expansion of what is required in Order No. 717. TC Alaska maintains that Order No. 717 is aimed at preventing affiliate abuse in "transmission transactions" between the pipeline and a "marketing function employee" of the pipeline (and its affiliates). Thus, TC Alaska states, affiliated marketing or production unit employees who do not engage in transmission transactions with the pipeline are outside the scope of the separation of functions required under Order No. 717's employee functional approach. As support, TC Alaska points to Order No. 717-A, where the Commission stated that "the term 'marketing function employee' of a transmission provider, as defined in § 358.3(d), does not include an employee of an affiliate that does not engage in transmission transactions on the affiliated transmission provider's transmission system."⁵¹

Commission Response

80. As recently clarified by the Commission in Order No. 2005-B, the Order No. 2004-based Standards of Conduct which the Open Season regulations originally imposed on prospective applicants have been replaced by the Standards of Conduct promulgated under Order No. 717. Our purpose in imposing certain Standard of Conduct requirements on project applicants was to "minimize the risk that an affiliate of a project applicant would have an advantage over non-affiliates in obtaining capacity in the open season."⁵² The Commission clarifies that the transmission function (e.g., the unit or division that is conducting the open season) must function independent of all marketing

⁵⁰ See Order No. 2005-B at P 13-15 and 18 C.F.R. § 157.35(c), to be codified.

⁵¹ Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, at P16 (2009).

⁵² Order No. 2005 at P 74.

function employees as well as of all production affiliates engaged in marketing functions with respect to natural gas produced in Alaska. The Commission imposed the Standards of Conduct during the open season even though no sales are currently taking place and no transmission transactions are taking place. To ensure that there is no confusion, the Commission clarifies that during the open season, the transmission function employees should observe the Standards of Conduct with respect to all marketing function employees and all production employees engaged in marketing functions with respect to natural gas produced in Alaska who are involved in negotiating precedent agreements or submitting bids for the open season or negotiating sales of gas.

C. Status of ExxonMobil’s President as “marketing function employee”

81. In reaction to TC Alaska’s contention that the Offices of President and above of ExxonMobil are outside both the production/marketing firewall, the State of Alaska also asks the Commission to clarify “that officers of marketing and production affiliates of any Alaska gas pipeline must be considered ‘marketing function employees’ if they are ‘actively and personally’ engaged on a day-to-day basis in marketing or production functions, as they would, if for example, they supervise, oversee or provide input in the negotiation for obtaining pipeline capacity.”⁵³ The State of Alaska questions whether the Offices of President and above of ExxonMobil should be within the production/marketing firewall.

82. TC Alaska’s response to this clarification is simply that it is unnecessary. According to TC Alaska, a “marketing function employee” is defined at section 358.3(d) of the Commission’s regulations as meaning an employee “who actively and personally engages on a day-to-day basis in marketing functions.” Moreover, states TC Alaska, Order No. 717 provides further guidance as to when officers may fall within this definition.⁵⁴

Commission Response

83. The State of Alaska’s request for clarification is understandable. While TC Alaska concludes, as has now been confirmed in Order No. 2005-B, that the employee functional approach of Order No. 717⁵⁵ and the guidance of Order No. 717 is applicable

⁵³ State of Alaska’s initial comments at p. 12–13.

⁵⁴ *Citing* Order No. 717 at P 116 -122.

⁵⁵ Except, as noted herein, for omitting the producer exemption from the definition of marketing function at 18 C.F.R. § 358.3(c)(2)(iii). *See* TC Alaska’s comments at p. 30, and reply comments at p. 7.

to open seasons,⁵⁶ TC Alaska's utilization of firewalls and reference to the shared employee concept, are inspired by the Order No. 2004-based Standards of Conduct. Under the Standards of Conduct now governing open seasons for Alaska pipelines, a senior officer or director will be treated as a marketing function employee if s/he is actively and personally engaged on a day-to-day basis in marketing functions.⁵⁷ Moreover, a senior officer or director is required to observe the no-conduit rule, which prohibits a transmission provider from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees.⁵⁸

D. The Compliance Procedures

84. BG Alaska asks that the Commission review closely the details of the Compliance Procedures to ensure that they comply with the Commission's Open Season regulations.

85. Despite TC Alaska claims that Order No. 717-based requirements are by their terms not applicable to the open season for the Alaska Pipeline Project, TC Alaska states that it has taken steps to ensure that its open season process fully complies with the Open Season regulations. Specifically, TC Alaska contends that TransCanada personnel continue to be subject to existing codes of conduct which create independence between TransCanada's personnel providing services to TC Alaska and TransCanada personnel in non-regulated units. Moreover, TC Alaska states that it has been separated on a corporate basis from ExxonMobil's Alaska production and marketing units and TC Alaska has implemented its Compliance Procedures.

86. As detailed above, TC Alaska, comprised of TransCanada and ExxonMobil, was created solely to build the Alaska Pipeline Project and has no other business operations. TC Alaska states that neither it nor TransCanada have any affiliates involved in the sale, marketing or production of Alaskan gas. Moreover, states TC Alaska, TransCanada employees providing services to the Alaska Pipeline Project are already effectively separated from TransCanada's non-regulated marketing affiliates. According to TC Alaska, TransCanada, comprised of many affiliated companies, some of which are regulated by the Commission, is subject to inter-affiliate codes of conduct, as well as the Standards of Conduct under Order No. 717, which safeguard against improper sharing of information, personnel, or resources. TC Alaska states that TransCanada's existing

⁵⁶ See 18 C.F.R. §§ 358.3(c) and (d) (2009); *see also*, Order No. 717 at PP 117 and 118 (explaining the concepts of "actively and personally engaged" and "day-to-day"); and at P 129 (the elimination of the shared employee concept).

⁵⁷ See 18 C.F.R. §§ 358.3(c) and (d) (2009); *see also* Order No. 717.

⁵⁸ 18 C.F.R. § 358.6(a) (2009).

regulatory compliance program includes comprehensive training on the Order No. 717-based Standards of Conduct, and this training is required for all individuals assigned to or supporting the Alaska Pipeline Project.

87. TC Alaska states that TransCanada has implemented safeguards to assure that the non-public Alaska Pipeline Project information is not disclosed to ExxonMobil personnel involved in the production of natural gas in the State of Alaska or the marketing or sales of natural gas from the State of Alaska. TransCanada further states that its personnel providing services to the Alaska Pipeline Project or who may receive non-public information regarding the Alaska Pipeline Project as part of their job function are instructed that ExxonMobil production and marketing personnel are to be considered in the same category as TransCanada non-regulated personnel. In connection with an open season, non-public Alaska Pipeline Project information may not be disclosed to ExxonMobil production or marketing personnel, either directly or through a conduit, unless, as permitted by the Open Season regulations, such information is in connection with a specific request for transportation service.

88. TC Alaska asserts that ExxonMobil, on the other hand, has established an organizational structure and implemented non-disclosure and other requirements to ensure that ExxonMobil personnel providing services to the Alaska Pipeline Project will function independently from ExxonMobil entities engaged in the sales, marketing or production of natural gas from Alaska.⁵⁹ Specifically, according to TC Alaska, ExxonMobil has accomplished structural separation by establishing a separate organizational unit within ExxonMobil Development Company solely dedicated to managing the Alaska Pipeline Project on behalf of TC Alaska. TC Alaska states that all ExxonMobil personnel, with active involvement in the Alaska Pipeline Project, other than shared employees providing general corporate/business support or performing non-commercially sensitive activities, have been assigned to this organizational unit. Further, states TC Alaska, there is an identified Alaska Pipeline Project Commercial Team within this unit that is responsible for the Alaska Pipeline Project's open season activities.

89. TC Alaska states that to supplement structural separation of the Alaska Pipeline Project, ExxonMobil has implemented procedures and established three firewall domains: (1) inside the Alaska Pipeline Project Firewall, (2) inside the Production/Marketing firewall, and (3) outside the firewalls. TC Alaska states that the Compliance Procedures appropriately designate personnel who are to be in each of the firewalls and those who

⁵⁹ These entities are ExxonMobil Production Company American Unit; ExxonMobil Gas and Power Marketing Company American unit, and ExxonMobil Development Company Arctic unit.

are outside the firewalls.⁶⁰ Also, TC Alaska states that all employees inside the firewalls are subject to standards of conduct regarding work activities and sharing and disclosure of non-public information, and that those outside the firewalls who are provide shared service or advice to the Alaska Pipeline Project and/or units inside the Production/Marketing Firewall receive Order No. 2005 compliance training and are required to adhere to certain “Firewall Related Behaviors.”⁶¹

90. TC Alaska further states that the Alaska Pipeline Project Commercial Team, which will conduct the open season activities, including review of bids and allocation and award of capacity, is inside the Alaska Pipeline Project Firewall, and subject to the same standards of conduct that apply to ExxonMobil personnel inside the Alaska Pipeline Project Firewall. Moreover, states TC Alaska, the Alaska Pipeline Project Commercial Team is to observe certain additional standards of conduct during conduct of open season; specifically (1) confidential information received as part of open season process to be maintained in confidence and is not to be disclosed to personnel inside Production/Marketing Firewall or shared with other potential shippers, unless authorized in writing by shipper or required by law; (2) non-public Alaska Pipeline Project information may not be disclosed to personnel inside Production/Marketing Firewall except to extent it relates solely to specific request for transportation service on behalf of an ExxonMobil unit as a potential shipper; and (3) if non-public information that does not relate solely to specific request for transportation service on behalf of an ExxonMobil unit as a potential shipper is disclosed to personnel inside Production/Marketing Firewall, information will be made available to all other potential shippers.

91. In addition, TC Alaska states that appropriate security procedures and controls have been implemented concerning physical access to the office space housing the Alaska Pipeline Project organizational unit, and to restrict access to all electronic information systems containing non-public Alaska Pipeline Project information.⁶² Finally, TC Alaska states that the compliance procedures address posting and training requirements, and designates a Chief Compliance Officer.⁶³

⁶⁰ See Compliance Procedures at 1.3.3. As discussed, *supra*, we have addressed the State of Alaska’s concerns over whether the President and certain other employees should be included within the P/M firewall.

⁶¹ See *id.* at 1.3.4.

⁶² See *id.* at 1.3.6.

⁶³ See *id.* at 1.5.

Commission Response

92. Generally, the Compliance Procedures track the requirements imposed by Order No. 2005, with some minor exceptions as noted herein. TC Alaska has narrowed the phrase “marketing affiliates” by adding “involved in the marketing or sale of natural gas from the State of Alaska.”⁶⁴ In Order No. 2005, the Commission intended for the Standards of Conduct to apply to all marketing affiliates during the open season, not only those involved in marketing or sales of natural gas from the State of Alaska. TC Alaska must revise its Compliance Procedures and, as relevant, Items 19, 20, and 21, to remove the language narrowing the scope of marketing affiliates, consistent with the above discussion. The Commission notes that TC Alaska’s proposal that the Standards of Conduct apply to producer affiliates involved in the State of Alaska is acceptable. In addition, TC Alaska has adopted a definition of affiliate in the Compliance Procedures that is not consistent with the Commission’s definition of affiliate at section 358.3(a)(3) of the Commission’s regulations, and TC Alaska must also revise that definition consistent with the above discussion.

93. As noted in Order No. 2005, the purpose of imposing the Standards of Conduct during the open season for Alaska natural Gas Transportation projects is to further the Commission’s goal of a non-discriminatory open season.⁶⁵ The Commission applied the Standards of Conduct because this will minimize the risk that an affiliate of a project applicant would have an advantage over non-affiliates in obtaining capacity through the open season.⁶⁶ To the extent that there is an affiliate that has not yet engaged in marketing activities that bids for capacity in the open season, the project applicant must ensure that it does not have an advantage over non-affiliates. Therefore, before commencing its open season, TC Alaska shall revise the information contained in its Compliance Procedures, and, as relevant, the information contained in Items 19, 20, and 21, consistent with this order and Order No. 2005-B.

94. In addition, as discussed above, the Compliance Procedures may be in some ways more restrictive (e.g., the creation of firewall domains) than would be required if wholly fashioned to correspond to the employee functional approach that now applies to conducting open seasons. Additionally, retention in the Compliance Procedures of the old “shared employee” concept in discussing the applicability of the Standards of Conduct to the Office of President is inconsistent with both the operable Standards of Conduct and TC Alaska’s understanding of the applicable Standards of Conduct as stated

⁶⁴ See TC Alaska’s Request at p. 40, *see also* Compliance Procedures at 1.3.

⁶⁵ Order No. 2005 at P 74.

⁶⁶ *Id.*

in its reply comments.⁶⁷ Recognizing that TC Alaska's request for approval of its open season plan was filed prior to the Issuance of Order No. 2005-B, we will not direct TC Alaska revises its Compliance Procedures such that they strictly track the current Standards of Conduct. We will however require that TC Alaska's implementation of the Compliance Procedures follow the applicable Standards of Conduct now imposed in Order No. 2005-B and remind TC Alaska that it remains under an obligation to comply with all of the principles of Order No. 717 and its progeny and Order No. 2005-B.

X. Conclusion

95. Conditioned on the modifications required herein pertaining to the opening of the data rooms and the revisions to the Compliance plan and standards of conduct, herein, the Commission finds that TC Alaska's detailed plan for conducting an open season for the purpose of making binding commitments for the acquisition of initial capacity on the Alaska Pipeline Project is in conformance with the Open Season regulations and it is therefore approved. We encourage TC Alaska and potential shippers to work together to resolve any issues arising during the implementation of the open season plan, during the open season, or the during negotiations after the close of the open season.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁷ See TC Alaska's reply comments at p. 10.