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### Effective Date and Congressional Notification

This Final Rule will take effect March 21, 2005. The Commission has determined with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>167</sup> The Commission will submit the Final Rule to both houses of Congress and the General Accounting Office.<sup>168</sup>

### List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

**Linda Mitry,**  
*Deputy Secretary.*

<sup>n</sup> In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18 of the *Code of Federal Regulations*, as set forth below:

### PART 35—FILING OF RATE SCHEDULES AND TARIFFS

<sup>n</sup> 1. The authority citation for part 35 continues to read as follows:

**Authority:** 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

<sup>n</sup> 2. In § 35.27, paragraph (c) is added to read as follows:

#### § 35.27 Power sales at market-based rates.

\* \* \* \* \*

(c) *Reporting requirement.* Any public utility with the authority to engage in sales for resale of electric energy in interstate commerce at market-based rates shall be subject to the following:

(1) As a condition of obtaining and retaining market-based rate authority, a public utility with market-based rate authority must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following:

(i) Ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or

(ii) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.

(2) Any change in status subject to paragraph (c)(1) of this section must be filed no later than 30 days after the change in status occurs.

[FR Doc. 05-3040 Filed 2-17-05; 8:45 am]

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 157

[Docket No. RM05-1-000; Order No. 2005; 110 FERC ¶61,095]

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

Issued: February 9, 2005.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission is amending its regulations to establish requirements governing the conduct of open seasons for proposals to construct Alaska natural gas transportation projects. This final rule fulfills the Commission's responsibilities to issue open season regulations under section 103 of the Alaska Natural Gas Pipeline Act (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, these regulations include the criteria for and timing of any open season, promote competition in the exploration, development, and production of Alaska natural gas, and 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.

**DATES:** *Effective Dates:* The rule will become effective May 19, 2005.

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#### SUPPLEMENTARY INFORMATION:

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

1. The Federal Energy Regulatory Commission is amending its regulations to establish requirements governing the conduct of open seasons for capacity on proposals to construct Alaska natural gas transportation projects. This Final Rule fulfills the Commission's responsibilities to issue open season regulations under section 103 of the Alaska Natural Gas Pipeline Act (the Act), enacted on October 13, 2004.<sup>1</sup> 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, these regulations (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.

2. As Congress has recognized, construction of a natural gas pipeline from the North Slope of Alaska to markets in the lower 48 states is in the national interest and will enhance national energy security by providing access to the significant gas reserves in Alaska to meet anticipated demand for natural gas. A successful Alaska natural gas transportation project will have to overcome a variety of significant logistical and procedural obstacles. The Commission strongly believes that it is in the mutual interest of the parties interested in such a project to reach a common understanding, in order to support a proposal that meets their needs and those of the Nation. To that end, the Commission urges the parties to expend their efforts in negotiation, compromise, and project development, such that this vital project can become a reality.

#### Background

3. Under the Act, Congress mandated the expedited processing by the Commission of any application for an Alaska natural gas transportation

<sup>167</sup> See 5 U.S.C. 804(2) (2000).

<sup>168</sup> See 5 U.S.C. 801(a)(1)(A) (2000).

<sup>1</sup> Public Law 108-324, October 13, 2004, 118 Stat. 1220.

project, namely any natural gas pipeline that carries natural gas derived from that portion of Alaska lying north of 64 degrees north latitude to the border between Alaska and Canada. The Act specifically directs the Commission to prescribe the rules which will apply to any open season held for the purpose of acquiring capacity on any Alaska natural gas transportation project, including the criteria for allocating capacity among competing bidders.

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 (NPR) containing the Commission's proposed Alaska natural gas transportation project open season regulations as a new subpart B to part 157 of the Commission's regulations (69 FR 68106, Nov. 23, 2004). The NPR stated that comments were to be filed by December 17, 2004, and that the Commission intended to issue the final regulations by February 10, 2005, in order to comply with the Act's 120-day deadline.

5. The Commission held a public technical conference in Anchorage, Alaska on December 3, 2004 to develop a record in this proceeding. At the conference, speakers including Alaska elected officials, Alaskan Natives, representatives of potential project sponsors, representatives of potential shippers, and representatives from other agencies or affected enterprises or the general public presented their views on the NPR and related issues. A transcript of the technical conference was filed in the record in this proceeding.<sup>2</sup>

6. Before the NPR was issued, the Commission received comments and suggested open season requirements from several interested parties, including BP, ConocoPhillips, and ExxonMobil (North Slope Producers),<sup>3</sup> other natural gas producers, potential project sponsors, and members of the Alaska legislature. In addition to the pre-NPR comments and technical conference presentations, comments were filed by 25 interested parties.<sup>4</sup> One group of commenters, including the North Slope Producers, who together own the majority of proven gas reserves on Alaska's North Slope at Prudhoe Bay

and Point Thomson, and several pipeline companies (TransCanada, MidAmerican/AGTA, and Enbridge) are potential sponsors of an Alaska natural gas transportation project. Another group of commenters is made up of entities with Alaska-based interests<sup>5</sup>, including elected officials. Yet another definable group consists of potential shippers, including explorers and producers other than the North Slope Producers, marketers, local distribution companies, power generators, and industrial end users.

#### Overview of Regulatory Approach

7. The comments filed in response to the NPR are discussed at length below, broken down by specific issues. However, broadly speaking, several commenters, led by the North Slope Producers, MidAmerican/AGTA, and TransCanada, expressed general support for the Commission's approach in developing the proposed regulations in the NPR.<sup>6</sup> These commenters perceive the proposed regulations as being not overly prescriptive, yet providing a fair and open process to obtain capacity on an Alaska pipeline on a non-discriminatory, non-preferential basis. As potential shippers, these commenters are encouraged that the proposed rules permit the sponsors the flexibility to design and conduct the initial and expansion open seasons. They claim that such flexibility is important in helping a project sponsor properly size the pipeline and satisfy the demands of financiers.

8. A number of the commenters, however, fault the Commission for not proposing detailed rules regarding certain elements of the open season, including timing of the open season, and the criteria for evaluating bids and allocating capacity in the event capacity on the proposed project is oversubscribed. These commenters claim that the Commission has deferred to the project sponsors too much of the responsibility of establishing the criteria for and timing of open seasons for Alaska projects. In addition, commenters whose interests are tied to the State of Alaska claim that the proposed rules ignore the requirements of section 103(g) regarding in-state needs for natural gas.<sup>7</sup> Potential project sponsors favor the flexibility they believe is provided in the proposed

rules in order to appropriately develop an Alaska natural gas transportation project. Other interested parties express concern that the North Slope Producers, either as project sponsors or as producers whose reserves will support the initial development of the project, will use that flexibility to develop open season rules to accommodate their own interests, to the exclusion and detriment of other explorers, developers and producers of Alaska natural gas, as well as of those seeking access to the pipeline for in-state natural gas demands.

9. As explained in the NPR, there are no current Commission regulations respecting open seasons. To date, the Commission's policy, developed through its orders and opinions, is that all new interstate pipeline construction be preceded by a non-discriminatory "open season" process through which potential shippers may seek and obtain firm capacity rights. Congress has determined that it is necessary to formalize this Commission policy with specific regulations governing the conduct of open seasons for an Alaska natural gas transportation project. Indeed, the tremendous size, scope, and cost of an Alaskan pipeline, the long lead-time needed for such a project, environmental sensitivities, and the competitive conditions that are unique to such a project warrant special consideration and oversight. In addition, Congress specifically required that the open season regulations promote competition in the exploration, development, and production of Alaska natural gas and, as to any open season for expansion of the initial capacity of any Alaska natural gas transportation project, the Commission's regulations are to specifically provide the opportunity for gas other than Prudhoe Bay and Point Thomson production to have access to the pipeline.

10. As revealed in detail in the comments to the NPR, there are complex, competitive conditions surrounding an Alaska natural gas transportation project, which are intensified by the generally agreed upon fact that there will be only one such pipeline for the foreseeable future. The North Slope Producers hold the proven reserves that may be able to support the initial construction of the project, and may now be in a position to make long-term capacity commitments to the project. Other producers and explorers, whose potential gas reserves are not yet commercially developed, may not currently be in a position to do so. Instead, they anticipate a need for capacity some time in the future, and express reluctance to make the large

<sup>2</sup> The Commission received, on December 23, 2004, January 10, 2005, and February 2, 2005, three motions to correct the transcript. The Commission approves the proposed corrections and incorporates them into the record of this proceeding. Commenters at the technical conference are listed in the Appendix.

<sup>3</sup> The short-form names used for commenters and other abbreviations used in this order are listed in the Appendix.

<sup>4</sup> These commenters are also listed in the Appendix.

<sup>5</sup> This group includes AOGCC, ANGDA, Alaska, Alaska Legislators, Arctic Slope and Doyon.

<sup>6</sup> AGA and Northwest Industrial Gas Users also stated general support for the NPR's proposed rules.

<sup>7</sup> This section of the Act requires a certificate holder for an Alaska project to demonstrate that it has conducted a study of Alaska in-state needs.

investment required to explore for and develop Alaska gas without being reasonably assured that they will have access to pipeline capacity when their gas is ready to move to market. Shippers seeking to move gas only within the State of Alaska for in-state uses may also seek pipeline capacity. While the North Slope Producers anticipate paying rates covering the costs of transportation through the entire project, shippers planning to make deliveries in Alaska likely will seek mileage-based or zone rates.

11. We have striven in this rule to balance the need to allow project sponsors the flexibility to develop and bring to market Alaska natural gas with the equally compelling needs to ensure fair competition in the transportation and sale of natural gas, promote the development of natural gas resources in addition to those in the North Slope, and consider Alaskan in-state requirements. As discussed in more detail below, we are not inclined to impose open season rules that prescribe such details as when open seasons must occur and precise criteria to be used in evaluating bids and allocating capacity. To do so could potentially unduly limit a prospective sponsor's ability to design and finance a viable project, and thereby add to the already-daunting challenges that face an Alaska natural gas transportation project sponsor.

12. At the same time, however, we are well aware of the risks to competition imposed by a project that is owned or primarily sponsored by a small group. Thus, we are imposing strict requirements on all proposals, and particularly on affiliate-owned projects, with respect to the public disclosure of information, to ensure that there is a level playing-field. As we discuss below, we will require applicants for an Alaska pipeline project to provide detailed information as to project design, how capacity is to be allocated, and proposed rates, terms and conditions. This will allow us to be in a position to monitor whether competition for capacity is fair. In addition, while we are permitting pre-subscription for "anchor" shippers,<sup>8</sup> we are requiring that contracts with such shippers be made publicly available, and that all shippers seeking the same type of capacity be offered service on the same terms and conditions. We will keep these considerations in mind, not only during an open season, but also during our consideration of any

<sup>8</sup> Anchor shipper(s) as used in the natural gas industry means one or a very few shippers with very large, significant volumes of natural gas that will financially support the initial design and cost of a project.

application for an Alaska natural gas transportation project placed before us.

13. Furthermore, we will bear in mind the concerns expressed by the non-North Slope producers in considering expansion issues. Thus, we will look to see whether a proposed pipeline is designed not only to meet immediate needs, but also to provide a reasonable opportunity for access to low-cost expansion capacity. Also, as discussed below, we will look, with the constraints of the Act in mind, to determine that rates for expansion capacity are set at levels that will promote competition in exploration and development of Alaska natural gas, not just protect the interests of initial shippers.

14. In addition to the careful scrutiny we will give to any Alaska pipeline proposal, the need to provide explorers and developers of Alaska natural gas with reasonable assurances that they will have access to capacity on any Alaska natural gas pipeline can be met through existing Commission oversight authority and certificate authorization authority, as supplemented, enhanced, and guided by the findings and requirements of this final rule, the NGA, and the Act. Any complaints regarding these Alaska project issues can be addressed through several ways, including the Commission's Dispute Resolution Service, the Enforcement Hotline, or the Commission's Fast Track complaint process which, under the final rule, will have automatic application to complaints involving any Alaska natural gas transportation open season.

15. Moreover, under section 157.33, any application for a certificate of public convenience and necessity for a proposed Alaska natural gas transportation project must include a demonstration that the applicant has conducted an open season for capacity on its proposed project in accordance with the requirements of this subpart, and failure to provide the requisite demonstration will result in an application being rejected as incomplete. This provision will provide a strong disincentive to discriminatory or unduly preferential conduct. Finally, although not required, project sponsors have the option of seeking Commission pre-approval of a proposed notice of open season.

16. The Commission stated in the NOPR that its goal was 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. It has been suggested that the Commission's stated goal improperly emphasizes the importance of providing certainty to project sponsors to facilitate construction of the project, when instead the Commission should focus on providing as much regulatory certainty as possible to natural gas explorers.<sup>9</sup> However, providing the economic certainty to support the building of an Alaska natural gas transportation project and promoting competition in the exploration and development and production of Alaska natural gas are not mutually exclusive goals. We conclude that emphasizing economic certainty to explorers, without balancing the similar needs of potential project sponsors, would overlook the Act's overall objective of facilitating the timely development of an Alaska natural gas transportation project, and to bring Alaskan natural gas to markets in Alaska and in the lower 48 states. Thus, we believe that the balanced approach we are taking here is appropriate.

17. In the Commission's view, exploration, development, and production of Alaska natural gas are best served by having a pipeline built and by ensuring that all potential initial and future shippers are able to obtain access on that pipeline under non-discriminatory, non-preferential terms. This rule will provide the framework for an open season process that will provide reasonable flexibility to pipeline sponsors, while ensuring sufficient exchange of information and regulatory oversight to ensure that the goal of fair, open competition in the transportation and sale of natural gas is met.

#### **Section-by-Section Analysis of Final Rule**

##### *A. Purpose—Section 157.30*

18. Proposed § 157.30 sets out the purpose of subpart B. That purpose is to establish rules for the conduct of any open season on any Alaska natural gas transportation project. Section 103(e)(2) of the Act provides that these regulations must include the criteria for and timing of any open season, promote competition in the exploration, development, and production of Alaska natural gas, and, for any open seasons for capacity exceeding the initial capacity, provide for the opportunity for the transportation of natural gas other

<sup>9</sup> See Comments of Shell USA, filed December 17, 2004, at 2. This belief is shared by a number of commenters aligned with the non-North Slope explorers and producers of Alaska gas.

than from the Prudhoe Bay and Point Thomson units.<sup>10</sup>

19. The Commission is adopting § 157.30 with certain changes recommended by Alaska for purposes of clarity. Specifically, the revised section makes clear that the regulations apply to open seasons “for the purpose of making binding commitments for the acquisition of initial or voluntary expansion capacity” on any Alaska natural gas transportation project. We see no need to change the description of the purpose of the subpart from being “to establish the procedures for” an open season to being to “prescribe the rules,” as recommended by Alaska.

#### *B. Definitions—Section 157.31*

20. Proposed § 157.31 defines the terms “Alaska natural gas transportation project” and “Commission.” ANGDA maintains that the definition of “Alaska natural gas transportation project” should be expanded to include a project involving “a liquid natural gas project to transport liquefiable natural gas from Southcentral Alaska to the West Coast states.” ANGDA bases its proposed amendment on a November 18, 2004 amendment to section 116 of the Act whereby Congress included an entity determined to be qualified to construct and operate a liquefied natural gas project to transport liquefied natural gas from Southcentral Alaska to the West Coast states as a “qualified infrastructure project” for purposes of obtaining a loan guarantee. The amendment ANGDA relies on did not expand, much less refer to, the definition of an “Alaska natural gas transportation project.” Consequently, the Commission finds no basis to conclude that Congress intended to include any liquefied natural gas project within the meaning of “Alaska natural gas transportation project.”

21. While the NOPR’s definition of “Alaska natural gas transportation project” is consistent with the Act’s definition of that term, it does not fully define that term as it is defined in the Act. To be precise, the Commission is revising § 157.31 at § 157.31(a) to adopt the full statutory definition of that term. Additionally, the Commission is including for clarity new § 157.31(c), defining the term “voluntary expansion.”

#### *C. Applicability—Section 157.32*

22. The NOPR proposes that the open season regulations are to apply to any application to the Commission for a

certificate of public convenience and necessity or other authorization for an Alaska natural gas transportation project, whether filed pursuant to the Natural Gas Act, the Alaska Natural Gas Transportation Act of 1976, or the Alaska Natural Gas Pipeline Act, and to applications for expansion of such projects. The proposed regulation also provides that the open season regulations do not apply to involuntary expansions pursuant to section 105, unless the Commission expressly so provides.

23. Alaska proposes language in the final rule that provides that the open season regulations will apply “to any Alaska Natural Gas Transportation Project for which a certificate of public convenience and necessity is sought pursuant to section 7 of the NGA and section 103 of the Alaska Natural Gas Pipeline Act.”<sup>11</sup> However, Alaska does not explain the basis for its proposed definition.

24. Section 102(2) of the Act defines an Alaska natural gas transportation project to include projects authorized under either the Alaska Natural Gas Transportation Act of 1976 or the Alaska Natural Gas Pipeline Act. Since the proposed regulation is consistent with this definition, the Commission sees no reason to amend it.

#### *D. Requirement for Open Season—Section 157.33*

25. Proposed § 157.33 requires that any application for a certificate of public convenience and necessity for a proposed Alaska natural gas transportation project include a showing that the applicant conducted an open season for capacity on its proposed project that fully complies with the requirements of this subpart. To ensure compliance with this requirement, proposed § 157.33 provides that any application lacking such a showing will be dismissed as deficient.

26. One of the questions that the Commission posed in its NOPR was whether the Commission should allow pre-subscribed, reserved capacity such as was allowed in connection with open seasons for certain new Outer Continental Shelf (OCS) pipeline facilities.

27. Several commenters, including TransCanada, Alliance, the North Slope Producers, Enbridge, Doyon, and MidAmerican/AGTA state that the Commission should allow pre-subscribed capacity for an Alaska natural gas transportation project. TransCanada and the North Slope

Producers state that the open season rules should allow for options such as pre-subscription agreements that will encourage or facilitate the successful development of an Alaska pipeline project. They believe that pre-subscription might grant the flexibility to sponsors and shippers that is required in view of the size, expense, risk, and long lead time involved in an Alaska project. Enbridge is convinced that these factors call for pre-subscription.

28. However, the supporters of pre-subscription also comment that steps can or should be taken in order to ensure that other shippers have the opportunity to obtain capacity on a non-discriminatory basis through an open season process. TransCanada, for instance, describes a situation where the sponsor enters into binding prearranged precedent agreements with “backstop” or “transition” shippers who commit to sign firm transportation agreements if no other shipper comes forward, but who agree to lower their capacity commitments to pre-agreed levels to allow the inclusion of other shippers who tender qualifying bids during the open season. In a similar fashion, MidAmerican/AGTA states that the open season rules should permit transportation commitments allowing pre-subscribed capacity to be prorated down to a minimum threshold level to allow others to obtain capacity in the event the total requested capacity exceeds design capacity.

29. Enbridge is confident that, even with pre-subscription, an open season conducted under the safeguards and transparency provided by the Commission’s proposed rules will result in a pipeline designed to enable every creditworthy shipper to obtain the long-term capacity it needs. However, Enbridge claims that there can be no Alaska natural gas transportation project without the full, binding commitment of the North Slope Producers. Alliance is also a strong believer in the potential usefulness of pre-subscribed capacity in facilitating the development of an Alaska pipeline. However, also recognizing that the open season rules must promote competition in the exploration, development and production of Alaska gas, Alliance claims that limits could be placed on the amount of capacity available for pre-subscription, or that pre-subscription could be reserved for initial open seasons only.

30. Another group of commenters prefers that the Commission not allow pre-subscription of capacity and asks that if it is permitted, limitations and conditions be imposed in order to

<sup>10</sup> The Prudhoe Bay and Point Thomson units are gas fields located on Alaska’s North Slope with a total of approximately 35 Tcf of known gas reserves.

<sup>11</sup> See Comments of the State of Alaska regarding § 157.32.

ensure that capacity is still available to prospective shippers which do not participate in pre-arranged agreements. These commenters include Anadarko, Alaska, Calpine and ChevronTexaco.

31. Anadarko argues that if the final rule approves the use of pre-subscription agreements, they must be subject to the outcome of the open season, and that potential bidders in the open season should be offered the same terms and conditions as the pre-subscribing shippers. Anadarko states that there are two distinct types of prospective shippers on an Alaska natural gas transportation project—the North Slope Producers and the explorers and producers of unproven or undeveloped Alaska natural gas—who are in long-term competition for the pipeline's capacity, and that pre-subscription favors the major producers to the detriment of those developing competing reserves. Second, Anadarko contends that there are circumstances that distinguish the situation in Alaska from that existing in the OCS cases cited in the NOPR, including the fact that the OCS cases involved the transportation of specific reserves and entailed unusual costs and risks, whereas the situation in Alaska calls for a pipeline that will access all Alaska gas, and that risk has been substantially reduced by a massive federal loan guarantee. Moreover, states Anadarko, the Act calls for mandatory open seasons for capacity on an Alaska natural gas transportation project. Consequently, Anadarko asserts that the final open season rules must require that pre-subscribed capacity must be subject to the outcome of the open season, and if the proposed project is oversubscribed, the project sponsors must either revise the project's capacity to accommodate all bids or fairly prorate all the capacity.

32. Alaska would also prefer that the final open season rules prohibit pre-subscribed capacity because of its potential to limit the amount of capacity in the open season. If pre-subscription is permitted, Alaska, like Anadarko, states that all parties should be able to obtain capacity on the same terms and conditions, and if the project is oversubscribed, all capacity should be pro-rated equally. ChevronTexaco has a similar view, stating that so long as the pre-subscription represents only a minimum commitment needed to construct a project, with the understanding that the project will be enlarged as a result of matching bids in the open season, and so long as pre-subscribed capacity and open season capacity are allocated on the same basis, the Act's open season goals are met. Calpine points out the same

circumstances as Anadarko did in distinguishing an Alaska natural gas transportation project from the OCS facilities referred to the NOPR. However, to facilitate the ultimate development of an Alaska natural gas transportation project, Calpine is agreeable to allowing pre-subscribed capacity that will be subject to an allocation procedure in the event capacity is oversubscribed.

33. Alaska Legislators and Arctic Slope oppose any pre-subscription. Arctic Slope asserts that 100 percent of the capacity of an Alaska natural gas transportation project must be made available on a non-discriminatory, open access basis to all potential shippers; therefore, the open season rules should prohibit pre-subscriptions. Alaska Legislators state that the Act requires the Commission alone to establish the open season procedures for awarding initial and expansion capacity on an Alaska natural gas transportation project. Moreover, since Congress mandates that these open season regulations promote competition in the exploration, development, and production of Alaska natural gas, Alaska Legislators contend that the project must be developed in a manner that maximizes the number of exploration and production companies able to participate in an open season and compete for capacity on the pipeline. The only way this can be done, according to Alaska Legislators, is by requiring that 100 percent of the initial and expansion capacity be awarded solely through a public open season. Alaska Legislators support their view by stating, like Anadarko and Calpine, that the OCS cases cited in the NOPR involved specific instances of individual pipeline construction proposals, and citing cases in which the Commission disapproved procedures outside of an open season and required transparent open seasons as the vehicle by which new pipeline capacity is obtained.<sup>12</sup>

34. The Commission recognizes that the expense, risk, and long lead time involved in developing an Alaska natural gas transportation project justify allowing project sponsors the flexibility to enter into pre-subscription agreements with the North Slope Producers and any other shippers who are currently in a position to support the project with long-term capacity commitments. We do not view the federal loan guarantees as reducing the

<sup>12</sup> Wyoming-California Pipeline Co., 50 FERC ¶ 61,070 (1990); TransColorado Pipeline Co., 53 FERC ¶ 61,421 (1991); and Colorado Interstate Gas Co., 56 FERC ¶ 61,015 (1991).

risk of an Alaska project to a level where pre-subscription should not be allowed, nor do we see pre-subscription as inherently anti-competitive.

35. Based on the foregoing, we will permit pre-subscription in order to facilitate the development of an Alaska natural gas transportation project. In order to ensure that all other potential shippers will have an equal opportunity to obtain access to capacity on the project in the open season, we are requiring in the final rule that any and all pre-subscription agreements be made public within ten days of their execution, and that capacity on the proposed project will be offered to all prospective qualifying shippers on the same rates, terms and conditions as contained in the pre-subscription agreements. In the event that there are pre-subscription agreements with varying rates, terms and conditions, all prospective qualifying shippers shall have the option of choosing among the several agreements which one they wish to accept. We note, however, that the justification for allowing pre-subscription may not be as compelling in the case of any expansion, since the major hurdles to developing the project in the first instance will have been overcome. Therefore, we will limit our authorization to provide for pre-subscribed initial capacity only.<sup>13</sup>

36. Much attention is given in the comments to concerns over potential discrimination and preference in allocating capacity in the event that the proposed Alaska pipeline project is oversubscribed, whether or not pre-subscription is allowed. While these concerns can best be addressed by designing a proposed project such that it meets the capacity needs of all shippers who are prepared to enter into binding agreements, we nonetheless will use our regulatory authority to protect against undue discrimination or undue preference in capacity allocation.

37. As discussed below, the Commission is holding to the regulatory approach taken in the NOPR which allows project sponsors to (subject to our subsequent review) develop the methodology by which they will allocate capacity in the event of oversubscription of a project not supported by precedent agreements. However, in the case of pre-subscribed capacity, the Commission will require

<sup>13</sup> Future requests and open seasons for voluntary expansion capacity after the pipeline is in service will be controlled by procedures spelled out in the Alaska pipeline's approved FERC gas tariff, while involuntary expansion capacity will be controlled by the requirements of section 105 of the Act and any rules that the Commission may issue in the future governing such expansions.

that the project sponsors must either revise the project's capacity to accommodate all qualified bids or prorate only the capacity that was subject to the pre-subscription agreements or was bid for in the open season on the same rates, terms and conditions as any of the pre-subscription agreements. The Commission has chosen this solution for several reasons. First, the parties most certain to be pre-subscription shippers are the North Slope Producers, who will be in a position of control over the proposed project's design, either as project sponsors or as owners of the reserves that support the project. Second, by their own estimate, the North Slope Producers assert that the initial pipeline can be designed to accommodate all qualified bids.<sup>14</sup> Consequently, the Commission believes that it is appropriate that entities involved in pre-subscription bear the risk that their capacity will be reallocated in the event that the project is undersized.

38. Anadarko proposes to add to this section a provision that, when read in the context of its other proposed rules, would prohibit any pre-subscription agreements. Alaska also proposes language that would lead to that result. As discussed herein, the Commission is, with appropriate limitations, allowing pre-subscription, and is amending § 157.33 accordingly. Moreover, the Commission is satisfied that modifying § 157.33 to provide that any application lacking a showing that the open season regulations have been fully complied with will be rejected as deficient will ensure compliance with the open season requirements. Alaska proposes to also include in this section a provision requiring that open seasons be conducted without undue discrimination or preference in the rates, terms, or conditions of service. The Commission is expanding § 157.35 to include language similar to that suggested by Alaska.

#### *E. Notice of Open Season—Section 157.34*

39. The criteria for and timing of Alaska natural gas transportation project open seasons are spelled out in proposed § 157.34. This proposed regulation received the most attention in comments. For clarity and convenience, the comments are broken down and grouped by the topics listed below.

#### i. Open Season Timing and Duration

40. Proposed § 157.34 sets forth the criteria for and timing of Alaska project open seasons. Proposed § 157.34(a) provides for public notice of an open season at least 30 days prior to the commencement of the open season through methods including postings on Internet websites, press releases, direct mail solicitations, and other advertising. The Commission believes that such prior notice would serve several purposes. First, it would reduce, if not eliminate, any advantage that one potential shipper might have as a result of prior knowledge of the open season. Second, it would afford both project sponsors and prospective shippers a period of time prior to the actual open season period in which they could address and possibly resolve any questions or problems regarding the terms and conditions of the open season. Third, it would afford potential shippers time to prepare submissions in response to the open season.

41. Proposed § 157.34(c) provides that an open season for an Alaska natural gas transportation project must remain open for a period of at least 90 days. This minimum 90-day period for prospective shippers to examine the open season materials and make service requests to the pipeline is intended to establish some parity among shippers, given that certain shippers, primarily the "anchor" shippers, may have had advance information relating to the pipeline's proposed services, tariff provisions, and cost projections. Ninety days is proposed as an adequate amount of time in which to conduct a reasoned evaluation of the open season materials and to help level the playing field.

42. Alaska Legislators state that the notice period established in the NOPR needs clarification. Specifically, they state that the proposed regulations are unclear whether the 30-day notice period precedes and is computed separately from the 90-day open season period. In any event and for several reasons, state Alaska Legislators, an initial open season will require a duration of a minimum of six months, and any subsequent open seasons should remain open for a minimum of four months. First, Alaska Legislators assert that this additional time is needed to offset the fact that shippers affiliated with the pipeline will have advance information. Second, the substantial capital commitment that will be required of any prospective shipper warrants a much longer period within which to evaluate whether to contract for capacity on the project.

43. ANGDA agrees that a 180-day period to review and assess the open season information is required in order to account for the huge information gap between the information now available to potential intra-state shippers and the information they would need to make multi-year commitments for capacity on an Alaska natural gas transportation project. ANGDA states that such a commitment would equal or exceed the asset base of potential shippers on a spur line. Moreover, public hearings and Regulatory Commission of Alaska (RCA) approval of contract terms is required for several potential shippers. The due diligence and expert advice required to make decisions of this magnitude require a minimum of 180 days, according to ANGDA.

Additionally, ANGDA states that many shippers' contract terms require RCA approval, which could take one to two years. Anadarko also believes 180 days is required due to the magnitude of the commitment and to offset the informational advantages that the major producers have over other potential shippers. For example, Anadarko estimates that a 500 MMcf/d commitment for 20 years' capacity on an Alaska natural gas transportation project translates into a \$7 billion demand charge, and a 30-year contract would involve a \$10 billion commitment.

44. AOGCC, Shell, Pacific Star, Doyon, and Alaska share the belief that the NOPR's 90-day open season period should be extended. Pacific Star could support a 120-day open season, with a prior 90-day review period. Alaska recommends a "safe harbor" range of 90 to 120 days, with no preference given based on when bids are received.

45. MidAmerican/AGTA, Alliance and Enbridge find the 30-day notice and 90-day open seasons to be adequate. In particular, Enbridge and MidAmerican/AGTA find these time frames to strike an appropriate balance between meeting prospective shippers' informational needs and the need to expedite the development of an Alaska natural gas transportation project. Enbridge states that because there have been years of developmental work on an Alaskan natural gas pipeline, with many prior public hearings and discussions on the subject having occurred and continuing dialog between potential sponsors and shippers taking place, it is unnecessary to lengthen the proposed open season period.<sup>15</sup> Enbridge adds that extending

<sup>14</sup> As noted, *infra*, the North Slope Producers state that it will require 50 Tcf of gas to keep a 4 to 4.5 Bcf pipeline full for 30 years, and any Alaska pipeline will be designed to be economically expandable to 6 Bcf/d, which would accommodate an additional 15 Tcf over 30 years.

<sup>15</sup> As support for the reasonableness of the 90-day open season period, Enbridge compares it to the 30-day and 53-day open seasons held in Maritimes & Northeast Pipeline, LLC, 80 FERC ¶ 61,346 at 62,174 (1997) and Alliance Pipeline L.P., 80 FERC ¶ 61,149 at 61,591 (1997), both large, cross-border

the open season could result in long delays in the project's overall schedule due to the narrow, seasonal windows associated with environmental studies and preliminary field work.

46. Another timing issue raised in comments involves when any open seasons for an Alaska natural gas transportation project should be held. The NOPR has no requirements on the subject of when project sponsors must hold the open season. According to Anadarko, the Commission's silence on this issue will allow sponsors to hold open seasons early in the project's developmental process. As a result, explorers will be unable to commit to capacity on the project because of the present uncertainties surrounding their reserves. This sentiment is shared by others, including Arctic Slope, DOI, Doyon, and Shell. As a solution, these commenters state that the open season regulations should include a requirement that any open seasons must remain open until the last practical point in time, which according to Anadarko and Shell is the time when the sponsors must close on their financing arrangements. These commenters state that in this way, some potential shippers, other than the major producers who are in a better position to commit early in the process, might be able to resolve the uncertainties currently prohibiting them from participation. Shell also states that the open season regulations should preclude any open season for an expansion project prior to one calendar year after the in-service date of the pipeline unless the open season is specifically requested by a shipper other than a major producer.

47. In addition, some commenters urge the Commission to require that the study of in-state needs provided for in section 103(g) of the Act precede any open season. Although the language of the Act requires that "the holder of the certificate" demonstrate that it has conducted the required study, the Act does not state when such study should be conducted; nor does the Act require that the study be made public. Alaska states that contrary to the intent of the Act, the NOPR is silent on the subject of ensuring that in-state needs for gas are met.<sup>16</sup> According to Alaska, the only logical way for this to be done is to require that the in-state study be conducted prior to the open season in order for the project sponsor to design the capacity, routing and expansibility

projects. Alliance too, refers to its own 53-day open season.

<sup>16</sup> Governor Murkowski also made this point at the technical conference.

of the project facilities to accommodate those needs. The Alaska Legislators argue that an in-state study is "virtually meaningless unless concluded and the results made public by the pipeline operator prior to any open season."<sup>17</sup> Chevron Texaco, TransCanada, and ANGDA agree that, in order to determine where tie-in points are needed to meet Alaska's domestic gas needs, the studies should precede any open season.

48. The Alaska Legislators further argue that the Commission should spell out the type of study that the pipeline will be required to undertake. ANGDA's comments address the need for two major gas trunk-line interconnect points in Alaska, most critically a spur line to make North Slope gas available to the Cook Inlet area, where two-thirds of the state's population resides, and which has less than a 10-year reserve life for current gas supply. United States Senator Murkowski, State Senator Therriault, and Mr. Izzo, representing Enstar, among others at the technical conference also stressed various in-state needs for natural gas. ChevronTexaco states that it could be a simple matter of identifying most logical tie-in points to address future needs and the most economic methods to expand the capacity to meet those needs when they arise. Alaska Legislators suggest that a January 2003 study conducted on behalf of Alaska's Department of Natural Resources might serve as a useful example to model in fashioning the requirements of the in-State study.<sup>18</sup>

49. The Commission is adopting the NOPR's 30-day notice period and 90-day open season period of "at least 90 days" for open seasons, and clarifies that the 30-day notice period will precede the 90-day open season and that the notice of open season is to contain all of the information detailed in § 157.34(b). Therefore, all interested persons will have a period of a minimum of 120 days in total to examine the information pertaining to any open season in order to assess whether they are willing and able to participate in the process and proffer bids. The Commission understands that on day one of the open season process, any shippers affiliated with the pipeline or who have entered into pre-subscription agreements may have certain information not available to other entities. However, that information is required to be disclosed

<sup>17</sup>Joint Comments of the Legislative Budget and Audit Committee of the Alaska State Legislature and Indicated Alaska State Legislators at 48.

<sup>18</sup>This study can be found at: [http://www.dog.dnr.state.ak.us/oil/products/publications/otherreports/demand/instate\\_gas\\_v1.pdf](http://www.dog.dnr.state.ak.us/oil/products/publications/otherreports/demand/instate_gas_v1.pdf).

at the beginning of the minimum 120-day period.

50. The Commission also appreciates that, due to the substantial capital commitment that will be required, any prospective shipper will need a sufficient period of time within which to evaluate whether to make multi-year commitments for capacity on the project. However, we also understand that in order to timely develop a pipeline proposal, size the facilities, secure financing and otherwise finalize the proposal in detail sufficient to file a certificate application, time is of the essence. This is accentuated by the fact that under section 109 the Act, if an application for an Alaska natural gas transportation project is not filed within 18 months after the October 2004 enactment of the Act, the Secretary of Energy is required to conduct a study of alternative approaches to an Alaska natural gas transportation project.<sup>19</sup> While the Act does not preclude the filing of an application after the 18-month period and the initiation of such a study, it is clear that the Act contemplates that an applicant will proceed with all deliberate speed.

51. The minimum 120-day open season period we are establishing is substantially longer than any open season heretofore held for a major pipeline project. While no other project equals or nears the size and complexity of an Alaska natural gas transportation project, this will be a project with many years of evaluation, information-gathering and private and public debate behind it. While there may currently be some disparity in the amount of information various interested parties have, most have been assessing their situations, at least conceptually, for many years. The Commission, on balance, believes a 120-day period is adequate to substantially level the playing field, particularly given the extensive information requirements imposed in the open season regulations. We are not convinced that an open season lasting as long as six months is necessary.

52. The Commission, for several reasons, will not impose a requirement that any open season must remain open

<sup>19</sup>Congress' sense of urgency is demonstrated by a number of other provisions in the law, including those calling for expedited action in connection with the environmental review and the Commission's certificate approval processes, as well as expedited judicial review in connection with any environmental impact statement or final Federal agency order issued under the Act. Moreover, the Act establishes an independent Office of Federal Coordinator who is empowered to oversee and coordinate the expeditious federal permitting processes in connection with any Alaska natural gas transportation project.

until a particular point in time tied to other project activities. This requirement was requested in order to allow as much time as possible for potential shippers to put themselves in a position to bid for capacity. The Commission is providing that the effective date of this final rule shall be 90 days from its publication in the **Federal Register**, which will prevent any open seasons for the first three months. Any specific point in time that the Commission might select (such as a year before an application was filed) might not be suitable under all circumstances, and could, therefore, frustrate efforts in planning project proposals. However, we are adding a new provision in the final rule, § 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. This requirement is designed to allow reasonable access to those shippers whose circumstances prohibit them from participating during the established open season period. Nonetheless, our expectation is that the pipeline can and will be designed and built to accommodate all qualified shippers who are ready to sign firm agreements. On balance, this should be of benefit to late-developing shippers and at the same time provide the sponsor with flexibility in the timing of its open season.

53. In light of the concerns expressed by Alaska entities and Congress' mandate that Alaska in-state needs be given due consideration, we are adding to § 157.34 of the regulations a requirement that open season information include an assessment of in-state needs, based to the extent possible on any available study performed by Alaska, and a listing of prospective delivery points within Alaska. We are also adding a requirement that the open season information include a proposed in-state transportation rate, based on the costs of providing that service. This will give participants in an open season sufficient information to understand what capacity is proposed to be offered to entities within Alaska, where the project proponent proposes to make in-state deliveries, and what the rates for in-state service may be. To the extent possible, we intend that for this assessment to be made based on information provided by the state, so

that we, project proponents, and other interested parties can have the benefits of the state's expertise.

54. We do not propose to set aside a specific amount of capacity for in-state service, because we do not now know how much capacity will be sought for that purpose. Similarly, although, as stated immediately above, in-state transportation rates must be based on the costs of providing that service, we cannot at this point determine the appropriate allocation of costs between services for in-state deliveries and for deliveries to the lower 48 States. We will deal with cost allocation issues occasioned by these matters as they arise.

55. We note that section 103(g) of the Act requires the holder of a certificate for an Alaska project to prepare a study of Alaska in-state needs. The open season information we are requiring does not obviate the need to comply with this provision, but the material provided during the open season could later be proffered as the post-certificate study, and, should we determine that there is sufficient agreement by interested parties that the open season information is sufficient, we may accept it as satisfying the statutory requirement.

#### ii. Open Season Technical Informational Requirements

56. Proposed § 157.34(b) lists the information that any notice of open season for an Alaska natural gas transportation project must contain. The listed information includes technical information such as the route, the proposed receipt and delivery points, the size and design capacity, estimated in-phase dates for expansion capacity, delivery pressure, projected in-service date, estimated unbundled transportation rate, estimated cost of facilities and estimated cost of service, expected return on equity, negotiated rates and other rate options under consideration, quality specifications, terms and conditions of service. In addition, the list includes a detailed methodology for determining the value of bids, the methodology by which capacity will be awarded in the case of over-subscription, a clear statement of all terms that will be considered, including price and contract term, and required bid information. Other listed information includes the form of a precedent agreement and time of execution of the precedent agreement, and definition and treatment of non-conforming bids.

57. The Commission recognized in the NOPR that a potential applicant for an Alaska natural gas transportation project

might find it necessary or appropriate to initiate an open season before some of the information can be determined. The NOPR also anticipated that in a given situation, such information cannot be reasonably determined until after an open season is held. As an example, the Commission described a situation where, for purpose of gathering information and assessing demand, a prospective project sponsor might first conduct a non-binding open season. Then, based on its evaluation of the response, the sponsor could conduct a second, binding open season containing information sufficiently detailed to permit prospective shippers to enter into binding precedent agreements.

58. To accommodate these situations, the NOPR provided that the sponsor would be required to include the listed information in the notice of open season "to the extent that such information is known or determined at the time the notice is issued."<sup>20</sup> Additionally, in order to level the playing field for all potential open season participants, the NOPR required that the sponsor include in the open season notice "[a]ll other information that may be relevant to the open season, including information pertaining to the proposed service to be offered, projected pipeline capacity and design, proposed tariff provision, and cost projections, made available to or in the hands of 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."<sup>21</sup>

59. Several commenters, including Anadarko, MidAmerican/AGTA, the North Slope Producers, Alliance, and Enbridge found the NOPR's listed information to be generally sufficient to provide prospective shippers the information needed to decide whether they to make binding, long-term commitments to purchase capacity on an Alaska natural gas transportation project. However, several aspects of the NOPR's informational requirements drew the attention of these commenters.

60. Anadarko and Shell state that limiting the sponsor's obligation to provide the information listed in the NOPR only "to the extent that such information is known or determined at the time the notice is issued" creates a loophole, and this qualifying language should be deleted from the regulations. According to Anadarko and Shell, a pipeline could avoid providing certain vital information simply by claiming that the information was not yet known

<sup>20</sup> NOPR, proposed § 157.34(b).

<sup>21</sup> *Id.*, § 157.34(b)(17).

or by holding the open season prematurely. These commenters state that the open season regulations should require that for any binding open season, pipelines include all the listed information in the notice. While certain physical characteristics of the pipeline will not be known until the pipeline is built, the pipeline can include in the notice the information upon which the open season proposal is based.

61. Alliance suggests that the Commission could reduce the risk of any dispute over the adequacy of the information contained in the notice by making clear that the information contained in the notice does not have to reflect the finalized positions on all elements at the time of notice of open season, and that a notice will not be invalidated by the absence of certain information. Additionally, Alliance recommends that the sponsors should be allowed to modify and update elements of their open season proposal if such modification is acceptable to prospective shippers. Alliance claims that this approach was useful in its own open season. MidAmerican/AGTA, on the other hand, feels that the above-mentioned qualifying language was reasonable.

62. However, MidAmerican/AGTA, together with the North Slope Producers and TransCanada, state that the catchall provision requiring "all other information that may be relevant \* \* \*" is too broadly written. These commenters fear that the provision might be abused by those seeking either to delay the process or to obtain proprietary information. The North Slope Producers are also concerned over protecting proprietary or commercially sensitive information. They contend that this catchall provision is not in line with the Commission's policy against burdensome disclosure of commercially sensitive information. The North Slope Producers state that a notice containing the other sixteen types of information listed in the proposed regulations already provides more information than has been historically shared with shippers.

63. A number of comments on the proposed informational requirements focus on the need or desirability of including information that would inform all proposed shippers with respect to the expandability of the proposed project. Many commenters express, at one point or another in their comments, and all commenters implicitly agree, that it is extremely important to determine the original sizing and future expandability of an Alaska natural gas transportation project, as it will likely be the only

pipeline built for the foreseeable future to transport Alaska natural gas for delivery to markets in the lower 48 states. Alaska, Calpine, and the Alaska Legislators all state that more information in the open season is needed to achieve optimal project design parameters. Alaska has proposed language to be included in the final regulations which includes feasibility and estimated cost of pipeline expansions, either through compression or looping, including any physical limitations.<sup>22</sup> Calpine also states that the notice of open season should contain information on the expandability of the project's design capacity, including the design capacity per stage of each expansion and method of achieving expansions, and that rate estimates should cover rates for expansion stages (calculated on a rolled-in basis).

64. The North Slope Producers request that the Commission clarify that proposed § 157.34(b)(6) does not require that capacity must be awarded on an MMBtu basis. Their argument is that, because the gas transported may include higher-Btu components, such as ethanes, which will not ultimately show up as natural gas, Btu-based rates would be unfair. Instead, they state that capacity on an Mcf basis is typical for similar pipelines.

65. ANGDA contends that the open season information should include design requirements for two major gas trunkline interconnect points in Alaska. ANGDA adds that a single tariff clearly would unduly discriminate against intrastate Alaska shippers.

66. Looking beyond the initial open season, Alaska and Alaska Legislators address in their comments additional information requirements needed for potential shippers to evaluate either their own expansion needs or whether there is sufficient demand to support an economic expansion of an Alaska natural gas transportation project. Alaska asserts that in addition to the expanded information it proposes for initial expansions, a notice of open season for expansion capacity should also include specific information identifying the location of the natural gas reserves to which the pipeline relates, although Alaska would permit the pipeline to seek a waiver of any expansion information requirement it considers to be inapplicable. Alaska also states that the regulations should provide that any voluntary expansion design must either accommodate the capacity requests of all open season

expansion bidders which are able to satisfy the Pipeline's creditworthiness requirements and willing to execute firm transportation agreements of reasonable duration at maximum recourse rates or demonstrate what technical or economic factors prevent such a design.

67. Alaska Legislators claim that ongoing collection and publication by the pipeline of real-time information necessary for non-pipeline owners to evaluate on an ongoing basis the potential for pipeline expansions is required. Alaska Legislators suggest alternative methods of accomplishing this. Either the pipeline should conduct periodic, non-binding open seasons, or it should maintain a publicly-available log or queue of capacity requests. In all events, Alaska Legislators state that the Commission should also require that the pipeline keep a regularly-updated schedule on its website that includes: (1) Good faith estimates by the pipeline operator as to the possible and probable expansion increments to at least twice the original design capacity of the then-existing pipeline; (2) pipe characteristics of the then-existing pipeline, including wall thickness, diameter, and metallurgy; (3) compressor descriptions (manufacturer and model number, site rated horsepower and capacity, suction and discharge pressure and milepost locations of all existing and planned or prospective compressor stations); (4) an elevation profile of the then-existing pipeline; (5) known limitations on potential receipt and delivery points and a good-faith statement as to the bases for those limitations; (6) any other known limitations that would constrain or preclude expansions and a good-faith statement as to the bases for those limitations; and (7) any other expansion-related information of whatever nature which the pipeline owners or operators have made available to potential shippers (including any producing affiliates).

68. DOI states that the Commission should not allow decisions regarding the timing of open seasons to be left to the sole discretion of the pipeline and its affiliates. Instead, DOI requests that the Commission establish procedures for conducting future non-discriminatory open seasons that are reasonably responsive to ongoing exploration and development activities.

69. The Commission did not intend to provide project sponsors with a reason not to provide necessary information by qualifying their obligation to provide information in the open season "to the extent that such information is known or determined at the time the notice is

<sup>22</sup> See Alaska's December 17 Comments, at Appendix, Proposed Open Season Regulations, § 157.34(a)(5)(ix).

issued.” As noted above, this qualification was intended to recognize that a potential Alaska pipeline project applicant might find it necessary or appropriate to initiate an open season before some of the information can be determined. As an example, the Commission described in the NOPR a situation where a prospective project sponsor first conducts a non-binding open season in order to gather information and assess demand, and thereafter, based on its evaluation of the response, conducts a second, binding open season containing information sufficiently detailed to permit prospective shippers to enter into binding precedent agreements.

70. The Commission’s thinking at that time was that the open season rules would apply to “non-binding” open seasons, and the above qualification would have utility in such a situation. However, we understand that it may be difficult to draw distinctions between a “non-binding” open season and some other process of assessing interest in or need for capacity to assist the project sponsor in preparing a binding open season notice. Therefore, we are clarifying in the final rule that the open season regulations apply only to open seasons for binding commitments for capacity. The Commission sees no utility or need in imposing the full array of these open season regulations on activities leading up to a binding open season. There are adequate protections built into the open season rules, including the obligation to disclose information, to address any discriminatory and preferential practices through the Commission’s oversight and enforcement capabilities.

71. Nonetheless, we understand that optimal design requirements are achieved as a result of an open season and not in advance of it, and we still foresee the possibility that a potential project sponsor might find it necessary or appropriate to conduct an open season before all the information required to be contained in the open season notice can be determined. Therefore, we will clarify in the final rule that the notice of open season must contain at a minimum, a good faith estimate based on the best information available of all items of required information and that the project sponsor must identify the source of information relied on, explain why such information is not presently known, and update the information when and if it is later determined during the open season period.

72. The Commission is also modifying proposed § 157.34(b)(17)<sup>23</sup> to address concerns that, as proposed, the regulations might be used to seek the disclosure of proprietary or commercially sensitive information. The purpose of the information-sharing requirement is to make sure that all interested parties are equally informed on matters essential to their decision whether to bid for capacity on the proposed project, with an eye toward leveling the playing field between affiliated shippers or others with prior knowledge of information to be contained in the open season notice and all other potential shippers. Between the specific information identified in proposed § 157.24(b)(17), namely, information pertaining to the proposed service to be offered, projected pipeline capacity and design, proposed tariff provision, and cost projections, and all the items of information enumerated in § 157.34(b), the Commission has, in essence, defined the information that all shippers will need to participate in an open season for capacity on an Alaska natural gas transportation project. Accordingly, we will delete the reference to “all of information that may be relevant.”

73. However, following review of the comments, the Commission is concerned that the informational requirements of § 157.34(b) alone might not be sufficient to prevent the possibility of discrimination by a project applicant in favor of an affiliate of that applicant. The Commission’s goal is to prevent unduly discriminatory behavior and limit the ability of a project applicant to unduly favor its affiliate.

74. Therefore, in order to further the Commission’s goal of a non-discriminatory open season, the Commission is applying certain of the Standards of Conduct requirements of Order No. 2004<sup>24</sup> to all project applicants conducting open seasons for an Alaska natural gas transportation project because this will minimize the risk that an affiliate of a project applicant would have an advantage over non-affiliates in obtaining capacity

<sup>23</sup> See § 157.34(b)(18) of the final rule.

<sup>24</sup> Standards of Conduct for Transmission Providers, Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), order on reh’g, Order No. 2004-A, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), order on reh’g, Order No. 2004-B, III FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), order on reh’g, Order No. 2004-C, 109 FERC ¶ 61,325 (2004) (Order No. 2004). Under Order No. 2004, for a natural gas pipeline Transmission Provider, the Standards of Conduct requirements do not apply until 30 days after the Commission issues a certificate allowing a project applicant to commence construction of an interstate natural gas pipeline.

through the open season. The Commission is requiring project applicants to create/designate a unit or division to conduct the open season. The unit or division will be required to function independent of the other non-regulated divisions of the project applicant as well as the project applicant’s Marketing and Energy Affiliates and subject to certain provisions of the Standards of Conduct. Specifically, the following provisions of Order No. 2004 will apply to project applicants conducting an open season: separation of functions (18 CFR 358.4(a)(1), (3), (4), (5) and (6) and (b)(e)(3),(5) and (6) (2004)); information access (18 CFR 358.5(a) (2004)); information disclosure (18 CFR 358.5(b) (2004)); prohibitions against discrimination (18 CFR 358.5(c)(5)(2004)) and discounts (18 CFR 358.4(d)(2004).

75. Under section 358.4(a)(1) of the Commission’s regulations, the transmission function employees of a transmission provider must function independent of the transmission provider’s Marketing affiliate or Energy Affiliates’ employees. The employees who are part of the unit/division conducting the open season will be treated as transmission function employees and must function independently. Applying the separation of functions requirement would entail that employees of a project applicant who are involved in the open season may not also perform duties for the Energy Affiliates or Marketing Affiliates (as defined in 18 CFR 358.3(d) and (k) (2004)) of that project applicant. This would prevent Energy Affiliates of the project applicant who participate in the open season from having the advantage of information or strategy that non-affiliated open season participants do not have.

76. The applicable exemptions from the separation of functions would also apply to permit the project applicant to share various categories of employees, including: Support, field and maintenance employees (section 358.4(a)(4)); senior officers and directors who are not “Transmission Function Employees” (as defined by 18 CFR 358.3(j)), provided that they do not participate in directing, organizing, or executing transmission system operations or market functions or act as conduits for sharing prohibited information with a Marketing or Energy Affiliate (§ 358.4(a)(5)); and risk management employees who are not engaged in transmission functions or sales or commodity functions.

77. Consistent with § 358.4(e)(3) of the Standards of Conduct, the Commission

will require each project applicant to post on its Internet Web site its written procedures describing how it complies with the applicable provisions of Order No. 2004. The Commission also will require each project applicant to train its employees involved in the open season or part of the open season unit/division, officers, directors and employees with access to transportation information or information concerning gas purchases, sales or marketing functions under § 358.4(e)(5). The project applicant must also designate a Chief Compliance Officer who will be responsible for Standards of Conduct compliance, as required by § 358.4(e)(6). In order to reduce the burden on project applicants, the Commission will not apply some of the posting requirements of Order No. 2004 to the open season (e.g., posting organizational charts and transfers of employees). However, project applicants must be able to verify that they have followed the organizational separation requirements.

78. The application of the information access (18 CFR 358.5(a)) and disclosure (18 CFR 358.5(b)) requirements will ensure that employees of Marketing/Energy Affiliates participating in the Open Season would not have access to any transmission information that is not publicly available to non-affiliated participants and require that any disclosure of non-public transmission information to a Marketing/Energy Affiliate be immediately disclosed to all other actual and potential open season participants by posting that information on the project applicant's Internet Web site. See 18 CFR 358.5(b)(3). The requirements for written consent before releasing non-affiliated customer information to a Marketing or Energy Affiliate and posting that consent on the Internet would also apply for project applicants. See § 358.5(b)(4).

79. The application of some of the non-discrimination requirements of Order No. 2004 will broadly prohibit discrimination by a project applicant conducting an open season and limiting its ability to unduly favor a Marketing/Energy Affiliate. The applicable non-discrimination provisions include: (1) Section 358.5(c)(3), which requires a Transmission Provider to process all similar requests for transmission in the same manner and within the same period of time; and (2) § 358.5(c)(5), which prohibits transmission providers from giving their Marketing or Energy Affiliates any preference over any other wholesale customer in matters relating to the sale or purchase of transmission service. In the context of an open season, these provisions ensure a project

applicant will not be provided any preferences to affiliated participants.

80. Finally, the application of the discount provision of § 358.5(d), which requires a Transmission Provider to post an offer of a discount for transmission service at the time an offer is contractually binding, will ensure the transparency of the open season process and discourage undue preferences. We note that if an offer of a discount becomes contractually binding through the execution of a precedent agreement, the offer must be posted at that time, not at the time of the final agreement.<sup>25</sup>

81. Applying many of the functional separation, information access, disclosure and non-discrimination provisions of Order No. 2004 to this open season process will ensure that it is conducted in a manner that is non-discriminatory and provides equal access to all participants, particularly those not affiliated with the project applicants. If during or following the open season the Commission determines that the project applicant has violated the terms of the Order No. 2004 requirements that we are making applicable to the open season, the results of the open season with regard to the Energy Affiliates of that project applicant may be voided and a new open season held for that capacity.

82. As noted above, a number of commenters discuss the need for or desirability of requiring disclosure of information relevant to the expandability of the project, both as proposed and on an ongoing basis. In overseeing the open season process and in processing and application for a certificate or other authority to construct and operate an Alaska natural gas transportation project, we will require that every reasonable effort be made to design a project that meets current needs for capacity, and accommodates future needs for capacity through low-cost expansion. The information identified in § 157.34(c)(2), together with the design and engineering information required as part of any application for a certificate, should be sufficient to reasonably inform all interested parties on matters involving the expandability of the project.

83. As noted above, we are providing that the open season information include an assessment of in-state needs, based to the extent possible on any available study performed by Alaska, and a listing of prospective delivery points within Alaska. Moreover, we are requiring that a proposed in-state transportation rate, based on the costs of

providing that service, also be included. This should address ANGDA's contention that the open season information should include design requirements for two major gas trunkline interconnect points in Alaska and that a single tariff clearly would unduly discriminate against intrastate Alaska shippers.

84. Also as noted above, the North Slope Producers request that proposed § 157.34(b)(6) clarify that it does not require that capacity must be awarded on an MMBtu basis. The Commission clarifies that this provision was intended to be a mandate that rates for an Alaskan pipeline will eventually have to be stated on a thermal basis, as is long-standing Commission policy. However, the Commission understands that at this stage of project development for an Alaskan pipeline, it will be significantly more complex for project sponsors to estimate rates and award capacity on that basis given the unique features of this project. Thus during the open season process, capacity may be described and rates may be estimated on a volumetric basis. However, as was the case in the two orders cited by the North Slope Producers,<sup>26</sup> the Commission has found that pipelines can meet the Commission's objectives concerning the statement of rates on a thermal basis by proposing methods of rate adjustment at a later time. If during the open season process, a project sponsor chooses that capacity will be described and has its rates estimated on a volumetric basis, then it must notify bidders that final pro forma service agreements and the sponsors proposed tariff will have to be submitted with rate calculated on a thermal basis.

### iii. Open Season Bid/Capacity Allocation Methodology

85. As stated above, the NOPR required that the notice of open season contain a detailed methodology for determining the value of bids,<sup>27</sup> and the methodology by which capacity will be awarded in the case of over-subscription, clearly stating all terms that will be considered, including price and contract term.<sup>28</sup> In addition, the NOPR required that capacity allocated as a result of any open season be awarded without undue discrimination or preference of any kind.<sup>29</sup>

86. The North Slope Producers contend that the combination of the

<sup>26</sup> Alliance Pipeline L.P., 84 FERC ¶61,239 (1998); Kern River Gas Transmission Co., 79 FERC ¶61,299 (1997).

<sup>27</sup> FERC Stats. & Regs., Proposed Regulations, ¶32,577(2004), § 157.34(b)(13).

<sup>28</sup> *Id.*, § 157.34(b)(14).

<sup>29</sup> *Id.*, § 157.35.

<sup>25</sup> Order No. 2004-A, III FERC Stats. & Regs. ¶ 31,161 at p 227.

mandatory non-discrimination/undue preference standard contained in the NOPR's § 157.35, the information disclosure requirements of § 157.34 (b), and § 157.33's provision that any application for a certificate of public convenience and necessity for a proposed Alaska natural gas transportation project must show that the applicant has conducted an open season for capacity in accordance with the open season rules fulfills the Commission's responsibilities under the Act to establish the criteria for conducting an open season, including the procedures for the allocation of capacity. Northwest Industrials, TransCanada, MidAmerican/AGTA, and the AGA all agree that the NOPR's proposed rules are appropriately flexible and provide a reasonably fair and open process that is consistent with the Act's directives.

87. The North Slope Producers stress that the most important, and first step to promoting competition in the exploration, development and production of Alaska natural gas is to get the Alaska natural gas transportation project built. They maintain that the Commission's current policies of allocating capacity in an open season to customers who value it most, and of favoring net present value (NPV) as a basis for awarding capacity will ensure that capacity will be awarded in a non-discriminatory and economically efficient manner. The North Slope Producers assert that through these policies, pipelines and shippers will also be assured that only capacity that is economically viable will be constructed.

88. Additionally, the North Slope Producers assert that based on preliminary assessments, there will be enough initial pipeline capacity to accommodate all near-term production from other producers and explorers, in addition to all production from Prudhoe Bay and Point Thomson. Specifically, they state that it will require 50 Tcf of gas to keep a 4 to 4.5 Bcf pipeline full for 30 years. Moreover, the North Slope Producers expect that any Alaska pipeline will be designed to be economically expandable to 6 Bcf/d, which would accommodate an additional 15 Tcf over 30 years.

89. At the same time, the North Slope Producers contend that while it is in a pipeline's interest to build a pipeline designed to carry all the gas shippers are willing to pay to transport, the costs of unused new capacity imposes certain limitations on just how much initial capacity the pipeline can build for a project to be economically viable. In response to suggestions made at the

technical conference that, regarding capacity allocation in the event of oversubscription, small shippers should be favored, the North Slope Producers argue that any preferential capacity allocation methodology would be discriminatory, anti-competitive, and contrary to the NGA. The North Slope Producers state that shipper support for the project could be adversely affected if prospective shippers thought their commitments could be reduced. Moreover, they claim that any such undue preference or discriminatory treatment to particular shippers or sources of gas is unnecessary since an expansion under section 105 of the Act is available as a backstop for any shipper.

90. On the other hand, a number of comments are critical of the Commission's approach to addressing bid evaluations and allocation of capacity as represented in the NOPR. Pacific Star, Alaska Legislators, Shell, ChevronTexaco, Anadarko, Alaska, Calpine, Arctic Slope, Alaska Venture Capital/Brook Range, and Doyon all fault the Commission for not taking a pro-active approach in developing the capacity allocation methodologies, and instead leaving it to the pipeline to develop them. These commenters contend that Congress specifically instructed the Commission to detail the criteria to be used in awarding capacity, and to do so in a manner which will promote competition in exploration, development and production of Alaska gas.

91. In the NOPR, the Commission required that the notice of open season contain a detailed methodology for determining the value of bids,<sup>30</sup> and that capacity allocated as result of any open season be awarded without undue discrimination or preference of any kind.<sup>31</sup> We do not read section 103 of the Act to require that we define the methodology with the precision urged by those commenters who advocate a prescriptive regulatory approach. We remain confident, even more so now that we have the expanded scope of the regulatory text prohibiting undue discrimination and undue preference, that the regulations being promulgated in this order fully comply with the directives as well as the intent of the Act. Although the Commission is permitting prospective applicants the flexibility to establish the details of the bid evaluation methodology, any such methodology must meet the criteria imposed in this rule prohibiting undue discrimination, and it is the

Commission, not the pipeline applicant who will apply that criteria to any open season claimed not to be in compliance with this rule. In this regard, the Commission notes that NPV has been the standard, but not required, methodology for evaluating bids in open seasons under current Commission policy. Although we are not mandating that methodology here, we will examine carefully any methodology that varies from those heretofore approved by the Commission to ensure that such variations respond to the unique circumstances of an open season for an Alaska project, and that they do not discriminate against any shipper or class of shippers in the evaluation of bids. We will now address specific issues.

#### a. Caps on Contract Terms

92. The Alaska Legislators, ChevronTexaco, Alaska, Anadarko, and Calpine all urge the Commission to establish some uniform cap on the term by which, under the NPV methodology, bids are evaluated. Calpine, for instance, proposes that the contract term for purposes of bid evaluation be 30 years. Anadarko states that any bid term or other terms and conditions that are difficult, if not impossible, for all but a few preferred shippers to meet, should be prohibited if they are not critically required to secure financing. Accordingly, Anadarko proposes a bid cap of 20 years or the length of the financing instrument. ChevronTexaco and Alaska concur that a 20-year cap would be appropriate.

93. The Alaska Legislators also argue that a uniform cap should be placed on the term by which bids are evaluated. Although they do not have a specific cap term in mind, they claim that the Commission should impose some bid evaluation to prevent the major producers from bidding unduly long contract terms in order to squeeze out competitors. Recognizing that previous efforts by the Commission to limit the duration of contracts awarded in Tennessee Gas Pipeline Company's open season did not survive judicial scrutiny, Alaska Legislators state that the circumstances surrounding an open season for an Alaska natural gas transportation project are quite different from the circumstances associated with Tennessee, a pipeline in the lower 48 states. These distinctions, they assert, satisfy the concerns that the Court had in *Process Gas Consumers Group v. FERC (Process Gas)*.<sup>32</sup>

94. The Alaska Legislators point out that in the case of an Alaska natural gas

<sup>30</sup> *Id.*, § 157.34(b)(13).

<sup>31</sup> *Id.*, § 157.35.

<sup>32</sup> 177 F.3d 995 (DC Cir. 1999).

transportation project open season, it would be the bid evaluation that is being limited, not the contract term itself, as was the case in Process Gas. Second, they assert that the parties in Process Gas were debating the duration of the cap, not the need for any cap to counter affiliates' attempts to obtain capacity through unjustifiably long bids. Third, they say, the Commission, on remand, concluded that open season caps in Tennessee's tariff were not required to protect captive customers because market forces dictate that pipelines have greater incentive to build new capacity to serve all demand, than to create scarcity by withholding capacity. On this point, Alaska Legislators contend that monopoly forces rather than market forces control the climate in Alaska, and that a producer-owned pipeline would indeed be disinclined to assist competing producers by affording them capacity on the pipeline.

95. The Commission is not persuaded that any cap on contract term bids is necessary or appropriate at this time. Other than general concerns of affiliate abuse, the comments have provided no factual predicate which would warrant the Commission to deviate from current Commission policy, which is to not impose limits on bid terms. However, the Commission will be reviewing the results of any open season processes to determine the appropriateness of any unusually long contract terms (e.g., a term exceeding the projected life of the pipe) to determine whether shippers incorporated them in their bids to obtain capacity allocation. For example, it would be in a prospective shipper's economic interest to seek a contract term that would be sufficient to allow the recovery of its revenues. However, it would not be in a shipper's economic interest to bid for capacity beyond its projected reserve's life because it would expose the shipper to reservation charges it may not be able to recover.

#### b. In-state Capacity Bids

96. The Alaska Legislators state that bids for in-state capacity, with lower NPV as a consequence of mileage-based rates, cannot fairly compete with bids for transportation over the full length of the pipeline. Consequently, in order for bids for Alaska deliveries to compete with deliveries to the lower 48 states, Alaska Legislators contend that the final open season rules should contain a mileage-based multiplier to bids for in-state capacity. Alaska Venture Capital also recognizes this potential problem, but offers no solution other than calling on the Commission to address the problem with specific rules.

97. Concerns over length-of-the-pipe versus in-state bids are misplaced in the context of NPV for a new pipeline such as any Alaska natural gas transportation project. The primary purpose of the open season process is to determine the appropriate size of the initial pipeline. In-state capacity bids will not result in stranded capacity, as can be the case with capacity sales on an existing pipeline. We agree with the Alaska Legislators. The purpose of the in-state capacity bids will be to determine whether and to what extent there is interest in developing a telescoped pipeline to service Alaskan needs in the initial capacity allocation. The revised regulations require that the open season include an estimated transportation rate for in-state deliveries, as well as a methodology for determining the value of bids for in-state deliveries and for deliveries outside of the State of Alaska.

98. Other topics raised in the comments include Anadarko's suggestion that prepayments are unnecessary since the pipeline sponsor may already be the recipient of an \$18 billion loan guarantee. Anadarko also claims that since prepayments would be much less burdensome to the major North Slope producers than to others, they are unduly preferential and should be prohibited. ChevronTexaco requests that the regulations expressly provide that, in the event more than one sponsor group conducts an open season for an Alaska natural gas transportation project, bidders may bid on the competing proposals. Calpine adds that bids should not exceed the amount of the proposal's design capacity, and that affiliates should be prohibited from making multiple bids, so that there is only one bid from each entity.

99. Although the loan guarantee under the Act will certainly facilitate the sponsor's ability to obtain financing, it cannot be said that such guarantee obviates the need for creditworthiness standards or prepayment requirements where reasonably necessary. Consequently, we will not prohibit prepayments as urged by Anadarko. Such standards must be included in the information contained in the notice, and as such, are subject to the requirement that there be no undue discrimination or undue preference in the terms or conditions of service. ChevronTexaco's request that the regulations expressly provide that, in the event more than one than one sponsor group conducts an open season for an Alaska natural gas transportation project, bidders may bid on the competing proposals is a reasonable one. We have included appropriate language in the regulations. Finally, the Commission takes note of

Calpine's requests regarding limitations on the amount of capacity bid and multiple bids from affiliates. Although we are not prohibiting all such bids, we will examine closely any such bids to determine whether they are soundly based on satisfying the legitimate needs of the bidder, or whether they are made to "game" the open season process.

#### c. Capacity Allocation in Case of Oversubscription

100. On the subject of allocating capacity in the event qualified bids for capacity exceed the amount of design capacity, a number of comments fault the Commission for not proposing requirements that will encourage exploration and development for yet to be discovered Alaska gas resources. This group includes Pacific Star, the Alaska Legislators, ChevronTexaco, Alaska Venture Capital/Brook Range, Alaska, Anadarko, Shell and Doyon. Consistent with their view that the Commission must take a pro-active approach and adopt detailed rules regarding critical elements of open season, Alaska Legislators contend that the rules governing capacity allocation in the event of oversubscription must provide that small shippers will not be subject to proration. Alaska Legislators claim that a pro rata basis of capacity allocation is not appropriate for an Alaska pipeline, especially a producer-owned pipeline. They assert that the producers' control over the pipeline must be countered by regulations favoring access to capacity by multiple, smaller-volume shippers over single, large-volume shippers. Alaska Legislators state that by providing as many shippers as possible all of the capacity they request, those with market power will be encouraged to ensure that there is enough capacity for their requirements as well.

101. ChevronTexaco claims that in order for any open season to be fairly and reasonably conducted, any project that is too small to accommodate all nominated volumes should be redesigned, if possible. ChevronTexaco states that if the project cannot be redesigned upward, the next step would require that the bidders prove their access to gas supply to support their bids. After that, any unsupported bids would be allocated on a pro rata basis. Doyon also recommends as a first step that the sponsor upwardly revise the project's proposed capacity to accommodate all, and if it cannot be done, all shippers would receive a pro rated minimum volume of capacity. Similarly, Anadarko suggests that in case of oversubscription, the sponsor should either revise upward the

proposed capacity to accommodate all shippers or the pipeline should be required to prorate capacity requests in a manner that does not disproportionately affect those shippers who do not have pre-subscribed capacity. Finally, Alaska states that the Commission should require that all bids for 20 or more years at the maximum rate be treated equally and prorated if necessary. If all such bids can be accommodated but bids under 20 years cannot, then NPV should be applied to award capacity to those bidders.<sup>33</sup>

102. Just as the Commission required that the notice of open season contain a detailed methodology for determining the value of bids, the Commission also required in the NOPR that the prospective applicant state the methodology by which capacity will be awarded, clearly stating all the terms that will be considered,<sup>34</sup> and that capacity allocated as a result of any open season be awarded without undue discrimination or preference of any kind.<sup>35</sup> Our justification and reasoning in support of our approach to establishing criteria for purposes of bid evaluation applies here as well. Moreover, to further meet the concerns expressed by parties who are worried about obtaining access to an Alaska pipeline, we have added new §§ 157.36 and 157.37, which make clear that the Commission will examine proposed pipeline designs, as well as expansion proposals, to ensure that all interested shippers are given a fair opportunity to obtain capacity both on an initial project and on any voluntary expansion. As stated elsewhere in this order, we believe it is in both the sponsor's and shippers' best interests to build the pipeline to accommodate all qualified shippers who are ready to sign firm agreements. We will carefully review project design and the documentation relating to the allocation of capacity, with the goal of promoting our open access and pro-competition policies.

#### F. Prefiling Procedures

103. Another specific issue on which the Commission sought comment was whether it should require that prospective applicants for Alaska natural gas transportation projects, before conducting open seasons, file with the Commission proposals for how

the open seasons will be conducted. If so, the Commission asked whether the proposals be filed for notice and comment, or for a decision or pre-determination by the Commission that such proposals conform to the regulations. The Commission concluded its inquiry on this subject by inviting suggestions on what other procedures would be suitable to facilitate the expeditious resolution of objections or concerns regarding any open season for an Alaska natural gas transportation project.

104. The majority of commenters who addressed the subject of requiring that all open season proposals be pre-filed with the Commission were of the opinion that such a requirement is unnecessary and could potentially delay or disrupt the whole open season process. MidAmerican/AGTA and TransCanada propose that, instead, the sponsor should have the option of requesting Commission preapproval, adding that such option should include a 45-day comment period. ChevronTexaco prefers that instead of mandatory pre-filing requirements, sponsors should be free to seek informal guidance from the Commission. Neither Alliance, nor Anadarko, nor the North Slope Producers supports any advance pre-approval filing requirement or procedure.

105. Alaska, on the other hand, believes that it is better to resolve any disputes involving the open season process beforehand. To accomplish this, Alaska proposes that the entire proposed open season package be filed with the Commission three months prior to opening date, and the Commission should notice the filing for comments prior to a Commission determination on the sufficiency of the open season notice.

106. Anadarko, ChevronTexaco, Alliance, Enbridge, the North Slope Producers, and MidAmerican/AGTA all stress the need for some form of dispute resolution during the open season process. Anadarko states that the open season rules should specify that the Commission's Fast Track Processing (18 CFR 385.206(h)) will apply to all complaints regarding non-compliance with open season regulations. Moreover, Anadarko maintains that the open season process should be suspended during pendency of the fast track complaint procedures in order to preserve the complainant's rights to acquire capacity. MidAmerican/AGTA and Alliance also refer to the Commission's Fast Track procedures as well as the Enforcement Hotline as useful, available procedures for resolving open season complaints. In

addition to expedited complaint procedures, ChevronTexaco states that open season disputes could be resolved by way of a declaratory order.

107. ChevronTexaco also states that the Commission should consider imposing Standards of Conduct-like requirements, such as guidelines for interstate transporters in Order No. 2004. Enbridge and the North Slope Producers are also satisfied that the Commission's existing procedures are sufficient to expeditiously resolve any complaints or disputes over the open season process. Alliance asserts that the best way to address disputes is to minimize them through clear and unambiguous, yet flexible, rules.

108. DOI believes that some form of oversight is needed and suggests that all proposals be filed and publicly reviewed by the Commission or other independent regulatory group. DOI states that the proposed rules are vague and some process should be developed to modify the rules to accommodate changing circumstances in the future as they may arise.

109. On balance, we conclude that it is in the public interest to require pre-approval of open season procedures. This will 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 Commission will have to require that deficient open seasons be conducted again. Therefore, the regulations will require that project proponents file open season plans for Commission approval.

110. As detailed above, various approaches to resolving disputes over the open season process are suggested. On review, the Commission believes that its current processes and procedures, combined with the pre-approval requirement, are sufficient to resolve any disputes arising out of the open season process, and in light of the sense of urgency expressed in the provisions of the Act, the Commission is providing in the final rule that any complaints alleging non-compliance with this subpart shall be processed under the Commission's Fast Track procedures.<sup>36</sup> However, the Commission does not find it necessary or appropriate as a rule to suspend the open season process during pendency of a Fast Track

<sup>33</sup> See Alaska's comments, Appendix at § 157.34(a)(3). As noted *infra*, Alaska also urges that the regulations include a requirement that a sponsor must justify in its application the technical or economic factors that prevented it from designing the project to accommodate all qualified bidders.

<sup>34</sup> See FERC Stats. & Regs., Proposed Regulations, ¶ 32,577(2004), § 157.34(b)(14).

<sup>35</sup> *Id.*, § 157.35.

<sup>36</sup> See 18 CFR 385.206(h) (2004). Normally, Fast Track complaint processing must be requested and supported by an explanation why expedited processing is required. The Fast Track procedures include expedited filing of responsive pleadings, an order spelling out the schedule and procedures to be followed, including expedited action on the pleadings, an expedited hearing before an administrative law judge, or expedited action on any particular relief sought.

complaint in order to preserve the complainant's rights to acquire capacity, as requested by Anadarko. The Commission anticipates that in most cases that might arise, the project sponsor will be able to comply with a Commission order directing that it provide the capacity requested by a prospective shipper who is found to be entitled to capacity. However, just as we will not require that the open season be suspended, nothing in this rule prohibits a complainant from requesting, or the Commission granting, such relief if necessary.

#### G. Rate Treatment for Expansions

111. As noted above, one of the issues that received substantial attention in the pre-NOPR comments is whether the Commission should require rolled-in rate treatment for Alaska pipeline expansions. Although the NOPR's proposed regulations are silent on this subject, the NOPR requested comment on whether, in the event the Commission issues regulations with respect to the Commission's authority to require expansion of any Alaska natural gas transportation project, those regulations should address the rate treatment (rolled-in or incremental) of any such expansion.

112. Other than the North Slope Producers and Alliance, there is much support for rolling-in the costs of both voluntary and involuntary expansions, although there is disagreement about when the issue should be resolved. ChevronTexaco states that the subject of appropriate rate treatment for expansions is a subject deserving of substantial, detailed consideration that should be addressed after dealing with the more pressing task of issuing the open season rules. Northwest Industrial Gas Users also believes that the issue can be addressed later. Alaska agrees that expansion pricing is a complex subject that should be examined thoroughly, and asserts that instead of addressing the issue in this rulemaking, the Commission should issue a notice regarding expansion rate treatment for Alaska natural gas transportation projects in early 2005. Alaska observes that the arguments in support of rolled-in pricing are strong, but suggests that rolled-in pricing might not be appropriate in all circumstances. Alliance believes that because the appropriateness of rolled-in or incremental rate treatment for any expansion should be made on a fact-specific basis, and not by rule that predetermines, before the circumstances of a given expansion are even known, how that expansion should be priced.

113. Pacific Star and Alaska Venture Capital state that the Commission should give an early indication that it will support rolled-in rates for expansions of any Alaska natural gas transportation project. Pacific Star states that it agrees with the statement at the technical conference by TransCanada, ANGDA, Anadarko, BLM, and MMS that rate uncertainty will discourage exploration and development and that expansions of the pipeline could present widely varying rate consequences. Pacific Star also states that concerns over existing shippers' subsidizing rolled-in expansions should be weighed against the facts that initial shippers are benefiting from substantial subsidies through the \$18 billion loan guarantee and a 7-year accelerated depreciation. Alaska Venture Capital/Brook Range similarly believes that the Commission should give an early indication that it will support rolled-in pricing under scenarios outside the Commission's existing policy, under which the Commission approves rolled-in rates only where the rolled-in rate is equal to or less than the existing recourse rate. According to Alaska Venture Capital/Brook Range, a policy calling for different rates for similar services would place explorers and smaller producers at a competitive disadvantage. This would, in turn, discourage exploration and development of Alaska natural gas, contrary to the mandate of the Act.

114. TransCanada, MidAmerican/AGTA, and DOI encourage the Commission to adopt a rebuttable presumption favoring rolled-in rates. TransCanada states that any shippers concerned about the effect of such treatment can seek to avoid it through negotiated rates. MidAmerican/AGTA qualifies its support for this presumption by stating that the presumption should apply only to reasonably-engineered increments of mainline expansions supported by long-term contracts similar to those supporting the initial project. DOI states that rolled-in rate treatment is more equitable to future shippers, and that, because Canada has adopted rolled-in rates for expansions, it would provide rate consistency for the entire system.

115. Alaska Legislators, Anadarko, Shell, Calpine, Arctic Slope, and Doyon all contend that rolled-in pricing should be required for pipeline expansions. Alaska Legislators contend that incremental treatment for expansions would discriminate against expansion shippers who, merely because of the timing of their capacity needs, may pay higher rates than initial shippers. This, according to the Alaska Legislators,

ignores the fact that the need for expansion is the consequence of the demands of all shippers. Alaska Legislators state that the Commission must balance the interests of the existing customers against interests of other stakeholders in determining whether or not pre-existing shippers should get the benefit of rate decreases for expansions that lower the average per unit cost of transportation, but face the possibility of rate increases that increase the average per unit cost of transportation. Alaska Legislators also note that the current Commission policy on expansion pricing was developed to address pipeline to pipeline competition, which will not arise in Alaska.

116. In addition to arguing that incremental rates operate to discriminate against expansion shippers, Alaska Legislators argue that the prospect of incremental rates will also act to reduce competition and impede the development of Alaska natural gas. Alaska Legislators state that exploration and development of Alaska reserves requires a long lead-time due to seasonal restrictions and the remoteness of the resource.<sup>37</sup> Alaska Legislators contend that this long lead time makes it difficult for an explorer to judge when it is feasible to commit to capacity on the pipeline. The result, state Alaska Legislators, is that the explorers and developers may be deterred from investing the large sums required to drill for Alaska natural gas, when they are unsure whether their future capacity needs will be met at a time when inexpensive expansion through increased compression will be available, or whether the expansion they require would involve costly looping. The Alaska Legislators also argue that Canada has a long-standing policy of requiring rolled-in rates for expansions which could make exploration in Canada much more attractive to exploration and production companies.

117. Anadarko, also convinced that expansions under section 103 of the Act must be priced on a rolled-in basis, argues that this is critical to avoid a rate structure or policy that discriminates on the basis of time of entry onto the pipeline. Anadarko maintains that it is important to establish this requirement in the initial open season process in order to inform those prospective shippers that their rates might increase as expansions are rolled-in. Alaska Legislators provide a history of the

<sup>37</sup> Alaska Legislators refers to a statement made at the technical conference by Jeff Walker, of DOI's Mineral Management Service that it takes at least nine years for an exploration project to mature into production.

Commission's expansion rate policy, varying over time in order to address different goals as deemed necessary to address changing market dynamics. In short, Alaska Legislators assert that the current Commission policy favoring incremental expansion rates seeks to address issues of competing pipelines, competitive markets, optimal construction, and protecting captive customers, all valid considerations of the market setting in the lower 48 states, but wholly inapplicable to an Alaska natural gas transportation project or the Alaska market. According to Alaska Legislators, the Act instructs the Commission, through its open season regulations, to focus on reducing barriers, not to competitive markets, but rather, to entry in exploration and development of Alaska natural gas. Alaska Legislators conclude that to achieve this mandated goal, the open season regulations must be revised to include rolled-in pricing as one of the criteria for open seasons for pipeline expansions.

118. Shell and Calpine also argue that Commission's 1999 pricing policy for expansions has no application to the circumstances of an Alaska natural gas transportation project where there is no element of pipeline competition or preventing overbuilding. Shell is concerned that companies might not invest hundreds of millions in exploration and development costs if they may have to pay for expansions on an incremental basis, while competitors benefited from earlier, inexpensive expansion. Calpine stresses that since an Alaska natural gas transportation project will be called to transport all Alaska gas, not just gas from Prudhoe Bay and Point Thomson reserves, a larger picture is required in assessing any policy against subsidization. Calpine maintains that an Alaska pipeline should be viewed as a 10 Bcf/d pipeline that will be built, in phases, over time, as opposed to a 4.5 Bcf pipeline that might be expanded from time to time. Under this picture, shippers on the first phase facilities will benefit from lower initial rates due to the Act's loan guarantees, however the Act was not only concerned with facilitating the development of a project that carries Prudhoe Bay and Point Thomson production to market, but also the development and transportation of Alaska's unproven reserves.

119. Arctic Slope is also concerned that unless rolled-in rates are mandated, there may never be an expansion of the pipeline beyond capacity created through infill compression and added compression horsepower. Arctic Slope estimates that rolled-in rates for

expansions would probably be only a little higher than the initial rates since expansion costs would be borne by the entire pipeline throughput. However, the impact of incrementally-priced expansions on the incremental shippers, which would be based entirely on the incremental throughput quantities, would be very severe.

120. Alliance and the North Slope Producers assert that rates for expansion should be determined on a fact-specific, case-by-case basis, not on a pre-determined, rolled-in basis under the open season rules. The North Slope Producers stress that absent information regarding design, timing, and other project attributes, it would be inappropriate either to require or to favor rolled-in rates. In addition, the North Slope Producers point to section 105(b)(1) of the Act wherein, they state, Congress identified either rolled-in or incremental rates as appropriate for mandatory expansions. They add that if rolled-in rates were made applicable to voluntary expansions in the final open season rule, the result would be that such expansions would become involuntary and they would be discouraged.

121. Additionally, the North Slope Producers state that the Commission's existing, fact-specific policy recognizes the risks inherent in major infrastructure projects and seeks to prevent uneconomic pipeline expansions, as well as subsidization by existing customers, and should not be lightly discarded. Responding to the assertion that the NEB requires rolled-in rates for Canadian expansions, the North Slope Producers state that although NEB has adopted rolled-in rates in expansion cases, NEB addresses the issue on a case-by-case basis.

122. Finally, the North Slope Producers claim that explorers do not require absolute rate certainty in order to decide whether to participate in open seasons; an anticipated range that supports future economics is sufficient. On the other hand, the North Slope Producers state that initial shippers who fear that they may be called on to subsidize future shippers may not bid for initial capacity. In this connection, the North Slope Producers contend that one of the Commission's goals is to protect captive customers from rate increases arising from costs unrelated to their service, resulting in rate uncertainty and increased contractual risk.<sup>38</sup>

123. In this rule, the Commission does not adopt a firm pricing policy for

future expansions of an Alaska natural gas transportation project, but we do take this opportunity to provide guidance on this important issue, as it will assist participants in the initial open season. We conclude that there should be a rebuttable presumption in favor of rolled-in pricing for project expansions. Our existing lower-48 states policy favoring incremental rates for expansions does not apply in the case of an Alaska natural gas transportation project. There is likely to be only one Alaska pipeline, so there will be little or no opportunity for competition between pipelines. Incremental pricing of expansion could put expansion shippers at a significant rate disadvantage compared with initial shippers, and accordingly could discourage exploration, development and production of Alaska natural gas. Having markedly different rates for similar service could be in conflict with one of the chief objectives of the statute, which is to encourage further exploration and development of Alaska natural gas. On the other hand, consistent with the arguments of a number of commenters, a presumption in favor of rolled-in pricing may spur investment in and development of Alaska reserves, and the ultimate delivery of that gas to the lower 48 states.

124. We 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. As a general matter, we have historically not favored requiring existing shippers to subsidize the rates of new shippers. We do not intend to discard this principle, but rather to indicate that we will not lightly authorize expansion rates that would have an unduly negative impact on the exploration and development of Alaska reserves. Witnesses at the technical conference acknowledged that defining subsidization is difficult without specific facts to review, and that fact was restated in several of the comments filed. We agree. But a basic observation may be useful here. For example, a rolled-in expansion rate that is less than or equal to the rate paid by the initial shippers would not be considered a subsidy. Whether a rolled-in expansion rate that is higher than original rates is a "subsidy" is a question that necessarily would have to be reviewed in the context of a future NGA section 7 filing. At that time, Pacific Star's arguments relating to whether the Federal government's loan guarantees and accelerated depreciation amount to

<sup>38</sup> See, e.g., *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299 (2004).

a "subsidy" of initial shippers' rates may be raised.

125. In conclusion, to provide guidance to potential shippers in advance of the initial open season that is the subject of this rule, the Commission intends to harmonize both objectives (rate predictability for initial shippers and reduction of barriers to future exploration and production) in designing rates for future expansions of any Alaska natural gas transportation project. It 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.

126. Anadarko states that the open season regulations must prohibit pipelines from bundling ancillary services with transportation. In particular, Anadarko is concerned that sponsors might include in a tariff and an open season the bundled cost of a gas conditioning plant that would extract CO<sub>2</sub> despite the fact that such extraction would not be required of gas from many new Alaska gas fields which likely will be of pipeline quality. MidAmerican/AGTA and Enbridge agree that the open season process should preclude

applicants from tying receipt of capacity to taking ancillary services, such as gas conditioning, treating, or processing. TransCanada simply states that it has no objection to proscription of tying.

127. DOI and MidAmerican/AGTA agree that rates for ancillary services should not be bundled with transportation rates. However, DOI contends that the State of Alaska should address the need for rules concerning non-discriminatory access to gathering and other production-related facilities, whereas MidAmerican/AGTA claims that the Commission should assert and jurisdiction over gas treatment plants and require separate open seasons and cost-based tariff structures for gas processing. On the other hand, the North Slope Producers contend issues of tying or bundling of services can be dealt with through established Commission processes and policies at the appropriate time, and need not be addressed in the open season. Alliance views the tying issue in the context of requiring designated downstream capacity, and suggests that as a practical matter, that should not be prohibited.

128. The Commission is stating in the final rule at § 157.34(c)(6) that the open season notice must contain an unbundled transportation rate. Moreover, § 157.34(c)(10) prohibits a prospective applicant from requiring

prospective shippers to process or treat their gas at any designated facility. The Commission is satisfied that it can address any other discriminatory conduct in connection with gas quality requirements or other ancillary services through the provisions of § 157.35 in conjunction with existing Commission policies and procedures.

**Information Collection Statement**

129. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting, recordkeeping, and public disclosure (collections of information) imposed by an agency.<sup>39</sup> The following information collection requirements contained in this final rule are being submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995.<sup>40</sup> The Commission identifies the information disclosed under part 157 as FERC-537. The Commission has submitted this information collection to OMB for review and clearance under emergency processing procedures.<sup>41</sup>

130. The Commission did not receive specific comments concerning its burden estimates and uses the same estimates here in the Final Rule. Comments on the substantive issues raised in the NOPR are addressed elsewhere in the Final Rule.

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
FERC-537 .....	0	1	80	2,400
Totals .....	.....	.....	.....	2,400

*Total Annual Hours for Collection:* 2400 hrs. These are mandatory information collection requirements.

*Information Collection Costs:* The Commission sought comments on the cost to comply with these requirements. No comments were received. The Commission is projecting the average annualized cost for all respondents to be \$139,000 (2400 × \$58.00).

*Title:* FERC-537 "Gas Pipeline Certificates: Construction, Acquisition and Abandonment."

*Action:* Proposed Information Collection.

*OMB Control Nos.:* 1902-0060. The applicant shall not be penalized for failure to respond to this collection of information unless the collection of information displays a valid OMB control number.

*Respondents:* Business or other for profit.

*Frequency of Responses:* One-time implementation.

131. *Necessity of Information:* On October 13, 2004, Congress enacted the Alaska Natural Gas Pipeline Act. Section 103(e) (1) of the Act directs the Commission to issue regulations within 120 days from the enactment of the Act. Congress and the Commission consider the issuance of these regulations to be of critical importance to the construction and development of and access to Alaska natural gas transportation projects. The Commission must issue a final rule by February 10, 2005.

132. Interested person may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 (Attention: Michael Miller, Office of the Executive

Director, (202) 502-8415, fax: (202) 273-0873), e-mail: [michael.miller@ferc.gov](mailto:michael.miller@ferc.gov). For submitting comments concerning the collection of information and the associated burden estimate(s) including suggestions for reducing this burden, please send your comments to the contact listed above and to the Office of Management and Budget, Room 10202 NEOB, 725 17th Street, NW., Washington, DC 20503 (Attention: Desk Officer for the Federal Energy Regulatory Commission, (202) 395-4650, fax: (202) 395-7285).

**Environmental Analysis**

133. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human

<sup>39</sup> 5 CFR 1320.11.

<sup>40</sup> 44 U.S.C. 3507(d).

<sup>41</sup> 5 CFR 1320.13.

environment.<sup>42</sup> No environmental consideration is raised by the promulgation of a rule that is procedural in nature or does not substantially change the effect of legislation or regulations being amended.<sup>43</sup> The final rule establishes requirements governing the conduct of open seasons for proposals to construct Alaska natural gas transportation projects and does not substantially change the effect of the underlying legislation or regulations being revised.

#### Regulatory Flexibility Act Certification

134. The Regulatory Flexibility Act of 1980 (RFA)<sup>44</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such an analysis if a rule would not have such an effect.

135. The Commission concludes that this final rule would not have such an impact on small entities. Most companies regulated by the Commission do not fall within the RFA's definition of a small entity.<sup>45</sup>

#### Document Availability

136. 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 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington DC 20426.

137. From FERC's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

138. User assistance is available for eLibrary and the FERC's Web site during normal business hours. For assistance, please contact FERC Online Support at

1-866-208-3676 (toll free) or (202) 502-6652 (e-mail at [FERCOnlineSupport@FERC.gov](mailto:FERCOnlineSupport@FERC.gov)), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659 (e-mail at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov)).

#### Effective Date

139. These regulations are effective May 19, 2005.

140. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this final rule is not a major rule as defined in Section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

#### List of Subjects in 18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements.

By the Commission.

**Magalie R. Salas**,  
Secretary.

<sup>n</sup> 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

<sup>n</sup> 1. The authority citation for part 157 continues to read as follows:

**Authority:** 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352; 1331-1356.

<sup>n</sup> 2. Subpart B is added to part 157 to read as follows:

#### Subpart B—Open Seasons for Alaska Natural Gas Transportation Projects

Sec.

- 157.30 Purpose.
- 157.31 Definitions.
- 157.32 Applicability.
- 157.33 Requirement for open season.
- 157.34 Notice of open season.
- 157.35 Undue discrimination or preference.
- 157.36 Open season for expansions.
- 157.37 Project design.
- 157.38 Prefiling procedures.
- 157.39 Rate treatment for pipeline expansions.

#### Subpart B—Open Seasons for Alaska Natural Gas Transportation Projects

##### § 157.30 Purpose.

This subpart establishes the procedures for conducting open seasons for the purpose of making binding commitments for the acquisition of initial or voluntary expansion capacity

on Alaska natural gas transportation projects, as defined herein.

##### § 157.31 Definitions.

(a) "Alaska natural gas transportation project" means any natural gas pipeline system that carries Alaska natural gas to the international border between Alaska and Canada (including related facilities subject to the jurisdiction of the Commission) that is authorized under the Alaska Natural Gas Transportation Act of 1976 or section 103 of the Alaska Natural Gas Pipeline Act.

(b) "Commission" means the Federal Energy Regulatory Commission.

(c) "Voluntary expansion" means any expansion in capacity of an Alaska natural gas transportation project above the initial certificated capacity, including any increase in mainline capacity, any extension of mainline pipeline facilities, and any lateral pipeline facilities beyond those certificated in the initial certificate order, voluntarily made by the pipeline. An expansion done pursuant to section 105 of the Alaska Natural Gas Pipeline Act is not a voluntary expansion.

##### § 157.32 Applicability.

These regulations shall apply to any application to the Commission for a certificate of public convenience and necessity or other authorization for an Alaska natural gas transportation project, whether filed pursuant to the Natural Gas Act, the Alaska Natural Gas Transportation Act of 1976, or the Alaska Natural Gas Pipeline Act, and to applications for expansion of such projects. Absent a Commission order to the contrary, these regulations are not applicable in the case of an expansion ordered by the Commission pursuant to section 105 of the Alaska Natural Gas Pipeline Act.

##### § 157.33 Requirement for open season.

(a) Any application for a certificate of public convenience and necessity or other authorization for a proposed Alaska natural gas transportation project must include a demonstration that the applicant has conducted an open season for capacity on its proposed project, in accordance with the requirements of this subpart. Failure to provide the requisite demonstration will result in an application being rejected as incomplete.

(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 paragraph (a) of this section, capacity is offered to all prospective bidders at the same rates and on the

<sup>42</sup> Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

<sup>43</sup> 18 CFR 380.4(a)(2)(ii) (2004).

<sup>44</sup> 5 U.S.C. 601-612.

<sup>45</sup> 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 623. Section 3 of the Small Business Act defines a "small-business concern" as a business which is independently-owned and operated and which is not dominant in its field of operation.

same terms and conditions as contained in the pre-subscription agreements. All pre-subscription agreements shall be made public by posting on Internet Web sites 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 the terms rates, terms and conditions contained in any one of the several agreements.

**§ 157.34 Notice of open season.**

(a) *Notice.* A prospective applicant must provide reasonable public notice of an open season, at least 30 days prior to the commencement of the open season, through methods including postings on Internet Web sites, 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.

(b) *In-State Needs Study.* A prospective applicant must conduct or adopt a study of gas consumption needs and prospective points of delivery within the State of Alaska and rely upon such study to develop the contents of the notice required in paragraph (a) of this section. Such study shall be identified in the notice and if practicable, shall include or consist of a study conducted, approved, or otherwise sanctioned by an appropriate governmental agency, office or commission of the State of Alaska. In its open season proposal, a prospective applicant shall include an estimate based upon the study, of how much capacity will be used in-state.

(c) *Contents of notice.* Notice of the open season required in paragraph (a) of this section, shall contain at least the following information; however, to the extent that any item of such information is not known or determined at the time the notice is issued, the prospective applicant shall make a good faith estimate based on the best information available of all such unknown or undetermined items of required information and further, must identify the source of information relied on, explain why such information is not presently known, and update the information when and if it is later determined during the open season period:

(1) The general route of the proposed project, including receipt and delivery points, and any alternative routes under consideration; delivery points must include those within the State of Alaska as determined by the In-State Study in paragraph (b) of this section.

(2) Size and design capacity (including proposed certificate capacity at the delivery points named in paragraph (c)(1) of this section to the extent that it differs from design capacity), a description of possible designs for expanded capacity beyond initial capacity, together with any estimated date when such expansions designs may be considered;

(3) Maximum allowable operating pressure and expected actual operating pressure;

(4) Delivery pressure at all delivery points named in paragraph (c)(1) of this section;

(5) Projected in-service date;

(6) An estimated unbundled transportation rate for each delivery point named in paragraph (c)(1) of this section, stated on a volumetric or thermal basis, for each service offered, including reservation rates for pipeline capacity, interruptible transportation rates, usage rates, fuel retention percentages, and other applicable charges, or surcharges, such as the Annual Charge Adjustment (ACA); (if rates are estimated on a volumetric basis then the notice must inform bidders that final pro forma service agreements and the sponsor's proposed FERC tariff will have to be submitted with rates based on a thermal basis.)

(7) The estimated cost of service (*i.e.*, estimated cost of facilities, depreciation, rate of return and capitalization, taxes and operational and maintenance expenses), and estimated cost allocations, rate design volumes and rate design;

(8) Based on the In-State Study and the delivery points within the State of Alaska identified in paragraph (c)(1) of this section, there must be an estimated transportation rate for such deliveries, based on the amount of in-state needs shown in the study. Such estimated transportation rate must be based on the costs to make such in-state deliveries and shall not include costs to make deliveries outside the State of Alaska;

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

(10) Quality specifications and any other requirements applicable to gas to be delivered to the project; provided that a prospective applicant shall not require that potential shippers process or treat their gas at any designated plant or facility;

(11) Terms and conditions for each service offered;

(12) Creditworthiness standards to be applied to, and any collateral requirements for, prospective shippers;

(13) The date, if any, by which potential shippers and the prospective applicant must execute precedent agreements;

(14) A detailed methodology for determining the value of bids for deliveries within the State of Alaska and for deliveries outside the State of Alaska;

(15) The methodology by which capacity will be awarded, in the case of over-subscription, clearly stating all terms that will be considered, including price and contract term. If 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 or was bid in the open season on the same rates, terms, and conditions as any of the pre-subscription agreements shall be subject to allocation on a pro rata basis; no capacity acquired through the open season shall be allocated.

(16) Required bid information, whether bids are binding or non-binding, receipt and delivery point requirements, the form of a precedent agreement and time of execution of the precedent agreement, definition and treatment of non-conforming bids;

(17) The projected date for filing an application with the Commission;

(18) All information pertaining to the proposed service to be offered, projected pipeline capacity and design, proposed tariff provisions, and cost projections, made available to or in the hands of 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;

(19) A list of the names and addresses of the prospective applicant's affiliated sales and marketing units and Energy Affiliates involved in the production of natural gas in the State of Alaska. Affiliated unit means "Affiliate" as applicably defined in § 358.3(b) of this chapter. Energy Affiliate means "Energy Affiliate" as applicably defined in § 358.3(d) of this chapter;

(20) A comprehensive organizational charts showing:

(i) The organizational structure of the prospective applicant's parent corporation(s) with the relative position in the corporate structure of marketing and sales units and any Energy Affiliates involved in the production of natural gas in the State of Alaska.

(ii) The job titles and descriptions, and chain of command for all officers and directors of the prospective

applicant's marketing and sales units and any Energy Affiliates involved in the production of natural gas in the State of Alaska; and

(21) A statement that any officers and directors of the of the prospective applicant's affiliated sales and marketing units and Energy Affiliates involved in the production of natural gas in the State of Alaska named in paragraph (c)(19) of this section will be prohibited from obtaining information about the conduct of the open season or allocation of capacity that is not posted on the "open season" Internet website or that is not otherwise also available to the general public or other participants in the open season.

(d) *Timing.*

(1) A prospective applicant must provide prospective shippers at least 90 days from the date on which notice of the open season is given within which to submit requests for transportation services. No bid shall be rejected because a prospective shipper has submitted another bid in another open season conducted under this subpart.

(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 or operational constraints, and a detailed explanation must accompany the rejection.

(3) Within 10 days after precedent agreements have been executed for capacity allocated in the open season, the prospective applicant shall make public on the Internet and through press releases the results of the open season, at least including the name of the prospective shipper, amount of capacity awarded, and term of agreement.

(4) Within 20 days after precedent agreements have been executed for capacity allocated in the open season, the prospective applicant must submit copies of all such precedent agreements to the Commission and copies of any relevant correspondence with bidders for capacity who were not allocated capacity that identifies why such bids were not accepted (all documents identified in this paragraph (d)(4) may be filed under confidential treatment pursuant to § 388.112 of this chapter if desired).

**§ 157.35 Undue discrimination or preference.**

(a) All binding open seasons shall be conducted without undue discrimination or preference in the rates, terms or conditions of service and all capacity allocated as a result of any open season shall be awarded without

undue discrimination or preference of any kind.

(b) Any complaint filed pursuant to § 385.206 of this chapter alleging non-compliance with any of the requirements of this subpart shall be processed under the Commission's Fast Track Processing procedures contained in § 385.206(h).

(c) Each project applicant conducting an open season under this subpart 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 § 358.(d) and (k) of this chapter.

(d) Each project applicant conducting an open season under this subpart that is not otherwise subject to the provisions of part 358 of this chapter must comply with the following sections of that part: Sections 258.4(a)(1) and (3); 358.4(e)(3), (4), (5), and (6); 358.5(a), (b), (c)(3) and (5); and 358.5(d). The exemptions from § 358.4(a)(1) and (3) set forth in § 358.4(a)(4), (5), and (6) of this chapter also apply to each project applicant conducting an open season under this subpart.

**§ 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 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.

**§ 157.37 Project design.**

In reviewing any application for an Alaska natural gas pipeline project, the Commission will consider the extent to which a 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 may require changes in project design necessity to promote competition and

offer a reasonable opportunity for access to the project.

**§ 157.38 Prefiling procedures.**

No later than 90 days prior to providing the notice of open season required by § 157.34(a), a prospective applicant must file, for Commission approval, a detailed plan for conducting an open season in conformance with these regulations. 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 plan.

**§ 157.39 Rate treatment of pipeline expansions.**

There 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.

**Note:** The following appendix will not appear in the Code of Federal Regulations.

**Appendix**

**Technical Conference Commenters**

Governor Frank H. Murkowski  
 U.S. Senator Lisa Murkowski  
 State Representative Ralph Samuels  
 State Senator Gene Therriault  
 Tony Palmer, TransCanada  
 Richard Guerrant, ExxonMobil  
 Ken Konrad, BP Alaska  
 Joe Marushack, ConocoPhillips  
 Ron Brintnell, Enbridge  
 Bill Corbus, Commissioner, Alaska Department of Revenue  
 Mark Handley/Dave Anderson, Anadarko  
 Tony Izzo, Enstar  
 Rick Mott, ConocoPhillips (as a shipper)  
 Tom Irwin, Commissioner, Alaska Department of Natural Resources  
 Jeff Walker, Minerals Management Service, Department of the Interior  
 Colleen McCarthy, Bureau of Land Management (BLM), Department of the Interior  
 David Houseknecht, U.S. Geological Survey  
 Harold Heinze, ANGDA  
 Jerry Isaac, Upper Tanana Intertribal Coalition  
 Bob Sattler, Tanana Chiefs Conference

**Commenters in Response to NOPR**

Alaska Natural Gas Development Authority (ANGDA)  
 Alaska Oil and Gas Conservation Commission (AOGCC)  
 Alaska Venture Capital Group LLC and Brook Range Petroleum Corporation (Alaska Venture Capital/Brook Range)

Alliance Pipeline, LP (Alliance)  
 American Gas Association (AGA)  
 Anadarko Petroleum Corporation (Anadarko)  
 Nels Anderson, Jr. (individual)  
 Arctic Slope Regional Corporation (Arctic Slope)  
 Ken Baker <sup>1</sup>  
 Alaska Representative Ethan Berkowitz  
 BP Exploration (Alaska) Inc., ConocoPhillips Company, and Exxon Mobil Corporation (North Slope Producers)  
 Calpine Corporation (Calpine)  
 ChevronTexaco Natural Gas, a Division of Chevron U.S.A. Inc. (ChevronTexaco)  
 Doyon Limited  
 Enbridge, Inc. (Enbridge)  
 Legislative Budget and Audit Committee and Indicated State Legislators (Alaska Legislators) <sup>2</sup>  
 MidAmerican Energy Holdings Company and Alaska Gas Transmission Company (MidAmerican/AGTA)  
 Northwest Industrial Gas Users (Northwest Industrials)  
 Pacific Star Energy LLC (Pacific Star)  
 B. Sachau, aka Jean Public (individual)  
 Shell USA (Shell)  
 State of Alaska (Alaska)  
 TransCanada Pipeline Limited (TransCanada)  
 U.S. Department of the Interior (DOI)  
 U.S. Geological Survey <sup>3</sup>

[FR Doc. 05-3035 Filed 2-17-05; 8:45 am]  
 BILLING CODE 6717-01-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 510**

**New Animal Drugs; Change of Sponsor's Address**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor's address for Phibro Animal Health.

**DATES:** This rule is effective February 18, 2005.

**FOR FURTHER INFORMATION CONTACT:** David R. Newkirk, Center for Veterinary Medicine (HFV-100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-6967, e-mail: [david.newkirk@fda.gov](mailto:david.newkirk@fda.gov).

**SUPPLEMENTARY INFORMATION:** Phibro Animal Health, 710 Rte. 46 East, suite

401, Fairfield, NJ 07004, has informed FDA of a change of address to 65 Challenger Rd., 3d floor, Ridgefield Park, NJ 07660. Accordingly, the agency is amending the regulations in 21 CFR 510.600(c) to reflect the change.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

**List of Subjects in 21 CFR Part 510**

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

n Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 510 is amended as follows:

**PART 510—NEW ANIMAL DRUGS**

n 1. The authority citation for 21 CFR part 510 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

n 2. Section 510.600 is amended in the table in paragraph (c)(1) by revising the entry for "Phibro Animal Health" and in the table in paragraph (c)(2) by revising the entry for "066104" to read as follows.

**§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

Firm name and address	Drug labeler code
* * *	* * *
Phibro Animal Health, 65 Challenger Rd., 3d floor, Ridgefield Park, NJ 07660	066104
* * *	* * *

(2) \* \* \*

Drug labeler code	Firm name and address
* * *	* * *
066104	Phibro Animal Health, 65 Challenger Rd., 3d floor, Ridgefield Park, NJ 07660
* * *	* * *

Dated: February 8, 2005.

**Steven D. Vaughn,**  
 Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.  
 [FR Doc. 05-3177 Filed 2-17-05; 8:45 am]  
 BILLING CODE 4160-01-S

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 520**

**Oral Dosage Form New Animal Drugs; Sulfamethazine Sustained-Release Boluses; Change of Sponsor**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for a new animal drug application (NADA) from Boehringer Ingelheim Vetmedica, Inc. to Phoenix Scientific, Inc.

**DATES:** This rule is effective February 18, 2005.

**FOR FURTHER INFORMATION CONTACT:** David R. Newkirk, Center for Veterinary Medicine (HFV-100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-6967, e-mail: [david.newkirk@fda.gov](mailto:david.newkirk@fda.gov).

**SUPPLEMENTARY INFORMATION:** Boehringer Ingelheim Vetmedica, Inc., 2621 North Belt Hwy., St. Joseph, MO 64506-2002, has informed FDA that it has transferred ownership of, and all rights and interest in, NADA 140-270 for Sulfamethazine Sustained Release Bolus to Phoenix Scientific, Inc., 3915 South 48th St. Terr., St. Joseph, MO 64503.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

**List of Subjects in 21 CFR Part 520**

Animal drugs.  
 n Therefore, under the Federal Food, Drug and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

**PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS**

n 1. The authority citation for 21 CFR part 520 continues to read as follows:

<sup>1</sup> New River Community and Technical College, Greenbrier Valley Campus.  
<sup>2</sup> Representative Ralph Samuels, Chairman of the Alaska Legislative Budget & Audit Committee (separately).  
<sup>3</sup> Brenda Johnson, Office of Environmental Affairs Program.