

111 FERC ¶ 61,332
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 157

(Docket No. RM05-1-001; Order No. 2005-A)

Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas
Transportation Projects

(Issued June 1, 2005)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) generally reaffirms its determinations in Order No. 2005. Order No. 2005 establishes requirements governing the conduct of open seasons for proposals to construct Alaska natural gas transportation projects, including procedures for allocation of capacity. Pursuant to the directive of section 103(e)(2) of the Alaska Natural Gas Pipeline Act, enacted on October 13, 2004, the regulations promulgated in Order No. 2005 (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.

In this order, the Commission addresses the requests for rehearing and/or clarification of Order No. 2005. Here, we grant rehearing in part, deny rehearing in part, and provide clarification of Order No. 2005. In specific, we: (1) clarify that the

Commission may require design changes necessary to ensure that some portion of a proposed voluntary expansion will be allocated to new shippers or shippers seeking to transport gas from areas other than Prudhoe Bay or Point Thomson, provided such shippers are willing to sign qualifying long-term firm transportation agreements;

(2) codify the expanded criteria for evaluating late bids for capacity and the requirement that any late bid contain a good faith showing; (3) in the case of the mandatory pre-review, codify that the plan to be filed by the Commission must contain the open season notice, and eliminates the 30-day prior notice requirement; (4) discuss how the open season rules may apply to jurisdictional gas treatment plants; (5) clarify that capacity bid for in the open season is exempt from allocation only in a case where there is also presubscribed capacity, and that in the event there are more than one pre-subscription agreement, bidders in the open season may not cherry-pick among the provisions of the several agreements; (6) clarify the project applicant's obligation to establish a separate entity to conduct the open season; and (7) further codify the requirements of the catchall provision regarding information to be include in an open season notice.

EFFECTIVE DATE: Revisions in this order on rehearing will become effective on the date this order is published in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Whit Holden, Office of the General Counsel, (202) 502-8089, edwin.holden@ferc.gov;

Richard Foley, Office of Energy Projects, (202) 502-8955, richard.foley@ferc.gov;

Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426

SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Regulations Governing the Conduct of Open
Seasons for Alaska Natural Gas Transportation
Projects

Docket No. RM05-1-001

ORDER NO. 2005-A

ORDER ON REHEARING AND CLARIFICATION

(Issued June 1, 2005)

1. On February 9, 2005, the Federal Energy Regulatory Commission (Commission) issued a Final Rule, Order No. 2005,¹ amending its regulations by adding Subpart B to Part 157 to establish requirements governing the conduct of open seasons for capacity on proposals to construct Alaska natural gas transportation projects. Order No. 2005 fulfilled the Commission's responsibilities to issue open season regulations under section 103 of the Alaska Natural Gas Pipeline Act (ANGPA or the Act), enacted on October 13, 2004. Section 103(e)(1) of the Act directs the Commission, within 120 days from enactment of the Act, to promulgate regulations governing the conduct of open seasons for Alaska natural gas transportation projects, including procedures for allocation of capacity. As required by section 103(e)(2) of the Act, the regulations promulgated in Order No. 2005 (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

¹ *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, RM05-1-000, Order No. 2005, FERC Stats. and Regs.

¶ 31,174 (2005).

opportunity for the transportation of natural gas other than from the Prudhoe Bay and Point Thomson units.

2. The Commission affirms here the legal and policy conclusions on which Order No. 2005 was based. As stated in Order No. 2005, the goal of the open season regulations is 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 exploration, development, and production of Alaska natural gas. We find that Order No. 2005's open season rules as revised and clarified herein, satisfy that goal and, therefore, are in the public interest.

Background

3. ANGPA mandates the expedited processing by the Commission of any application for an Alaska natural gas transportation project. To this end, as stated above, section 103(e)(1) of the Act specifically directs the Commission to prescribe the rules which shall apply to any open season held for the purpose of soliciting interest in, or making binding commitments to the acquisition of capacity on, any Alaska natural gas transportation project, including the criteria for allocating capacity among competing bidders. In this regard, Congress instructed the Commission to include in its regulations the criteria for, and timing of, any open season, and to design its open season regulations to promote competition in the exploration, development, and production of Alaska natural gas and, as to any open season for the voluntary expansion² of the initial capacity of any Alaska natural gas transportation project, to specifically provide the opportunity for gas other than Prudhoe Bay and Point Thomson production to have access to the pipeline.

4. In response to the Act's directive, on November 15, 2004, the Commission issued in Docket No. RM05-1-000 a Notice of Proposed Rulemaking (NOPR) in this proceeding

² Excluded from the scope of the open season rules are expansions compelled by the Commission pursuant to section 105 of the Act. Section 105 authorizes the Commission to order these "involuntary" expansions upon the request of one or more persons, and upon the satisfaction of certain statutory criteria.

containing the Commission's proposed Alaska natural gas transportation project open season regulations. Also, the Commission held a public technical conference in Anchorage, Alaska on December 3, 2004 to develop a record in this proceeding. The Commission received 25 comments in response to the NOPR.

5. On February 9, 2005, the Commission issued Order No. 2005. The open season regulations contained in Order No. 2005 apply to any application for a certificate or other Commission authorization for an Alaska natural gas transportation project, whether filed pursuant to the NGA, the Alaska Natural Gas Transportation Act of 1976, or ANGPA, as well as to any voluntary applications for expansions of such a project.

6. The Final Rule adopted the NOPR's proposed requirements that the applicant provide a 30-day prior public notice containing extensive information intended to allow all interested persons to decide whether to participate in the open season, followed by an actual open season period of at least 90 days. The regulations in the Final Rule also adopted the NOPR's approach of allowing prospective applicants to develop and state in detail the methodologies for determining the value of bids and for allocating capacity, subject to the requirement that all capacity be awarded without undue discrimination or preference of any kind. In addition, the Final Rule required that at least 90 days prior to providing the open season notice, the prospective applicant must file its open season plan with the Commission for approval, and that the Commission will act on the plan within 60 days of its filing.

7. The Final Rule provided that prospective applicants must conduct or adopt a study of Alaska's in-state needs, and use the study results to design capacity needs for use within the state, and design in-state delivery points and in-state transportation rates as part of an open season. Moreover, bidding on in-state capacity must be conducted independent of out-of-state deliveries during a prospective applicant's open season.

8. In order to further the Commission's goal of a non-discriminatory open season, the Final Rule applied certain of the Standards of Conduct requirements of Order No. 2004, including the establishment of an independent, functionally-separate unit to conduct the open season. In addition, the open season notice must identify the prospective applicant's affiliates involved in the production of natural gas in the state of Alaska, and all information about the open season disclosed to any potential shippers must be made available to all potential shippers.

9. The Final Rule permitted pre-subscription by anchor shippers, limited to initial capacity only, in order to facilitate the development of an Alaska pipeline project. However, to ensure that all other potential shippers have an equal opportunity to obtain

access to capacity on the project in the open season, all pre-subscription agreements must be made public within ten days of their execution, and capacity on the proposed project must be offered to all prospective qualifying shippers under the same terms and conditions and at the same rates as the pre-subscription agreements. In addition, if capacity is oversubscribed in the open season and it is not feasible to redesign the proposed project to meet both the pre-subscription shippers' and the open season shippers' capacity needs, then capacity bid for in the open season will not be reduced, but all capacity subject to the terms and conditions of pre-subscription agreements will be allocated pro rata.

10. In an effort to allow as many potential shippers as possible the opportunity to acquire capacity in the initial open season, the Final Rule required that the project sponsor must consider any qualifying bids tendered after the expiration of the open season, and reject them only if they cannot be accommodated due to economic, engineering, or operational constraints.

11. The Final Rule stated that, within ten days after precedent agreements have been executed for capacity acquired in the open season, the prospective applicant shall make public the results of the open season, including the names of the prospective shippers, amount of capacity awarded, and the terms of the agreements. Within 20 days after precedent agreements have been executed, copies of all precedent agreements, as well as copies of any correspondence with bidders whose bids were not accepted, must be filed with the Commission.

12. In another provision, the Final Rule stated that, as a part of the Commission's review of any application for an Alaska natural gas transportation project, it will consider the extent to which the proposed project has been designed to accommodate the needs of shippers who have made conforming bids during an open season, as well as the extent to which the project can accommodate low-cost expansion, and the Commission may require changes in the project's design necessary to promote competition and offer a reasonable opportunity for access to the project.

13. Finally, to provide guidance to interested parties on the important subject of expansion rate treatment, the Final Rule establishes a presumption in favor of rolled-in pricing for expansions up to the point that it would cause there to be a subsidy of expansion shippers by initial shippers.

14. Requests for rehearing and/or clarification were filed jointly by BP Exploration (Alaska), Inc., ConocoPhillips Company and Exxon Mobile Corporation (the North Slope Producers), by Enbridge, Inc. (Enbridge), by ChevronTexaco Natural Gas, a division of

Chevron U.S.A. Inc. (ChevronTexaco), and by the State of Alaska. In addition, Anadarko Petroleum Corporation (Anadarko) and the Legislative Budget and Audit Committee of the Alaska State Legislature (Alaska Legislators) filed responses to the rehearing requests.³

Discussion

I. Mandating Pipeline Design

A. The Final Rule - §§ 157.36 and 157.37

15. Section 157.36 requires that any open season for expansion capacity of an Alaska natural gas transportation project must provide the opportunity for the transportation of gas other than Prudhoe Bay or Point Thomson production, and that the Commission, in considering any proposed voluntary expansion of an Alaska natural gas pipeline project, “may require design changes to ensure that all who are willing to sign long-term firm transportation contracts that some portion of the expansion capacity be allocated to new shippers or shippers seeking to transport natural gas from areas other than Prudhoe Bay and Point Thomson.” Section 157.37 states that, in reviewing any application for an Alaska natural gas pipeline project, the Commission “may require changes in the project design necess[ary] to promote competition and offer a reasonable opportunity for access

³ Under Rule 213 of the Commission’s Rules of Practice and Procedure, answers to rehearing requests are not permitted. However, the Commission has discretion to waive this rule when it finds that the answers will help provide a complete record in the proceeding or allow a better understanding of the issues. This proceeding involves the establishment of open season rules for capacity on an Alaska natural gas transportation project, and is critical to the development of Alaska’s vast natural gas resources to meet anticipated national demand for natural gas, thereby enhancing national security. The Commission finds that the answers will provide necessary information to provide a full and complete record, which will assist the Commission in addressing the issues on rehearing pertaining to the complex and unique circumstances surrounding the development of an Alaska natural gas transportation project. Therefore, Anadarko’s and the State of Alaska’s answers to the rehearing requests are accepted. *See* 18 C.F.R. § 385.213 (2004).

to the project, taking into account the extent to which the proposed project design accommodates the open season's conforming bids as well as low-cost expansion."⁴ These provisions were included in the Final Rule in response to concerns of non-North Slope producers that they have access to capacity on an Alaska natural gas transportation project when their potential gas reserves are commercially developed.

B. Rehearing/clarification requests

16. The North Slope Producers and ChevronTexaco object to the provisions contained in sections 157.36 and 157.37 to the extent that they authorize the Commission to require changes in the design of an Alaska natural gas transportation project. The North Slope Producers object to these provisions on a number of grounds. First, they contend that it is beyond the Commission's NGA authority to mandate changes in the design of a pipeline, either to provide additional capacity or to enhance future expandability. The North Slope Producers contend that, in either case, the result is a mandatory expansion of the project, which according to section 7(a) of the NGA, is outside the Commission's authority to require.⁵ The North Slope Producers maintain that this limitation on the Commission's authority is reflected in the Commission's regulations providing that open access pipelines are "not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities,"⁶ and in judicial precedent.⁷ According to the North Slope Producers, the Commission has acted unreasonably in "morphing" ANGPA's vague and undefined open

⁴ "Necessity" in section 157.37 is revised to read "necessary."

⁵ Section 7(a) of the NGA provides "[t]hat the Commission shall have no authority to compel the enlargement of transportation facilities..." 15 U.S.C. 717f(a).

⁶ 18 C.F.R. §284.7(f).

⁷ The North Slope Producers cite *Panhandle Eastern Pipe Line Co.*, 204 F.2d 675 (3rd Cir. 1953) in which the court stated that "[i]n light of Section 7(a) we are compelled to conclude that Congress meant to leave the question whether to employ additional capital in the enlargement of its pipeline facilities to the unfettered judgment of the stockholders and directors of each natural gas company involved." 204 F.2d at 680.

season requirements pertaining to competition in the exploration, development, and production of Alaska gas and sufficient opportunity for future access for the transportation of non-Prudhoe Bay/Point Thomson gas into factors to be considered by the Commission in its NGA section 7 review of a certificate applications for Alaska natural gas transportation projects.

17. Second, the North Slope Producers assert that ANGPA section 105 further limits the Commission's authority to require an expansion of an Alaska natural gas transportation project sections. The North Slope Producers state that before an involuntary expansion can be ordered by the Commission, section 105 lists a number of statutory requirements that must be met which are designed to balance potential future shippers' interests with the need to protect the pipeline and existing shippers and to protect against uneconomic overbuilding. The North Slope Producers state that none of these statutory requirements are referenced in or satisfied by section 157.36 or 157.37.

18. Third, the North Slope Producers argue that the Commission appears to mistakenly "assume that a pipeline can, in all circumstances, be efficiently designed to accommodate all qualifying bids." The North Slope Producers assert that the most efficient and economic pipeline design might not be one which can accommodate 100 percent of the capacity bid for in the open season. In fact, according to the North Slope Producers, it is possible that a pipeline designed to accommodate all the capacity bid in the open season "could result in a design that is inefficient and/or negatively impacts future expansion design alternatives."

19. Fourth, the North Slope Producers maintain that to the extent that it authorizes a set-aside of capacity, section 157.36 violates the Order No. 636's goal of eliminating impediments to the transmission of proper pricing signals between producers and consumers, as well as the Commission's non-discrimination policies. The North Slope Producers point to the second sentence of section 157.36, which states:

"In considering a proposed voluntary expansion of an Alaska natural gas pipeline project, the Commission will consider the extent to which the expansion will be utilized by shippers other than those who are the initial shippers on the project, and in order to promote competition and open access on the project, *may require design changes to ensure that all who are willing to sign long-term firm transportation contracts to some portion of the expansion capacity be allocated to new shippers or shipper s seeking to transport natural gas from areas other than Prudhoe Bay and Point Thomson.*" (Emphasis added).

The North Slope Producers assert that if this “indecipherable” language is intended to set aside capacity for new shippers or shippers of gas from areas other than Prudhoe Bay and Point Thomson, then the Commission is favoring one shipper’s bid over another bid that otherwise meets all of the bid criteria. The North Slope Producers assert that ANSPA’s section 103(e)(2)(C) requirement that open season regulations for voluntary expansions are to “provide an opportunity for the transportation of gas other than Prudhoe Bay and Point Thomson gas” does not support section 157.36’s apparent set-aside or preference. The North Slope Producers state that not only is such a preference inconsistent with the Commission’s open access policies, it is patently discriminatory and anti-competitive and unlawful under the NGA. The North Slope Producers contend that allocating pipeline capacity in an open season to customers who value it most, *i.e.*, through the use of the Commission-favored net present value capacity allocation methodology, ensures pipelines and shippers that capacity will be allocated in a non-discriminatory and economically efficient manner. The North Slope Producers also assert that development of multi-owner fields could be delayed or hampered if one group of shipper/owners had a competitive advantage over another shipper/owner group due to a capacity allocation advantage or preference.

20. Finally, the North Slope Producers maintain that sections 157.36 and 157.37 are contrary to the Commission’s reliance on market forces, on which its existing policies are based. Specifically, the North Slope Producers claim that Order No. 2005 fails to reconcile Subparts 157.36 and 157.37 with current Commission policies in favor of “facilitate[ing] the unimpeded operation of market forces to stimulate the production of natural gas,”⁸ and against the subsidization of new services by existing shippers. The North Slope Producers state that it would be unreasonable to expect that the pipeline sponsors would simply assume the financial risk for significant amounts of uncontracted capacity on such an enormous project, yet Order No. 2005 fails to address cost recovery issues associated with any mandated design changes that might be ordered.

21. ChevronTexaco claims that the regulations promulgated in Order No. 2005 apply to open seasons for initial or voluntary expansion capacity; therefore, the idea of post-open season Commission-mandated design changes is inconsistent with and outside the

⁸ Order No. 636, FERC Stats. and Regs. ¶ 30,939 at 30,393 (1992), *quoting* S.Rep. No. 309, 101st Cong., 1st Sess. at p.2 (1989).

scope of this rulemaking. Moreover, ChevronTexaco asserts that the design change provisions of sections 157.36 and 157.37 should be deleted from the open season regulations because the subject was not included in the Notice of Proposed Rulemaking. ChevronTexaco states that absent removing sections 157.36 and 157.37 from the open season regulations, the Commission should provide that it would not require project design changes if doing so would negatively impact the rates, terms or conditions of service for initial shippers or otherwise adversely affect pipeline operations of efficiency.

22. In its response to the rehearing requests, Anadarko argues that ANGPA and the NGA provide the Commission with ample authority to require changes in the design of an initial or expanded Alaska natural gas transportation project necessary to meet the statutory objectives of promoting competition and provide a reasonable opportunity for access to all shippers who have made conforming bids during the open season. Anadarko states that clearly there is interplay between the NGA and ANGPA. Specifically, states Anadarko, section 7(e) of the NGA provides that a “certificate shall be issued ... if it is found that proposed service, sale, operation, construction... to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity.” Anadarko states that the Commission considers many factors in making this public convenience and necessity finding, and, in the case of an Alaska natural gas transportation project, should consider the requirements of ANGPA.

23. Anadarko asserts that the Commission often imposes conditions to its certificates requiring routing or design modifications in order to support a finding that a particular project is in the public convenience and necessity. In any event, sections 157.36 and 157.37 do not mandate an expansion, according to Anadarko, because the applicant may choose not to accept a certificate that requires that the project be redesigned. Anadarko states that the regulations merely put the applicant on notice that its proposed project design might be rejected as failing to meet the objectives of ANGPA, and consequently, not being required by the public convenience and necessity.

24. In response to the North Slope Producers’ charge that section 157.36 provides for discriminatory reallocation of capacity contrary to existing Commission policy, Anadarko contends that the Commission is merely following the mandate of ANGPA section 103(e)(2)(C). Anadarko states that under section 103(e)(2)(C), the Commission’s regulations must ensure that any open season for expansion capacity provides the opportunity for the transportation of natural gas other than from Prudhoe Bay/Point Thomson, and section 157.36 seeks to do just that.

25. Anadarko also disputes the North Slope Producers’ claim that parties were not adequately notified in the NOPR that pipeline design would be a subject of the

rulemaking. Anadarko maintains that the regulations contained in sections 157.36 and 157.37 reasonably respond to many concerns expressed throughout the rulemaking process.⁹ Anadarko contends that under the Administrative Procedure Act (APA), the Commission was required in this informal rulemaking proceeding to provide either the terms or substance of the proposed rule or a description of the subjects and issues involved.¹⁰ Moreover, Anadarko points out that the courts have held that “even if the final rule deviates from the proposed rule, [s]o long as the final rule promulgated by the agency is a ‘logical outgrowth’ of the proposed rule... the purposes of the notice and comment have been adequately served.”¹¹ Anadarko states that Order No. 2005’s pipeline design provisions were a “logical outgrowth” of the NOPR and the issues discussed therein, *e.g.*, the major goals of ANGPA, concerns over potential discrimination, producer/sponsor preferences, the role of pre-subscriptions, and tensions between ANGPA’s goals and the application of existing policies to an Alaska project.

26. Lastly, Anadarko contends that the Commission provided ample support for not following current Commission policies that favor reliance on market forces. Anadarko states that the rulemaking record in Order No. 2005 thoroughly discusses the conditions and circumstances in Alaska that are much different than those found in the lower 48 states, requiring the appropriate regulatory action taken in sections 157.36 and 157.37. In conclusion, Anadarko disagrees that 157.36 is “indecipherable” as claimed by the North Slope Producers.

27. The Alaska Legislators maintain that sections 157.36 and 157.37 are well within the Commission’s broad power to attach to certificates any conditions that may be found to be required by the public convenience and necessity. They claim that the “forced expansion” argument fails to acknowledge that ANGPA has injected into the public convenience and necessity standard of the NGA a new statutory standard, *i.e.*, the promotion of competition in the exploration, development and production of Alaska

⁹ Anadarko identifies comments addressing pipeline size both at the technical conference and written. *See* Anadarko’s March 29, 2005 response at 15 -16.

¹⁰ *See* 5 U.S.C.A. 553(b)(3).

¹¹ *Appalachian Power Co. v. EPA*, 135 F.3d 791, 804 n.22 (D.C. Cir. 1998).

natural gas with respect to Alaska natural gas transportation projects. Moreover, the Alaska Legislators contend that the Commission's pipeline design concerns are required not only by the mandate of ANGPA, but also by the economic realities in Alaska, where virtually all of the proven reserves are held by the North Slope Producers. The Alaska Legislators state that the Commission is simply announcing in sections 157.36 and 157.37 that it may condition the approval of the certificate upon the applicant's making necessary design changes required to satisfy the public convenience and necessity standard, including the "promote competition" standard, which is uniquely applicable to an Alaska natural gas transportation project.

28. Addressing the North Slope Producers' claim that section 157.36 provides for an unduly discriminatory set aside of capacity for non-North Slope shippers, the Alaska Legislators agree with Anadarko that ANGPA mandates that in the case of an expansion of an Alaska natural gas transportation project, the Commission must provide an opportunity for the transportation of natural gas other than from Prudhoe Bay and Point Thomson units in its open season rules. Alaska Legislators state that section 157.36 is consistent with that mandate.

29. The Alaska Legislators also defend the Commission's "proactive" approach through which it fashioned the open season rules in recognition of the recognized differences between competitive forces in the lower 48 states and the lack of competition in Alaska. Given these differences, the Alaska Legislators maintain that the Commission was right to depart from existing Commission policy. They assert that the fact that Congress required the Commission to promulgate the Alaska open season rules in place of the Commission's long-standing policy of evaluating open seasons on a case-by-case, after-the-fact basis, is an illustration of the need for different approach based on the unique circumstances surrounding an Alaska pipeline. The Alaska Legislators conclude that, unlike the situation in the lower 48 states, there is no existing or foreseeable competitive environment in Alaska, where the North Slope Produces not only control all the known gas reserves, but also may become the sponsors of the Alaska pipeline. Therefore, the Commission was right to not rely on market forces in Alaska to ensure the development, routing, sizing and timing of an Alaska pipeline.

30. Finally, the State of Alaska suggests that section 157.36 be expanded to better reflect its intent. According to the State of Alaska, section 157.36 should read:

"In considering a proposed voluntary expansion of an Alaska natural gas transportation project, the Commission will consider the extent to which the expansion will be utilized by shippers other than those who are the initial shippers on the project and, in order to promote competition and open

access to the project, may require design changes to ensure that new shippers willing to sign long-term firm transportation contracts or shippers

seeking to transport natural gas from areas other than Prudhoe Bay or Point Thomson who are willing to sign long-term contracts can have access to some portion of the expansion capacity.”

C. Commission Response

31. The North Slope Producers’ assertion that the Commission has no authority under the NGA to require changes in the design of an proposed Alaska natural gas transportation project in connection with an application for authorization either to construct the project, or to expand the project is inconsistent with law and precedent. At the outset, we reject the notion that any design change that might be required under either section 157.36 or 157.37 would constitute a mandatory expansion of the project. First, in every case in which the section 7(a) limitation has been addressed, the facilities involved were existing facilities subject to existing certificate authorization. The reasoning behind this limitation is clear. Once a natural gas company accepts a certificate and in reliance thereof expends resources to construct the facilities authorized therein, the pipeline and its customers should have the right to rely on the authorizations contained in that certificate. It is quite another thing where the Commission tells a certificate applicant that unless it agrees to certain changes (including cost allocations and the design of initial service rates), its proposal will not be found to be in the public convenience and necessity. In such case, if the applicant does not want to change its proposed project design, it is not required to accept the certificate. Furthermore, because design changes under either 157.36 or 157.37 would not constitute a mandatory project expansion, the statutory requirements of ANGPA section 105 have no application.

32. In considering an application for a certificate of public convenience and necessity under section 7 of the NGA, the Commission has the authority to consider all factors

bearing on the public interest,¹² and in particular, the Commission “certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity.”¹³ In the case of an Alaska natural gas transportation project, these factors would properly include the requirements of ANGPA, including the statutory objectives of promoting competition and provide a reasonable opportunity for access to all shippers who have made conforming bids during the open season.

33. The Commission has authority under NGA section 7(e) to attach to a certificate of public convenience and necessity any conditions it deems necessary to meet the public interest.¹⁴ The Commission has exercised this conditioning authority to require routing or design modifications in order to support a finding that a particular project is in the public convenience and necessity.¹⁵ Sections 157.36 and 157.37 merely codify our existing authority and practice.

34. The North Slope Producers’ claim that sections 157.36 and 157.37 are predicated on the Commission’s erroneous assumption “that a pipeline can, in all circumstances, be efficiently designed to accommodate all qualifying bids.” This is inaccurate. We noted in Order No. 2005 that both the North Slope Producers and Enbridge maintained that an Alaska pipeline could be designed and built with sufficient capacity to accommodate the

¹² See, e.g., *FPC v. Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 81 S.Ct. 435 (1961); *Office of Consumers’ Counsel v. FERC*, 655 F.2d 1132, 210 U.S.App. D.C. 315 (1980).

¹³ *City of Pittsburgh v. FPC*, 237 F.2d 741 at 754 (D.C. Cir. 1965).

¹⁴ See, e.g., *FPC v. Hunt*, 376 U.S. 515, 525 -527, 84 S.Ct. 861 (1964); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959).

¹⁵ See, e.g., *Vector Pipeline, L.P.*, 87 FERC ¶ 61,225 at 61,892-893 (1999); *Maritimes & Northeast Pipelines, L.L.C.*, 80 FERC ¶ 61,345 (1997); *NE Hub Partners, L.P.*, 83 FERC ¶ 61,043 (1998); see also, *Transcontinental Gas Pipe Line Corp v. FERC*, 589 F.2d 186 (5th Cir.), cert. denied, 445 U.S. 915 (1979).

needs of every qualified shipper.¹⁶ Our expectation is that an Alaska natural gas transportation project will be designed and built, to the extent possible, to accommodate all qualified shippers who are ready to sign firm transportation agreements. Nonetheless, in Order No. 2005 we certainly did not rule out the possibility that a project, with or without pre-subscription agreements, might be oversubscribed.¹⁷ On this note, we should emphasize that in our review of any application for initial Alaska project or any expansion thereof, our consideration of the project design will be driven by our need to find that the proposal is in the public convenience and necessity. Any conditions we impose must be required by the public interest, and be based on substantial evidence.

35. The North Slope Producers' claim that section 157.36 provides for an unduly discriminatory set-aside of capacity for non-North Slope shippers discounts, if not ignores, the Congressional mandate of ANGPA section 103(e)(2)(C) that requires our open season regulations to ensure that any open season for expansion capacity provides the opportunity for the transportation of natural gas other than from Prudhoe Bay/Point Thomson. Section 157.36 does so in a reasonable manner. In any event, our regulations do not require that an expansion proposal must, regardless of economic and technical considerations, provide transportation of gas other than Prudhoe Bay/Point Thomson volumes. The regulations simply require that an opportunity for such transportation be provided.

36. As pointed out elsewhere in this order, and throughout Order No. 2005, a number of existing Commission policies predicated on competitive conditions in the lower 48 states are ill-suited for application in the case of an Alaska natural gas transportation project, particularly in view of ANGPA's directives. As we stated in Order No. 2005, a successful Alaska natural gas transportation project will have to overcome a variety of significant obstacles, including unique and complex competitive conditions. Those competitive conditions, we said, are intensified by the generally agreed-upon fact that

¹⁶ See, e.g., Order No. 2005 at P 29, 37, and 88.

¹⁷ See *id.* at P 37; see also § 157.34(c)(15).

there will be only one such Alaska pipeline for the foreseeable future.¹⁸ Against that backdrop, we affirm the conclusions of Order No. 2005, which serve as the underpinnings of the Final Rule's regulations, including the need in certain instances to accommodate existing Commission policy to the unique circumstances surrounding the exploration, production, development, and transportation to market of Alaska natural gas.

37. Finally, while due process and the APA impose an obligation on agencies to provide adequate notice of issues to be considered,¹⁹ that obligation is satisfied in this informal rulemaking by providing either the terms or substance of the proposed rule or a description of the subjects and issues involved.²⁰ Order No. 2005's pipeline design provisions were a logical outgrowth of the NOPR and the issues discussed therein, *e.g.*, major goals of ANGPA, concerns over potential discrimination, producer/sponsor preferences, potential role of pre-subscriptions, tensions between ANGPA's goals, and application of existing policies to the circumstances of an Alaska project. Indeed, the critical importance of properly sizing the pipeline was a recurring theme throughout this proceeding, and was raised by several parties at the technical conference, and in later comments and reply comments.²¹ Thus, Order No. 2005 does not unduly change the scope of this proceeding. In any event, the parties' ability to seek rehearing resolves any due process issues.

38. Although the North Slope Producers describe section 157.36 to be "indecipherable," their comments demonstrate that they understand its intent.

¹⁸ The North Slope Producers, in their rehearing request, claim that it is too early to conclude that only one Alaska pipeline will ever be built. We find nothing in the record to support a contrary conclusion.

¹⁹ *Public Service Commission of the Commonwealth of Kentucky v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005), *citing Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54 (D.C. Cir. 1999); *see* 5 U.S.C. § 554(b)(3).

²⁰ *See* 5 U.S.C. 553(b)(3).

²¹ *See* n. 8, *supra*.

Section 157.36 is intended to provide that the Commission may require design changes necessary to ensure that some portion of a proposed voluntary expansion will be allocated to new shippers or shippers seeking to transport gas from areas other than Prudhoe Bay or Point Thomson, provided such shippers are willing to sign qualifying long-term firm transportation agreements. To ensure clarity, we will revise section 157.36 to read as follows:

“In considering a proposed voluntary expansion of an Alaska natural gas transportation project, the Commission will consider the extent to which the expansion will be utilized by shippers other than those who are the initial shippers on the project and, in order to promote competition and open access to the project, may require design changes to ensure that some portion of the expansion capacity will be allocated to new shippers willing to sign qualifying long-term firm transportation contracts, including shippers seeking to transport natural gas from areas other than Prudhoe Bay or Point Thomson.”

II. Presumption of Rolled-in Rates for Expansions

A. Final Rule - § 157.39

39. Section 157.39 states that “[t]here shall be a rebuttable presumption that rates for any expansion of an Alaska natural gas transportation project shall be determined on a rolled-in basis.” The Commission stated in Order No. 2005 that by providing for this presumption, the Commission is advising potential shippers, in advance of any initial Alaska natural gas transportation project open season, of its intention to harmonize the objective of rate predictability for initial shippers with the objective of reducing barriers to future exploration and production in designing rates for future expansions of any Alaska natural gas transportation project. The Commission concluded in Order No. 2005 that section 157.39 is consistent with “our guiding principle that competition favors all of the Commission’s customers, as well as with the objectives of the Act, to adopt rolled-in rate treatment up to the point that would cause there to be a subsidy of expansion shippers by initial shippers, if any subsidy were to be found.”

B. Rehearing/Clarification Requests

40. The North Slope Producers, Enbridge, and ChevronTexaco assert that the presumption in favor of rolled-in rates for voluntary expansions established in section 157.39 creates uncertainty for shippers and project sponsors, and, therefore, section 157.39 should be eliminated from the regulations or substantially revised. The

North Slope Producers and Enbridge claim that prospective initial shippers, fearing that in the future their rates may be increased to subsidize the cost of expansion facilities, will be less willing to make the long-term commitments necessary to support an Alaska project. This uncertainty, they predict, will discourage rather than advance the development of an Alaska pipeline or any voluntary expansion thereof – a result clearly inconsistent with ANGPA’s primary goal. Moreover, the North Slope Producers and Enbridge suggest that mandatory expansions pursuant to ANGPA section 105 will become more attractive than voluntary expansions because of the explicit rate protection for existing shippers in section 105.

41. The North Slope Producers contend that section 157.39 is unjustifiably inconsistent with the Commission’s current policy regarding rate treatment of expansions, which is to discourage uneconomic expansions and assure that expansions will not be subsidized by existing shippers. They assert that even if, as claimed by the Commission, only one pipeline will be built in Alaska, that distinction does not justify deviating from the Commission’s current policy.

42. The North Slope Producers charge that the Commission acted arbitrarily and capriciously in relying on ANGPA section 103(e) to justify its conclusion to provide for a presumption of rolled-in rates for expansions. Although the North Slope Producers concede that the Commission clearly has the authority under ANGPA and the NGA to approve rates for Alaska natural gas transportation projects, they claim that ANGPA section 103(e) has nothing to do with rate regulation. Furthermore, state the North Slope Producers, even if section 103 could be read to give the Commission authority to include rate regulations in its open season rules, the proper course would be to remove section 157.39 from the open season rules and instead address rate policy issues only after the parties have the opportunity of developing a complete factual record. Failing this, the North Slope Producers state that the Commission should revise section 157.39 to provide that the Commission’s current rate policies will apply to Alaska projects.

43. Enbridge also argues that the Commission acted arbitrarily and capriciously by imposing a rebuttable rolled-in presumption, even where rolled-in pricing would increase existing shippers’ rates. According to Enbridge, Order No. 2005 identifies two considerations, namely the Commission’s disfavor of existing shippers subsidizing the rates of new shippers, and the Commission’s reluctance to authorize an expansion rate that would have an unduly negative impact on the exploration and development of Alaska reserves. Enbridge contends that the presumption should be “scaled back” to apply only to cases where expansion rates are no higher than pre-existing rates. Enbridge points to the Commission’s acknowledgement in Order No. 2005 that it “cannot at this point, without a specific project proposal or the facts surrounding a proposed expansion before

us, define exactly what will be required to overcome the presumption.” Enbridge contends that the Commission’s inability to explain how the presumption can be rebutted renders rolled-in pricing mandatory, leaving the question of whether a rolled-in expansion rate that is higher than original rates is a subsidy to be resolved in a future NGA section 7 filing.

44. ChevronTexaco stresses that because the text of Order No. 2005 recognizes that “without a specific project proposal or the facts surrounding a proposed expansion” the Commission cannot determine what is needed to overcome the presumption favoring rolled-in rates, the Commission should defer any determination of rate treatment for expansions until a record can be developed after a specific proposal is made. According to ChevronTexaco, this inability to articulate when the presumption will be applied creates uncertainty that inhibits the development of any Alaska project.

45. ChevronTexaco states that inconsistency between the text of order and the text of the regulations creates further uncertainty. ChevronTexaco states that while the regulations state that the presumption applies to “any expansion,” Order No. 2005’s text, at paragraphs 124 and 125, suggests that rolled-in rates are appropriate only if there is no increase in rates for existing shippers. ChevronTexaco urges the Commission to clarify section 157.39 to state that no cross-subsidy is intended. Otherwise, the Commission should consider issuing, in lieu of a regulation, a policy statement which outlines the general direction that the Commission intends to take.

46. The Alaska Legislators and Anadarko contend that rolled-in pricing is essential and justified. Anadarko asserts that the Commission clearly has the statutory authority to establish a presumption of rolled-in pricing for future expansions in the open season regulations. Both Anadarko and the Alaska Legislators contend that the significant differences identified in the record between an Alaskan pipeline project and a pipeline in the lower 48 states provide ample justification for departing from the current pricing policy. The Alaska Legislators contend that even if there were some factual reason for applying the current policy, that policy cannot be reconciled with the policy considerations stated in ANGPA. Both Anadarko and the Alaska Legislators state that incremental pricing of expansions cannot be reconciled with ANGPA’s goals of promoting competition in the exploration, development, and production of Alaska natural gas, and providing for the transportation of natural gas other than from the Prudhoe Bay and Point Thomson units in any expansions of the Alaska pipeline facilities. The Alaska Legislators estimate that expanding a pipeline, through looping, to a capacity of 7 billion cubic feet (Bcf), would result in an expansion rate 50 percent higher than existing rates if incrementally priced. Anadarko predicts that incremental pricing of expansions of an Alaskan pipeline beyond 6 Bcf would cause the pipeline to be capped at 6 Bcf.

C. Commission Response

47. ANGPA section 103(i) gives the Commission broad authority to establish “such regulations as are necessary” for the conduct of open seasons. In this regard, the Commission believes that it is appropriate to establish rate criteria that will assist potential shippers to make informed open season bids, and will promote competition, as required by ANGPA. As discussed in detail in Order No. 2005, these criteria include projected rates for in-state deliveries of gas, as well as a presumption for rolled-in rate treatment for future pipeline expansions.

48. In adopting the presumption for rolled-in rate treatment, the Commission balanced rate predictability for initial shippers with the objective of reducing barriers to future exploration, development and production of Alaska natural gas. The Commission was concerned that the prospect of high incremental transportation rates might increase risks to Alaskan producers and serve as a disincentive to future exploration and development of potentially valuable natural gas resources. On the other hand, the Commission does not wish to discourage voluntary capacity expansions.

49. The rolled-in rate presumption was not an abandonment of our current policy of not favoring rate subsidization by existing customers of capacity expansions as suggested in the requests for rehearing. The Commission did, however, suggest that because of the likelihood of a single Alaskan pipeline project, it would consider alternatives to our current policy on how to define or quantify subsidization by current customers. Current policy primarily considers whether the expansion project will result in a rate higher than the existing transportation rate for existing customers. An alternative consideration or definition of subsidization could be whether the expansion rate is no higher than the actual initial rate or of an initial rate without built-in subsidies. The Commission believed and continues to believe that the appropriate place to review this issue is in the context of a future NGA section 7 filing. In such a proceeding, if the pipeline owners can show that the initial pipeline was sized appropriately, *i.e.*, it was uneconomic or inefficient to build a larger capacity pipeline, the Commission would consider this in overcoming the rolled-in rate presumption.

50. The text of Order No. 2005 referred to by ChevronTexaco does not simply state that rolled-in rates are appropriate only if there is no increase in rates for existing shippers; it suggests that a rolled-in expansion rate that is higher than the original rate is not necessarily a subsidy. As noted above, we will determine whether a particular rate amounts to a subsidy when the issue is presented to us.

51. Nothing in the requests for rehearing causes us to question our conclusion that a rebuttal presumption of rolled-in treatment for the expansion of an Alaska Project is a reasonable approach to the difficult issues we, and prospective pipeline proponents and shippers, may face on the future. We think that the signal we are sending is a positive one that will help spur natural gas exploration and development in Alaska. At the same time, we have not prejudged how we will resolve future proceedings, and all parties will have the opportunity to convince us of appropriate rate treatment if and when expansion proposals for an Alaska project are developed. We therefore will not change the rule on this matter.

III. Late Bids

A. The Final Rule - § 157.34(d)(2)

52. Order No. 2005 added a new provision in the Final Rule, section 157.34(d)(2), that a project sponsor must consider any bids tendered after the expiration of the open season by qualified bidders, and may reject them only if they cannot be accommodated due to economic, engineering, or operational constraints, in which case the project sponsor must provide a detailed explanation for the rejection. The Commission explained that this requirement is designed to allow reasonable access to those shippers who may not be ready to participate during the established open season period, and at the same time provide the sponsor with flexibility in the timing of its open season.

B. Rehearing/Clarification Requests

53. The North Slope Producers and Enbridge contend that it is important for the timely development of any project that the project sponsors be able to rely on an open season that has a definite term. They state that the open season results are needed to permit the project sponsor to gauge demand and in turn finalize pipeline design. They assert that the late bid provisions of section 157.34(d)(2) will result in unreasonable risks and costs to the project sponsor by creating a never-ending, open-ended open season in which the project sponsor will be required, for each and every late bid received, to divert resources and incur additional costs to evaluate whether bid can be accommodated. In addition, they state that there is tremendous potential for delay at each step of the development of the project, if the project sponsor must stop and make design changes at every stage to accommodate a late bid. Thus, they state, section 157.34(d)(2) would frustrate the Commission's stated goal of adopting open season regulations that ensure sufficient economic certainty to support the construction of a pipeline.

54. The North Slope Producers add that financing cannot be secured until pipeline design and development costs are known and precedent agreements are in place. Consequently, they claim, the prospect of having to make changes to key project components to accommodate late bids jeopardizes the project sponsor's ability to obtain financing in a timely manner.

55. Both Enbridge and the North Slope Producers also state that section 157.34(d)(2) fails to provide a clear standard under which the project sponsor must evaluate late bids. This failure, they claim, presents another risk of uncertainty and delay. Enbridge argues that, even if it is necessary to significantly re-design a project in order to satisfy a late bid, the regulation would require that such a bid be accepted if the re-designed project remains feasible from an "economic, engineering or operational" perspective.

56. The North Slope Producers state that another effect of the late bid provision is that potential shippers will be discouraged from participating in an open season if they can submit a late bid. They worry that this would diminish the open season's ability to accurately demonstrate the demand for pipeline capacity. Enbridge also claims that, absent a good faith requirement in connection with submitting late bids, section 157.34(d)(2) permits such gamesmanship. Enbridge states that at a minimum, section 157.34(d)(2) should put "the burden on the bidder to demonstrate compelling circumstances that prevented participation in open season, and that the bid can be accommodated without changing system design, requiring capacity to be allocated away from other shippers, or otherwise adversely impacting the project's development and timing." In this regard, the State of Alaska maintains the Commission should include language in section 157.34(d)(2) that requires late bidders to provide adequate justification for their late bids.

57. Additionally, the North Slope Producers assert that, to the extent a project sponsor would be required to expand the project to accommodate late bids, the Commission is in effect ordering an expansion of the pipeline. In such a case, section 157.34(d)(2) raises the same issues regarding forced expansions as are raised by sections 157.36 and 157.37. The North Slope Producers contend that whereas the Commission may require an expansion under section 105, that section places the burden on the party seeking such expansion to establish that specific conditions are met, section 157.34(d)(2) appears to place the burden on the pipeline to justify why it cannot expand the project to accommodate a late bid.

58. Enbridge states that in any event there is little or no reason for section 157.34(d)(2) "given the other measures instituted by Order No. 2005 to protect the interests of late developing shippers." Specifically, Enbridge refers to the

unprecedented level of information required in the open season notice on which bidders will be able to base their long-term capacity decisions, Order No. 2005's emphasis on requiring that the project's design demonstrate a capability for low-cost expansion, and, finally, the mandatory expansion provisions of ANGPA 105. Enbridge contends that to the extent late bids can be accommodated without adversely impacting the project's development, it is in the project sponsor's economic interests to do so.

59. ChevronTexaco requests that the Commission clarify that project sponsors will be required to consider late bids only if there is excess capacity after capacity is allocated to those open who bid in the open season. ChevronTexaco states that one of the major purposes of the open season is provide a level playing field for all participants, thereby eliminating the advantages of possessing superior or advance information. ChevronTexaco cannot understand the Commission's reasoning in giving special consideration to one specific parameter of a conforming bid, namely, the timing of the bid. According to ChevronTexaco, late bidders should not be allowed to put new burdens on the project or to adversely affect timely open season bidders.

60. Anadarko states that section 157.34(d)(2) is a reasonable compromise balancing concerns that the open season could be held prematurely with a project sponsor's desire to control open season timing. Anadarko also states that it is possible to accommodate all qualified bidders up to the time the pipeline design is finalized.

C. Commission Response

61. Under the Commission's open access policy and rules, all operating interstate pipelines have an obligation to receive and respond to new requests for service, even if no capacity is available. All operating pipelines have provisions in their FERC tariffs governing the procedures that the pipeline will use in evaluating requests for service. Absent an expansion,²² capacity could still be made available to a prospective shipper via capacity release or the capacity turnback provisions of an interstate pipeline's FERC

²² Interstate pipelines, other than an Alaska pipeline, cannot be required to expand their systems, but pipelines are required to respond to those who request service, even when none is available.

tariff. During the several years between the time that the open season ends and an Alaskan pipeline goes into service, there will be no tariff with provisions like those described above in effect for that pipeline. Without the late bidder provisions of section 157.34(d), late-developing prospective shippers would have no formal way of seeking capacity on the pipeline after the open season ends. As revised herein, the Commission believes that the late bidder provision is a fair and necessary addition to the open season process for an Alaska natural gas transportation project.

62. The project sponsor's obligation under section 157.34(d)(2) is not "unbounded" or "open-ended," as North Slope Producers contend. We added this requirement in recognition of the possibility that an appreciable amount of time might pass between the close of the open season and the project sponsor's finalizing the details of the proposed pipeline design and associated development costs, given the size and scope of an Alaska natural gas pipeline project. During that time, it is possible that producers of Alaska natural gas who were not in a position to commit to long-term capacity commitments during the open season, might then be in a position to request capacity consistent with the open season notice (except, of course, that the bid is tendered out of time). We felt it proper to require the project sponsor to consider such a request. At the same time, we appreciated that at some point in time, either before or after the proposed pipeline design is finalized, the project sponsor might not be able to accommodate reasonably a late request. For that reason, we provided that late requests could be rejected on the basis of "economic, engineering or operational constraints." This is far from an unbounded, open-ended obligation. Indeed, as noted above, Enbridge points out that to the extent that late bids can be accommodated without adversely impacting the project's development, it is in the project sponsor's economic interest to do so. We see no harm in requiring that result.

63. We will however, revise the requirements of section 157.34(d)(2) in response to the complaints that the "economic, engineering or operational constraints" standard for rejecting late bids is too vague. Specifically, we are clarifying the criteria for rejecting late bids in section 157.34(d)(2) to be "economic, engineering, design, capacity or operational constraints, or accommodating the request would otherwise adversely impact

the timely development of the project.”²³ Additionally, we are adding a provision to the section which will enable the project sponsor, at the appropriate time in the development of its project and subject to Commission approval, to determine, based on the above criteria, that no further bids can be accepted. We will also revise section 157.34(d)(2) to provide that any bid tendered after the expiration of an open season must contain a good faith showing, including a statement of the circumstances which prevented the bidder from tendering a timely bid, and how those circumstances have changed. This requirement is consistent with the underlying premise of section 157.34(d)(2) in the Final Rule, and should serve to protect against “gamesmanship.” With these revisions and clarifications, we believe that the late bid provision will permit late-developing shippers to obtain capacity after the expiration of the open season, while also providing the prospective applicant the assurance that it will be able to design and develop its project according to its own schedule.

V. Mandatory Pre-Approval

A. The Final Rule - § 157.38

64. Section 157.38 requires that, at least 90 days prior to providing its notice of open season, an applicant must file, for Commission approval, a detailed plan for conducting the open season in conformance with the regulations. The Commission will establish a date by which comments on the request for approval are due, and the Commission, unless it directs otherwise, will act on the request within 60 days of its filing. The Commission concluded in Order No. 2005 that this requirement would allow for the resolution of disputes or dissatisfaction with an open season at the earliest possible time, thereby reducing the risk of having to require a second remedial open season because the first one did not conform to the regulations.

²³ We are retaining the requirement that the prospective applicant must provide a detailed explanation for its rejection, at least until such time as it has determined, subject to Commission approval, that no further late bids can be accepted. We find that, based on the prospective applicant’s position, it is easier for it to evaluate why a late bid cannot be accepted, than it is for a later bidder to explain why its bid can be accommodated.

B. Rehearing/Clarification Requests

65. The North Slope Producers and Enbridge urge the Commission to eliminate the mandatory pre-review process set out in section 157.38, calculating that with the addition of this mandatory review, the open season process will take at least 210 days, instead of the 120-day open season period proposed in the NOPR and established in section 157.34. They state that this additional 90 days does not include further delays that could result from disputes arising during the pre-review process, including the need to consider requests for rehearing of any orders pre-approving an open season or the Commission's inability to adhere to its 90-day window. The result, they claim, is that the open season process will be delayed, not expedited. Enbridge states that the 210-day period is longer than the 180-day open season period which the Commission rejected as inconsistent with Congress' sense of urgency, as well as the Commission's conclusion in Order No. 2005 that "timing is of the essence."

66. The North Slope Producers maintain that the Commission's justification for this requirement is that a successful open season is more likely to occur if issues are identified and resolved at the earliest time. The North Slope Producers disagree, claiming that, instead of reducing the chance of post-bid disputes, this layer of review will provide those who would gain commercial leverage by delaying the open season process "with an additional bite at the apple, first by objecting to the bid package, then by objecting to the results of the open season."

67. Both the North Slope Producers and Enbridge contend that the mandatory pre-review process is unnecessary and duplicative of other protections provided in Order No. 2005, including the transparency and specificity of the open season information, the 30-day prior notice requirement, the prohibition against undue discrimination or preference in rates, terms or conditions of service, and the imposition of Order No. 2004 standards of conduct. They contend that the effects of any delay of the open season can be profound, due to narrow, seasonal windows for environmental studies and preliminary field work, which cannot take place until the open season has been held. These risks, they claim, far outweigh any utility of a mandatory pre-review. In conclusion, the North Slope Producers contend that any pre-review of the open season notice should be voluntary, shortened, and that the Commission decision on the sufficiency should be deemed a pre-decisional, non-reviewable determination, similar to the Commission's action in rejecting a deficient certificate application under section 157.8 of the Commission's regulations.

68. Anadarko defends the mandatory pre-review requirement as striking an “appropriate balance between granting project sponsors flexibility in designing open seasons and providing regulatory supervision to potential bidders by requiring project sponsors to file and obtain approval of the open season plan.” Anadarko and the Alaska Legislators state that pre-approval will reduce any risk of having to hold a second open season to correct one done improperly. Anadarko states that this will, as the Commission believes, promote rather than hinder a timely and successful open season. The Alaska Legislators agree with this assessment, contending that adding 90 days to the front end of the open season process, even with the prospect of a rehearing, is better than having an open season called back by an order on rehearing or on appeal from the results of an open season, and then having to hold another open season. Moreover, they state that once the open season is approved, parties may rely on those terms being controlling throughout the bidding and contracting process.

C. Commission Response

69. The North Slope Producers and Enbridge correctly state that, by virtue of the mandatory pre-approval established in section 157.38, the minimum duration of the whole open season process would be 210 days. However, the concept of a mandatory pre-approval and the attendant additional time that such review will add is not inconsistent with our concern that “time is of the essence” that caused us to reject a 180-day open season period, and instead provide for a 120-day open season.²⁴ Our focus in establishing this 120-day period was to arrive at a time period such that all prospective bidders reasonably could review the open season information and evaluate whether to make multi-year capacity commitments, thereby leveling the playing field.

70. When discussing the duration of the whole “open season process,” we must consider the potential for delays due to disputes arising during the open season. In this regard, we found in Order No. 2005 that pre-approval of open season procedures would “allow issues to be identified and resolved at the earliest possible time and, ideally, reduce the possibility of dissatisfaction with open seasons, as well as the risk that the

²⁴ The 120 days consists of the 30-day prior notice period (section 157.34(a)), followed by a 90-day open season (section 157.34(d)(1)).

Commission will have to require that deficient open seasons be conducted again.”²⁵ The North Slope Producers’ and Enbridge’s disagreement with this assessment is based on arguments that the transparency and specificity of the information required in the open season and other protections provided in the open season rules render pre-approval unnecessary, and that the pre-approval process itself invites delay.

71. We are not as optimistic as the North Slope Producers and Enbridge that there is little likelihood that disputes might arise over the conduct of an open season and its conformance with the open season rules. While the transparency and specificity of the open season rules might lead to a clearer identification of any issues in dispute, they do not change the fact that in any open season there will be a universe of potential bidders with starkly different, competing needs and interests, and the potential for dispute is real. We continue to believe that getting it right the first time is the best approach.

72. Nonetheless, in revisiting the requirement for mandatory pre-approval as a result of these rehearing requests, we find that it is appropriate to make some changes. First, we are revising section 157.38 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). Since the public will have actual notice of a prospective applicant proposed open season notice at least 90 days prior to the open season, there is no reason to provide for an additional prior notice period. By this change, we are reducing the 210-day period to 180 days. It also our conclusion that, given the fact that participants in an open season will have the opportunity to object to the conduct of the open season after a certificate application is filed, as is our current practice, as well as the ability to seek rehearing and obtain appellate review of any Commission certificate orders, orders approving open season procedures will be interlocutory and not subject to rehearing.

V. In-State Study

A. The Final Rule - §157.34(b)

²⁵ Order No. 2005 at P 109.

73. In response to concerns expressed by Alaska entities and in recognition of Congress' mandate that Alaska in-state needs be given due consideration, the Final Rule added in section 157.34(b) a requirement not contained in the proposed regulations that the open season information include an assessment of Alaska's in-state needs and prospective points of delivery within the State of Alaska, based to the extent possible on any available study performed or otherwise approved by an appropriate Alaska governmental entity.

B. Rehearing/Clarification Requests

74. While the North Slope Producers find reasonable a requirement that a study of in-state needs be completed prior to any open season, they object to section 157.34(b)'s requirement that the contents of the open season notice rely on an in-state study, if practicable. They assert that ANGPA does not require a pipeline sponsor's study to "include or consist" of a state-sanctioned study. The North Slope Producers contend that this requirement invites disputes as to whether it is "practicable" to include a state study, or whether "appropriate" state officials were involved. Consequently, the North Slope Producers request that the Commission revise section 157.34(b) to require that a project sponsor consult with the State regarding the study for in-state needs.

75. The Alaska Legislators state that the Commission has avoided the problem of "dueling studies" by deferring the study to the State of Alaska. In this regard, the Alaska legislators advise the Commission that the State of Alaska has undertaken to designate an appropriate agency to conduct or sanction the required study, and the Alaska House of Representatives has passed a resolution urging the Administration to conduct, approve, or sanction the required study prior to the effective date of the opens season rules.

C. Commission Response

76. Section 157.34(b) does not mandate the use of a particular study but rather is premised on the common-sense notion that information provided by the State of Alaska likely will be valuable to potential shippers. We trust that the State and prospective pipeline applicants can agree on the manner in which such information can be provided. If questions arise as to the extent to which it is possible to include a state study, we will resolve them. Our regulations offer several options that the prospective applicant and the State of Alaska could take to ensure the adequate involvement of the State. Accordingly, we will not revise section 157.34(b).

VI. In-State Rates

A. The Final Rule - § 157.34 (c)(8)

77. In addition to the requirement that in-state gas needs be addressed in the open season, the Commission also required, in section 157.34(c)(8), that, based on in-state needs and the delivery points identified in the study, open season information include a proposed in-state transportation rate, based on the costs of providing that service.

B. Rehearing/Clarification Requests

78. The North Slope Producers ask the Commission to clarify that estimating rates for in-state service does not create a requirement to offer such a service at that rate (or at all) if the open season does not yield firm commitments for in-State deliveries. They assert that the ultimate indicator of any market for in-state service is the willingness of shippers to make firm commitments to purchase capacity for in-state use during the open season, not a study. They also request that the Commission clarify that the estimated in-state service rates are merely illustrative and subject to adjustment.

79. Enbridge requests that the Commission make clear that the “estimated transportation rate” referred to in section 157.34 (c)(8) is one based on project sponsor’s estimated costs to make in-state deliveries, not upon any rates assumed by the study. Additionally, Enbridge states that the Commission clarify that bids for in-state service should be subjected to the same requirements for creditworthiness, collateral and execution of binding contractual commitments as apply to any other open season bidder.

80. The State of Alaska asks the Commission to clearly state that the in-state rates are to be distance-sensitive in order to ensure that the cost of in-state service is calculated properly.

C. Commission Response

81. During the open season process, qualified bidders must successfully bid upon and arrange to consummate service agreements for transportation service. Projected rates for in-state deliveries must be based on estimates of costs for providing service to the in-state delivery points. While prospective applicants will estimate rates during an open season, the Commission’s review of proposed rates will be guided by section 284.10(c)(3) of our regulations, which states in part that “[a]ny rate filed for service ... must reasonably reflect any material variation in the cost of providing the service due to ... the distance over which the transportation is provided.”

82. All shippers on any new interstate pipeline have a right to pay only the initial rate on file as approved in the NGA section 7 certificate of public convenience and necessity. Those initial rates, approved under section 7 as part of the certificate, would be paid unless changed under section 4 or 5 of the NGA after appropriate regulatory proceedings and upon the Commission's order. However, under the Commission's negotiated rate policy,²⁶ pipelines and shippers are free to make an agreement to "dispense with cost-of-service regulation" and agree to any mutually agreeable rate. A recourse rate found in the pipeline's tariff would be available for those shippers preferring traditional cost-of-service rates. Thus, if an in-state service is successfully bid upon, filed for and approved, an in-state cost-of-service recourse rate would be set in an Alaskan pipeline's tariff, but in-state shippers would also be free to seek a negotiated in-state rate with an Alaskan pipeline. Negotiated rates can be used to lock in transportation costs and pipeline revenues to the mutual benefit of both the shippers and the pipeline, without the risks of later changes to rates and revenues under the NGA.

83. If there are no successful bids for in-state service, the prospective applicant would nonetheless have to include the in-state service as part of its proposed initial tariff. An opportunity to have in-state service might arise if the pipeline voluntarily accepts a request for it at a later time, or if the Commission acts under section 103(h) of ANGP and section 5 of the NGA to require the pipeline to make such in-state deliveries. The actual in-state rate for in-state service would be an issue for such future proceedings. Based on the foregoing, we see no need to further clarify the regulations.

VII. Tying Arrangements

A. The Final Rule - §§ 157.34(c)(6), 157.34(c)(10), and 157.35(a)

84. The Commission addressed the matter of tying access to pipeline capacity on an Alaska project to ancillary services in two sections of the Final Rule. First, section 157.34(c)(6) requires that the open season notice must contain an unbundled

²⁶ Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Docket No. RM95-6-000, Regulation of Negotiated Transportation Services of Natural Gas Pipelines, Docket No. RM96-7-000, 74 FERC ¶ 61,076, (Jan. 31, 1996).

transportation rate. Second, section 157.34 (c)(10) prohibits a prospective applicant from requiring prospective shippers to process or treat their gas at any designated facility. We explained elsewhere in Order No. 2005 “that [we] can address any other discriminatory conduct in connection with gas quality requirements or other ancillary services through the provisions of section 157.35 in conjunction with existing Commission policies and procedures.” Relevant to this explanation, section 157.35(a) provides 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 awarded as a result of any open season shall be awarded without undue discrimination or preference of any kind.”

B. Rehearing/Clarification Requests

85. The State of Alaska states that the Commission should more explicitly explain the prohibition against tying arrangements, and explain how the open season rules will apply to gas treatment plants. The State believes that the open season rules should do more than require an applicant to use an unbundled transportation rate, prohibit tying of capacity on the pipeline to the use of a designated plant or facility, and merely refer to the existing regulations and policies prohibiting undue discrimination or preference. Rather, Alaska states that the open season rules should make clear that any tying arrangements will be subject to an exacting inquiry by the Commission and will require a compelling justification, and even offers recommended language to this end.

86. Alaska also states that since ANGPA includes gas treatment plants in its definition of an Alaska natural gas transportation project,²⁷ treatment plants should be subject to the open season regulations. Alaska points out that the effect of the unbundling requirement of section 157.34(c)(6) is to exclude gas treatment plants from the requirements of the open season. As a possible solution, Alaska suggests that the open season rules be clarified to provide that the applicant must separately offer gas treatment plant capacity and pipeline capacity in the open season notice, and give bidders an opportunity to bid on

²⁷ ANGPA §102(2) defines the term ‘Alaska natural gas transportation project’ as “any natural gas pipeline system that carries Alaska natural gas to the border between Alaska and Canada (including related facilities subject to the jurisdiction of the Commission) ...”

either or both, as they choose. ChevronTexaco contends that because gas treatment plants are jurisdictional facilities,²⁸ Order No. 2005's approach of deferring consideration of any discriminatory conduct as to necessary such ancillary facilities and services to a later day does not satisfy the requirements of the ANGPA. Chevron Texaco maintains that it is particularly important that access to treatment facilities be subject to the same open season, non-discriminatory requirement as the pipeline because pipeline capacity without access to gas treatment facilities that maybe a part of the pipeline system is meaningless.

C. Commission Response

87. The Commission did not intend to preclude the inclusion of jurisdictional natural gas conditioning facilities from the open season. If, pursuant to ANGPA section 103, a project sponsor intends to file an application under section 7 of the NGA for authorization of a project that includes a jurisdictional natural gas conditioning service, we will review the open season plan and notice to ensure that such service is offered in its open season notice, subject to the same requirements as apply to transportation service. However, the prospective applicant must offer a separate rate for the gas treatment service and separate rate for the transportation service. Furthermore, the prospective applicant can neither require bidders to bid on both services, nor evaluate the bids based on whether bidders requested one or both services. Moreover, while the prospective applicant can require specific natural gas quality specifications such as would be met by using the conditioning services offered, it cannot reject an otherwise qualified bidder that states that it will deliver to the pipeline facilities gas that meets the stated quality specifications.

88. On the other hand, if a prospective applicant is proposing to apply to revise the Alaska Natural Gas Transportation System (ANGTS) application now held in abeyance, then a conditioning service will have to be included as a part of the open season but again, with all services offered priced separately. Specifically, in 1981, President Reagan submitted a Waiver of Law to Congress for the purpose of clearing away certain government-imposed obstacles to the private financing of the ANGTS. The Commission

²⁸ See *Venice Gathering Co.*, 97 FERC ¶ 61,045 at 61,255 (2001) (Treatment of gas to enhance its safe and efficient transportation is subject to Commission jurisdiction).

implemented that portion of the Presidential waiver that required the Commission to include within the ANGTS the gas conditioning plant at Prudhoe Bay.²⁹

VIII. Pre-Subscribed Capacity

A. The Final Rule - §§ 157.33(b) and 157.34(c)(15)

89. Under section 157.33(b), pre-subscription agreements for initial capacity on a proposed Alaska natural gas transportation project are permitted, provided that capacity is offered to all open season prospective bidders at the same rates and on the same terms and conditions as contained in the pre-subscription agreements. In addition, if there is more than one pre-subscription agreement, open season prospective bidders are given the option of selecting the rates, terms and conditions contained in any one of the several agreements. However, section 157.34(c)(15) states that “[i]f capacity is oversubscribed and the prospective applicant does not redesign the project to accommodate all capacity requests, only capacity that has been acquired through pre-subscription shall be subject to allocation on a *pro rata* basis; no capacity acquired through the open season shall be allocated.”

B. Rehearing/Clarification Requests

90. The North Slope Producers assert that the provision in section 157.34(c)(15) subjecting only presubscribed capacity to *pro rata* allocation, will dissuade any shippers from signing up for the presubscribed capacity, thereby “wholly negating” the recognized benefits of allowing pre-subscription agreements to facilitate the development of an Alaska natural gas transportation project. They predict that prospective shippers would rather wait for the open season than risk proration. The North Slope Producers maintain that this selective proration unduly discriminates against those shippers who are willing to make early commitments for firm capacity in order to support the project, in violation

²⁹ See *Alaskan Northwest Natural Gas Transportation Co.*, 18 FERC ¶ 61,002 (1982).

of the NGA and Commission policy. They add that since section 157.33(b) allows all open season participants to enjoy the same benefits as contained in the pre-subscription agreements, such discrimination is particularly unjustified. The North Slope Producers add that this is another example where the Commission is attempting to compel the project sponsor to make design changes in order to accommodate all bids.

91. The North Slope Producers also state that the final clause of section 157.34(c)(15) is not consistent with the Commission's presumed intent not to foreclose proration among open season bidders where there is no presubscribed capacity. They suggest that the final clause of that provision, which states "no capacity acquired through the open season shall be allocated," should be clarified.

92. In addition to agreeing that proration renders pre-subscription an unattractive option for prospective shippers, Enbridge adds that the additional requirement that the terms and conditions of any pre-subscription agreements be made public prior to the open season notice renders pre-subscription even less desirable because it put anchors shippers at a competitive disadvantage to open season bidders who would have prior knowledge of the pre-subscription bids. At the same time, Enbridge concedes that it would be highly unlikely that project would not be re-designed to accommodate capacity of all qualified bids at the incipient, open season stage.

93. Enbridge raises again the claim that the "numerous and overlapping protections" of Order No. 2005, in particular the level of information provided in open season notice and measures provided to ensure against discrimination, are sufficient to ensure a fair, open and non-discriminatory open season process. Enbridge also states that the Commission should clarify that open season shippers who in the open season elect to select the terms and conditions of a pre-subscription agreement may not cherry-pick" terms and conditions from several agreements but must accept any one agreement in its entirety.

94. The State of Alaska seeks clarification that, in the case of capacity allocation on an oversubscribed pipeline that cannot reasonably be redesigned, both presubscribed capacity and capacity later acquired on the same rates, terms and conditions will be subject to allocation, for the reason that the final words of section 157.34 (c)(15) stating that "no capacity acquired through the open season shall be allocated," suggests otherwise.

95. ChevronTexaco maintains that the Commission failed to consider and provide for the various circumstances that could trigger the pro-rationing of pre-subscribed capacity. ChevronTexaco states that bidders in the open season could outbid pre-subscribing

shippers on the basis of any of the qualifying conditions: for instance, an open season bidder might outbid pre-subscribing shippers whose agreements are at less than maximum rates, or whose agreements are of shorter terms. ChevronTexaco is concerned that pre-subscribing shippers might lose their capacity to open season bidders who outbid them because they know the salient terms of the pre-subscription agreements. Therefore, ChevronTexaco submits that the Commission should expand the requirement of pro-rationing by establishing that all bids eligible to be allocated capacity in an open season where pre-subscribing shippers will be prorated should be treated as having equal value to the pre-subscription precedent agreement for purposes of pro-rationing. In this way, later qualifying bidders would be prevented from outbidding pre-subscribing shippers.

96. In response to the claims on rehearing that the capacity allocation provisions of section 157.34(c)(15) are counterproductive because they will deter potential anchor shippers from entering into pre-subscription agreements, Anadarko contends that the Commission's finding that the North Slope Producers' unique position of control over pipeline design amply justifies putting the consequences of any decision not to redesign pipeline to accommodate all bidders on them. Anadarko also questions the importance placed on pre-subscription agreements in connection with an Alaska pipeline project. According to Anadarko, the only justification for a pre-subscription agreement is to facilitate financing and to provide the project sponsor with assurances that it has the commitments to justify development and construction expenses. However, states Anadarko, there is little doubt that any Alaska natural gas transportation project will be fully committed, even without pre-subscription agreements.

97. The Alaska Legislators support the pre-subscription rules of Order No. 2005, claiming that the rules make sense given the unique nature and circumstances of an Alaska natural gas transportation project and the need to balance concerns "that pre-subscription is essential to finance the pipeline with concerns of those who feared that such arrangements would favor affiliates of the pipeline or otherwise undermine the objectives of conducting public open seasons for capacity."

C. Commission Response

98. Although we allowed pre-subscription agreements in the belief that they could have utility in facilitating the development of an Alaska natural gas transportation project, we cannot quantify how beneficial such arrangements are. Our paramount consideration in allowing pre-subscription was that it should not impact in any way the capacity obtained through the open season process. For this reason, we provided that any capacity acquired by reason of agreements entered into prior to the open season would have to yield to capacity bid for in the open season in the case of oversubscription. We

believe our reasons for this selective proration, as stated in Order No. 2005 and reaffirmed here, are sound.

99. The argument that anchor shippers will be dissuaded from entering into pre-subscription agreements if they risk losing capacity as a result of open season bidding, and that the “recognized benefits” of pre-subscription will be lost, is unpersuasive. The North Slope producers and other potential project sponsors have developed a plethora of information in recent years regarding the viability of an Alaska project. They are fully capable of deciding whether they wish to execute pre-subscription agreements. If they do not, capacity will be allocated in an open season. There has been no showing that an Alaska project cannot be financed, as are many major projects, based on commitments made in an open season. While we have concluded that the public interest permits pre-subscription, under the conditions established by the rule, we do not find that the public interest requires pre-subscription. It does require competition and open-access. We leave it to potential project sponsors and shippers whether pre-subscription makes sense to them.

100. We will, however, clarify section 157.34(c)(15) in two respects, first to eliminate confusion over the last sentence of that section which concludes “no capacity acquired through the open season shall be allocated,” and second to make clear that in the event there is more than one pre-subscription agreement, bidders in the open season may not cherry-pick among the provisions of the several agreements. The North Slope Producers contend that the last clause of section 157.34(c)(15) might be read to provide that proration is foreclosed among open season bidders even where there is no presubscribed capacity. We will clarify the language of the rule to avoid such a misreading. Capacity bid for in the open season is exempt from allocation only in a case where there is also presubscribed capacity, as explained in the text of Order No. 2005. The State of Alaska reads that clause to suggest that capacity acquired by bidders in the open season who elect to acquire their capacity on the same rates, terms and conditions as contained in a pre-subscription agreement will not be subject to pro rata allocation along with the pre-subscription shippers. Such an interpretation also misreads the intent of section 157.34(c)(15), and we will clarify the language of the rule accordingly. Finally, we will clarify section 157.33 to make clear that open season bidders may not cherry pick among the provisions of several precedent agreements, as was our intent in the Final Rule.

IX. Other Issues

101. The North Slope Producers request that the open season rules be clarified in certain respects. First, they request that the Commission clarify the open season

regulations by replacing references to “prospective points of delivery within the State of Alaska” or “delivery points” in several subsections of the regulation with the term “tie-in points.”³⁰ The North Slope Producers assert that the term “delivery point” implies an obligation that the pipeline will be finally designed to deliver gas all the way to in-State markets and that ANGPA does not contemplate or impose such an obligation.

102. The Commission understands the terms “prospective points of delivery within the State of Alaska” or “delivery points” to mean those points on the interstate Alaskan pipeline where custody of the gas would be transferred to the facilities of an intrastate pipeline, local distribution company, or end-user whose facilities are not otherwise under the Commission’s jurisdiction, assuming that shippers on an Alaska pipeline requested such deliveries. The term “tie-in points” as used only once in ANGPA is used in reference to the study of in-state needs in section 103(g) and as a familiar natural gas industry phrase is not as familiar to the Commission as the terms “points of delivery” or “delivery points.”³¹

103. As part of the open season, the prospective applicant is in fact obligated to offer to deliver gas at least at certain prospective in-state delivery points identified in the study of in-state needs. However, the open season notice’s initial design of the pipeline need only match the prospective applicant’s open season business proposal to deliver at least the amount of gas identified in the study of in-state needs at those prospective in-state delivery points. Bidders may seek alternative delivery points (such as ones closer to their market) as part of their bids, and as part of the open season the prospective applicant may consider building additional facilities to such alternate points, but has no obligation to do so as long as it treats similar requests the same. As discussed above, if the open season ends without any successful bids for in-state deliveries, then there is a continuing obligation for the prospective applicant to leave provision for such in-state service available in its tariff, but it would not have to voluntarily propose such service as part of its initial application. Also, as used in section 157.34, the term “delivery point(s)” also refers to the location at the border between Alaska and Canada where presumably

³⁰ These sections include §§ 157.34(b) and 157.34(c)(1), (2), (3), (6), (8), and (16).

³¹ Although tie-in point is used in some Commission documents, the most common use is to identify the point where a pipeline’s loop ties back into the mainline.

prospective bidders will seek to have their volumes delivered. It would be much more confusing if the regulations were revised to refer to “tie-in points” for points inside Alaska and “delivery points” for locations at the border between Alaska and Canada. Therefore, we will not clarify the rules as requested by the North Slope Producers in this regard.

104. Second, the North Slope Producers state that the “catch-all” language in section 157.34(c)(18) was not scaled back enough from the language proposed in the NOPR. Specifically, they state that as written, the final regulation requires a pipeline applicant to provide all bidders, not only with information the applicant has provided to any bidder, but also with information “in the hands of” any bidder. The North Slope Producers claim that the applicant cannot know what information identified in section 157.34(c)(18) is “in the hands of a potential shipper.” Moreover, they contend that while the text of Order No. 2005 does not discuss the intent of this subsection, the Commission’s press release and the Commission staff’s PowerPoint presentation at the February 9, 2005 Commission Open Meeting presentation refer to information that the applicant has in some way made available to a potential shipper, and the regulations should be clarified to be consistent with this intent. The North Slope Producers add that, read literally, this language would call for protected information. Enbridge, on the other hand, claims that section 15734(c)(18) should be eliminated as unnecessary due to the transparency assured by the rest of the numbered subsections of section 157.34(c).

105. Anadarko objects to this requested clarification, pointing out that the North Slope Producers are likely already to possess relevant project-related information as a result of discussions with other possible project sponsors, and if the North Slope Producers becomes the project sponsor, this information is already in their hands and was not made available to them by an applicant.

106. The “catchall” provision addresses the difficult issue of separation of functions between a prospective applicant and its affiliates who produce, sell or market Alaska gas, and as such are potential bidders for capacity on an Alaska natural gas transportation project. It has been targeted as a problem since it appeared in the NOPR and it was discussed extensively in the Final Rule.³² The North Slope Producers have undertaken

³² See Order No. 2005 at P 72 -83.

millions of dollars of due diligence “homework” on the design, cost, operation and feasibility of an Alaska pipeline. If they are not affiliated with the prospective applicant for an Alaska pipeline, then all that knowledge and information is theirs and, presumably, would give them an informational advantage in the open season bidding. However, if the North Slope Producers are affiliated with the prospective applicant, then the Commission and other potential bidders must be assured that any relevant information about the design, cost, operation and feasibility of an Alaska pipeline that the North Slope Producers transfers to an affiliated prospective applicant is available to everyone. The Commission desires to make this very important part of the Final Rule as clear as possible. Thus, we will revise section 157.34(c)(18) to read as follows:

All 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;

The Commission understands that the scope of this information is extensive. Therefore, we will not require that the contents of the open season notice to be published by the prospective applicant must contain copies of all the documents which would be covered under section 157.34(c)(18), but that the notice identify a “public reading room” where such information is available, for copying at the reader’s expense. Further, as the North Slope Producers point out, dealing with potential “protected information” will have to be addressed as it is in any commercial situation. The Commission expects that all parties will cooperate in dealing with “protected information,” but as in all matters pertaining to the open season process, the Commission and its staff stand ready to assist in resolving any disputes.

107. Third, the North Slope Producers request that the Commission clarify the requirement in section 157.35(c) 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.” They claim that they intend to create a separate entity to be the project sponsor and to conduct the open season, and that this section would require them to establish yet another separate entity to conduct the opens season, and that section 157.35(c) should be revised to reflect that this is sufficient. Specifically, the North Slope Producers propose to delete from the regulations the language requiring that a project applicant must designate a separate unit

or division to conduct the open season. Anadarko claims that this requested clarification would largely nullify the purpose of section 157.35(c).

108. The Commission denies the North Slope Producers' proposed change to section 157.35(c). However, the Commission will amend the section to take into account situations in which a project applicant is an entity that has been separately created for the purpose of conducting an open season. In such cases, the separate entity would comply with the provisions of section 157.35(c) if that project applicant functioned and operated independently from the project applicant's Marketing and Energy Affiliates, as well as the other divisions of the project applicant. The purpose of section 157.35(c) is to ensure that the project applicant conducting the open season is independent of, and does not favor, its affiliates. If the project applicant was created to comply with section 157.35(c) and does, in fact, comply with the regulation, the project applicant is not required to create a further subdivision to achieve compliance.

109. The North Slope Producers identify several other non-substantive clarifications to the regulatory language that should be made to avoid confusion.³³ These corrections will be made.

110. Enbridge argues that since the open season regulations require that the project design criteria include a requirement that the project be capable of "low-cost expansion,"³⁴ the Commission should explain that the threshold for satisfying the low-cost expansion" standard is any expansion that does not increase rates to initial shippers. However, as Enbridge recognizes, any certificate application for an Alaska natural gas

³³ These include typographical errors in section 157.35(d) (references to sections 258.4(a)(1) and (3) should be to sections 358.4(a)(1) and (3)), Order No. 2005, P 74 (should cite to §§ 358.5(d) and 358.4(e)(3) rather than §§ 358.4(d) and 358.(b)(e)(3)); section 157.34(c)(9) ("proscribed" should be changed to "prescribed"); and section 157.33(b) ("terms, rates, terms and conditions" should be changed to "duration, rates, terms and conditions"). The North Slope Producers also suggest that the term "rate amounts" in section 157.34(c)(9) should be changed to "rates" as the latter term is more commonly used in the industry.

³⁴ *See, e.g.*, Order No. 2005 at P 82; section 157.37.

transportation project might provide detail regarding several expansion scenarios depending on and in response to the results of the open season. The project design review that the Commission will undertake focuses on the proposed project's ability to accommodate the capacity bid for in the open season, as well as the extent to which the project can accommodate "low-cost" expansion. All expansions will involve cost. Obviously, as recognized by virtually all stakeholders, capacity that can be gained by compression alone would typically be the lowest-cost expansion. At the other end of the spectrum would be a pipeline that has no compression-only expansion potential, necessitating the need for looping in the first instance. The operative word in connection with any "low-cost" standard in section 157.37, is the *extent* of the design's expandability, and that standard is not tied to the cost impact of a given expansion. Consequently we will not clarify section 157.37 as requested by Enbridge.

111. ChevronTexaco claims that the Final Rule contains a conflict about how the contract term might be used by the prospective applicant in establishing its methodologies for the evaluation of bids and the allocation of capacity due to oversubscription, should that be necessary. It states that this confusion is caused because contract term is not mentioned in section 157.34(c)(14) regarding evaluation of bids, but is mentioned in section 157.34(c)(15) regarding allocation of capacity due to oversubscription. ChevronTexaco also complains that the Commission's stated intention to rely on after the fact enforcement of issues that might be caused by unusual contract terms, rather than set a cap on contract term for the purpose of bidding and allocation review methodologies, does not satisfy ANGPA's mandate that the Commission's open season rules are fully prescriptive. ChevronTexaco requests that the Commission clarify the open season regulations to require that open season notices to include a cap on the contract term for capacity bids.

112. First, our intention to rely on after-the-fact enforcement of open season issues that might be caused by unusual contract terms, or by any other aspect of the open season process that is not specifically enumerated in the open season regulations, completely satisfies the intent of Congress as stated in ANGPA. Moreover, as explained in Order No. 2005, it is consistent with our existing policy. However, we do agree that the discrepancy in language between section 157.34(c)(14) and section 157.34(c)(15) should be clarified to provide consistency between the methodologies for the evaluation of bids and the allocation of capacity due to oversubscription. To be consistent and avoid confusion, we will delete the phrase "including price and contract term" from section 157.34(c)(15). Furthermore, we will look carefully at this issue in our review of any open season plan and notice under section 157.38.

113. ChevronTexaco claims that the only way to assure that an open season was conducted fairly and in accordance with the open season rules is by making the precedent agreements publicly available. Therefore, ChevronTexaco objects to the provision in section 157.34(d)(4) which provides that all precedent agreements and correspondence with bidders who were not allocated capacity must be filed with the Commission, but that they may be filed under a request for confidential treatment pursuant to section 388.112 of the Commission's regulations. ChevronTexaco claims that since precedent agreements will become agreements that will appear in a pro forma tariff or an effective tariff, there is little chance that the information in the precedent agreements should be confidential for any prolonged period of time, or that any of the information would fall under a Freedom of Information Act exemption. ChevronTexaco states that the precedent agreements could be filed in a public and non-public version in the event parts of the agreements do contain protected information.

114. We deny ChevronTexaco's request. Under section 388.112 of the Commission's regulations, any person submitting a document to the Commission may request privileged treatment by claiming that some or all other information is exempt from the Freedom of Information Act's disclosure requirements. We are not conferring any special confidential status to the agreements. The party requesting privileged treatment must support that claim. It may be, as ChevronTexaco claims, that precedent agreements are not likely to be exempt from disclosure. Neither section 157.35(d)(4) nor section 388.112 predetermines whether privileged treatment will be granted.

Document Availability

115. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

116. From FERC's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number excluding the last three digits of this document in the docket number field.

117. User assistance is available for FERRIS and the FERC's website during normal business hours from our Help line at (202)502-8222 or the Public Reference Room at

(202) 502-8371 Press 0, TTY (202)502-8659. E-Mail the Public Reference Room at public.referenceroom@ferc.gov

Effective Date

118. These regulations are effective as of the date of publication in the FEDERAL REGISTER.

List of subjects in 18 CFR Part 157

Administrative practice and procedure; natural gas; reporting and recordkeeping requirements

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

In consideration of the foregoing, the Commission amends Part 157, Chapter I, Title 18, Code of Federal Regulations, as follows.

PART 157 - APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

1. The authority citation for Part 157 continues to read as follows:

AUTHORITY: 15 U.S.C. §§ 717 -717w.

SUBPART B – OPEN SEASONS FOR ALASKA NATURAL GAS TRANSPORTATION PROJECTS

2. In section § 157.33, paragraph (b) is revised to read as follows:

§ 157.33 Requirements for Open Seasons.

(a) * * *

(b) Initial capacity on a proposed Alaska natural gas transportation project may be acquired prior to an open season through pre-subscription agreements, provided that in any open season as required in (a) above, capacity is offered to all prospective bidders at the same rates and on the same terms and conditions as contained in the pre-subscription agreements. All pre-subscription agreements shall be made public by posting on Internet websites and press releases within ten days of their execution. In the event there is more than one such agreement, all prospective bidders shall be allowed the option of selecting among the several agreements all of the rates, terms and conditions contained in any one such agreement.

3. In section 157.34, paragraphs (a), (c)(9), (c)(15) and (c)(18), and (d)(2) are revised to read as follows:

§ 157.34 Notice of open season.

(a) Notice. A prospective applicant must provide reasonable public notice of an open season through methods including postings on Internet websites, press releases, direct mail solicitations, and other advertising. In addition, a prospective applicant must provide actual notice of an open season to the State of Alaska and to the Federal

Coordinator for Alaska Natural Gas Transportation Projects.

* * * * *

(c) * * *

(9) Negotiated rate and other rate options under consideration, including any rates and terms of any precedent agreements with prospective anchor shippers that have been negotiated or agreed to outside of the open season process prescribed herein;

* * * * *

(15) The methodology by which capacity will be awarded, in the case of over-subscription, clearly stating all terms that will be considered, except that if any capacity is acquired through pre-subscription agreements as provided in §157.33(b) above and the prospective applicant does not redesign the project to accommodate all capacity requests, only that capacity that was acquired through pre-subscription or was bid in the open season on the same rates, terms, and conditions as any one of the pre-subscription agreements shall be allocated on a pro rata basis and no other capacity acquired through the open season shall be allocated.

* * * * *

(18) All 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;

* * * * *

(d) * * *

(2) A prospective applicant must consider any bids tendered after the expiration of the open season by qualifying bidders and may reject them only if they cannot be accommodated due to economic, engineering, design, capacity or operational constraints, or accommodating the request would otherwise adversely impact the timely development of the project, and a detailed explanation must accompany the rejection. Any bids tendered after the expiration of the open season must contain a good faith showing, including a statement of the circumstances which prevented the late bidder from

tendering a timely bid and how those circumstances have changed. If a prospective applicant determines at any time that, based on the criteria stated above, no further late bids for capacity can be accommodated, it may request Commission approval to summarily reject any further requests.

* * * * *

4. In section 157.35, paragraph (c) is revised to read as follows and paragraph (d), the word “258.4(a)(1)” is removed and the word “358.4(a)(1)” is inserted in its place.

§ 157.35 Undue Discrimination or Preference.

(a) * * *

(b) * * *

(c) Each prospective applicant conducting an open season under this subpart must function independent of the other divisions of the prospective applicant as well as the prospective applicant’s Marketing and Energy affiliates as those terms are defined in §§ 358.3(d) and (k) of the Commission’s regulations. In instances in which the prospective applicant is not an entity created specifically to conduct an open season under this Subpart, the prospective applicant must 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 project applicant’s Marketing and Energy affiliates as those terms are defined in sections 358.3(d) and (k) of the Commission’s regulations.

* * * * *

5. Section 157.36 is revised to read as follows:

§ 157.36 Open seasons for expansions.

Any open season for capacity exceeding the initial capacity of an Alaska natural gas transportation project must provide the opportunity for the transportation of gas other than Prudhoe Bay or Point Thomson production. In considering a proposed voluntary expansion of an Alaska natural gas pipeline project, the Commission will consider the extent to which the expansion will be utilized by shippers other than those who are the initial shippers on the project and, in order to promote competition and open access to the project, may require design changes to ensure that some portion of the expansion capacity be allocated to new shippers willing to sign long-term firm transportation contracts, including shippers seeking to transport natural gas from areas other than Prudhoe Bay and Point Thomson.

6. Section 157.38 is revised to read as follows:

§ 157.38 Pre-Approval Procedures.

No later than 90 days prior to providing the notice of open season required by section 157.34(a), a prospective applicant must file, for Commission approval, a detailed plan for conducting an open season in conformance with these regulations. The prospective applicant's plan shall include the proposed notice of open season. Upon receipt of a request for such a determination, the Secretary of the Commission shall issue a notice of the request, which will then be published in the Federal Register. The notice shall establish a date on which comments from interested persons are due and a date, which shall be within 60 days of receipt of the prospective applicant's request unless otherwise directed by the Commission, by which the Commission will act on the proposed plan.