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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 157

[Docket No. RM05-1-002]

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

(Issued March 18, 2010)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Commission is amending its regulations, in order to clarify them in response to Order Nos. 717 and 717-A, governing the Standards of Conduct for transmission providers. These amendments are required in order to make clear to prospective applicants for an Alaska natural gas transportation project which Standards of Conduct are applicable to conducting open seasons for Alaska natural gas transportation projects. This clarification will benefit both prospective applicants and prospective shippers of an Alaska natural gas transportation project by eliminating any uncertainties those parties may have pertaining to the standards of conduct governing open seasons for such a project.

EFFECTIVE DATE: This rule will become effective [insert date that is 30 days after publication in the **FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Regulations Governing the Conduct of  
Open Seasons for Alaska Natural Gas  
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Docket No. RM05-1-002

ORDER NO. 2005-B

FINAL RULE

(Issued March 18, 2010)

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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. RM05-1-002

ORDER NO. 2005-B

FINAL RULE

(Issued March 18, 2010)

**I. Introduction**

1. By this instant final rule, the Commission is amending Part 157, Subpart B of its regulations, specifically 18 CFR §§ 157.34 and 157.35, in order to clarify and reconcile them in response to Order Nos. 717 and 717-A,<sup>1</sup> governing the Standards of Conduct for transmission providers. Part 157, Subpart B contains the regulations governing open seasons for Alaska natural gas transportation projects. Specifically, the Commission is eliminating references to “energy affiliates” in §§ 157.34 and 157.35 of the Commission’s regulations in order to be consistent with Order No. 717, in which the Commission eliminated the concept of “energy affiliates” in response to the U.S. Court of

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<sup>1</sup> Standards of Conduct for Transmission Providers, Order No. 717, 73 FR 63796 (Oct. 27, 2008); FERC Stats. & Regs. ¶ 31,280 (2008), order on reh’g and clarification, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297 (2009), order on reh’g, Order No. 717-B, 129 FERC ¶ 61,123 (2009).

Appeals for the D.C. Circuit decision in National Fuel Gas Corporation v. FERC (National Fuel).<sup>2</sup>

2. The Commission, in Order No. 717, also eliminated the corporate functional approach taken in Order No. 2004's<sup>3</sup> Standards of Conduct in favor of an employee functional approach. In doing so, the Commission revised and reformed the Standards of Conduct to combine the best elements of Order No. 2004, with those of the Standards of Conduct originally adopted by the Commission in Order Nos. 497<sup>4</sup> (for the gas industry) and 889<sup>5</sup> (for the electric industry). By this rule, the Commission is reconciling

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<sup>2</sup> 468 F.3d 831 (D.C. Cir. 2006).

<sup>3</sup> Standards of Conduct for Transmission Providers, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), order on reh'g, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, order on reh'g, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, order on reh'g, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), order on reh'g, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006); see Standards of Conduct for Transmission Providers, Order No. 690, FERC Stats. & Regs. ¶ 31,237, order on reh'g, Order No. 690-A, FERC Stats. & Regs. ¶ 31,243 (2007); see also Standards of Conduct for Transmission Providers, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,630 (2008).

<sup>4</sup> Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, 53 FR 22139 (Jun. 14, 1988), FERC Stats. & Regs. Regulations Preambles 1986-1990 ¶ 30,820 (1988), Order No. 497-A, order on reh'g, 54 FR 52781 (Dec. 22, 1989), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,868 (1989) Order No. 497-B, order extending sunset date, 57 FR 9 (Jan. 2, 1992), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,934 (1991), reh'g denied, 57 FR 5815 (Feb. 18, 1992), aff'd in part and remanded in part sub nom. Tenneco Gas v. FERC, 969 F.2d 1187 (D.C. Cir. 1992) (Tenneco) (collectively, Order No. 497).

<sup>5</sup> Open Access Same-Time Information System and Standards of Conduct, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), order on reh'g, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049, reh'g denied, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

references in § 157.35(d) to the specific Standards of Conduct with which a project sponsor conducting an open season for an Alaska natural gas transportation project must comply, as they have been revised and now appear in the Commission's regulations as a result of Order Nos. 717 and 717-A.

## II. **Background**

3. In 1988, the Commission, in Order No. 497, first adopted Standards of Conduct for transmission providers. In Order No. 497, the Commission sought to deter undue preferences by (i) separating a transmission function provider's employees engaged in transmission services from those engaged in its marketing services, and (ii) requiring that all transmission customers, affiliated and non-affiliated, be treated on a non-discriminatory basis.

4. In 2003, the Commission issued Order No. 2004, which broadened the Standards of Conduct to include a new category of affiliate, the energy affiliate.<sup>6</sup> The new standards were made applicable to both the electric and gas industries, and provided that the transmission employees of a transmission provider<sup>7</sup> must function independently not

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<sup>6</sup> The Order No. 2004 Standards of Conduct defined an energy affiliate as an affiliate of a transmission provider that (1) engages in or is involved in transmission transactions in U.S. energy or transmission markets; (2) manages or controls transmission capacity of a transmission provider in U.S. energy or transmission markets; (3) buys, sells, trades, or administers natural gas or electric energy in U.S. energy or transmission markets; or (4) engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets. Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 40; see also 18 CFR 358.3(d). Certain categories of entities were excluded from this definition in subsequent sections of the regulations.

<sup>7</sup> A transmission provider was defined as (1) any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce; or (2) any interstate natural gas pipeline that transports gas for others pursuant to subpart A of Part 157 or subparts B or G of Part 284 of the same chapter of the regulations. Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 33-34; see also 18 CFR 358.3(a).

only from the company's marketing affiliates but from its energy affiliates as well, and that transmission providers may not treat either their energy affiliates or their marketing affiliates on a preferential basis.

5. In 2005, the Commission issued Order No. 2005,<sup>8</sup> amending its regulations to establish requirements governing the conduct of open seasons for proposals to construct Alaska natural gas transportation projects.<sup>9</sup> In order to further the Commission's goal of a non-discriminatory open season, Order No. 2005 applied certain of the Standards of Conduct requirements of Order No. 2004, several of which incorporated Order No. 2004's "energy affiliate" concept.

6. In 2006, in National Fuel, the U.S. Court of Appeals for the D.C. Circuit overturned the standards as applied to gas transmission providers on the ground that the evidence of energy affiliate abuse cited by the Commission was not in the record.<sup>10</sup> As a result of the court's decision in National Fuel, on January 9, 2007, the Commission

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<sup>8</sup> Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects, Order No. 2005, FERC Stats. & Regs. ¶ 31,174 (2005), order on reh'g, Order No. 2005-A, FERC Stats. & Regs. ¶ 31,187 (2005).

<sup>9</sup> Order No. 2005 fulfilled the Commission's responsibilities under section 103 (e)(1) of the Alaska Natural Gas Pipeline Act (the Act), enacted on October 13, 2004, which directed 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.

<sup>10</sup> National Fuel, 468 F.3d at 841.

issued an interim rule, Order No. 690,<sup>11</sup> which repromulgated the portions of the Standards of Conduct not challenged in National Fuel as applied to natural gas transmission providers. Subsequently, on October 16, 2008, the Commission issued Order No. 717 amending the Standards of Conduct for transmission providers to make them clearer and to refocus the rules on the area where there is the greatest potential for abuse.

7. The reforms in Order No. 717 were intended to eliminate the elements that had rendered the Standards of Conduct difficult to enforce and apply. The Commission strove to conform the Standards of Conduct with the court's opinion in National Fuel and combine the best elements of Order No. 2004 with those elements of the Standards of Conduct originally adopted in Order Nos. 497 and 889. Specifically, Order No. 717 (i) eliminated the concept of energy affiliates, and (ii) eliminated the corporate separation approach in favor of the employee functional approach used in Order Nos. 497 and 889.

### **III. Discussion**

8. The Commission's goal in promulgating §§ 157.34 and 157.35 of its regulations was to prevent unduly discriminatory behavior and limit the ability of a project applicant for an Alaska natural gas transportation project to unduly favor its affiliates in the open season process. The Commission sought to do this by applying certain of the Standards of Conduct requirements of Order No. 2004 to all project

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<sup>11</sup> Standards of Conduct for Transmission Providers, Order No. 690, 72 FR 2427 (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,237 (2007) (Interim Rule); clarified by, Standards of Conduct for Transmission Providers, Order No. 690-A, 72 FR 14235 (Mar. 27, 2007); FERC Stats. & Regs. ¶ 31,243 (2007).

applicants conducting open seasons for an Alaska natural gas transportation project because this would minimize the risk that an affiliate of a project applicant would have an advantage over non-affiliates in obtaining capacity through the open season.

9. First, in § 157.35(c), the Commission required project applicants to

create/designate a unit or division to conduct the open season. The employees of this unit

or division are treated as transmission function employees, and as such are required,

under Order No. 2004, to function independent of the other non-regulated divisions of the

project applicant, as well as the project applicant's Marketing and Energy Affiliates.<sup>12</sup>

This, the Commission stated, would prevent Energy Affiliates or Marketing 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.

10. Second, in § 157.35(d), the Commission provided that the project sponsor's unit or division conducting an open season would be subject to certain

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<sup>12</sup> See 18 CFR 358.4(a)(1).

provisions of the Standards of Conduct, specifically, those pertaining to: separation of functions (18 CFR. §§ 358.4(a)(1) and (3)); written procedures (18 CFR §§ 358.4(e)(3), (4), (5) and (6)); information access (18 CFR § 358.5(a)); information disclosure (18 CFR § 358.5(b)); prohibitions against discrimination (18 CFR §§ 358.5(c)(3) and(5)) and discounts (18 CFR § 358.5(d).

**A. Concept of “Energy Affiliates”**

**1. Current Alaska Open Season Regulations –§§ 157.34 (c)(19), (20)(i) and (ii), and (21), and 157.35(c)**

11. The current regulations governing the conduct of open seasons for Alaska natural gas transportation projects refer in several sections to “energy affiliates.” In particular, paragraphs (19), (20)(i) and (ii), and (21) of § 157.34(c): include “Energy Affiliates” among the entities that a prospective applicant must list and identify in organizational charts to be included in the prospective applicant’s Notice of Open Season.

12. Additionally, as part of the Commission’s regulations to prevent undue discrimination or preference in the conduct of open seasons for Alaska natural gas transportation projects, § 157.35(c): requires that all prospective applicants conducting open seasons for an Alaska natural gas transportation project function independent of, among others, their Energy Affiliates, as defined the Commission’s Standards of Conduct.

**B. New Alaska Open Season Regulations –§§ 157.34 (c)(19),**

**(20)(i) and (ii), and (21), and 157.35(c)**

13. As stated above, Order No. 717 eliminated the concept of “energy affiliates” by deleting that term, as it was defined in § 358.3(d)<sup>13</sup> of the pre-Order No. 717 Standards of Conduct. Order No. 717 also deleted from the Standards of Conduct the definition of “marketing affiliate,” consistent with its goal of eliminating Order No. 2004’s corporate functional approach. In its stead, Order No. 717 refers to the terms “marketing function” in new § 358.3(c)<sup>14</sup> and “marketing function employee” in new § 358.3(d).<sup>15</sup> In the case of interstate pipelines and their affiliates, marketing function means “the sale for resale in interstate commerce, or the submission of offers to sell interstate commerce, natural gas” subject to several exclusions, including “sales of natural gas solely from a seller’s own production, or a “seller’s own gathering or processing facilities.”<sup>16</sup> However, for purposes of these regulations, these exclusions, which also existed under the definition of “marketing” under the Order No. 2004 Standards of Conduct (see 18 CFR 358.3(l)(1)), cannot be read to exclude any prospective project sponsors that comprised or were affiliated with the owner of the Alaskan North Slope natural gas. The Commission made this clear by providing in § 157.35(d) of the open season regulations that all project applicants, even those who would not otherwise be subject to the Standards of Conduct

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<sup>13</sup> 18 CFR 358.3(d).

<sup>14</sup> 18 CFR 358.3(c).

<sup>15</sup> 18 CFR 358.3(d).

<sup>16</sup> 18 CFR 358.3(c)(iii) and (iv).

provisions, must comply with certain enumerated sections of the Standards of Conduct.

14. Therefore, in order to render the regulations governing the conduct of open seasons for Alaska natural gas transportation projects consistent with the current Standards of Conduct, the Commission is amending paragraphs (19), (20) and (21) of § 157.34(c) to eliminate references to “energy affiliates” and “marketing affiliates,” and is adopting Order No. 717’s employee functional approach as reflected in the marketing function/marketing function employee concept. However, the Commission is also making clear that the “producer exemption” of § 358.3(c)(iii) does not apply in the case of prospective applicants conduction open seasons for Alaska natural gas transportation projects .

15. The Commission is also amending § 157.35(c) to eliminate references to “Energy Affiliates” in that provision of the open season regulations, and to replace the term “marketing affiliates” with “affiliates” performing a “marketing function,” as those terms are defined in the current Standards of Conduct. Again, the Commission is making clear in this section that the “producer exemption” of § 358.3(c)(iii) does not apply in the case of prospective applicants conduction open seasons for Alaska natural gas transportation projects.

**C. Specific Provisions of the Standards of Conduct**

**Current Alaska Open Season Regulations –§ 157.35(d)**

16. As explained above, Commission provided in § 137.35(d) that the project sponsor’s unit or division conducting an open season would be subject to certain provisions of the Commission’s Standards of Conduct, namely, §§ 358.4(a)(1) and (3); 358.4(e)(3), (4), (5), and (6); 358.5(a), (b), (c)(3) and (5); and 358.5(d). That section

also provided that the exemptions from § 358.4(a)(1) and (3) set forth in § 358.4(a)(4), (5), and (6) of the open season regulations also applied to any project applicant conducting an open season for an Alaska natural gas transportation project.

17. Below, we will discuss the specific Standards of Conduct with which an applicant for an Alaska natural gas transportation project must comply and compare those requirements with those contained in the Standards of Conduct as revised by Order No. 717.

**D. Separation of Functions – §§ 358.4(a)(1) and (3) (2004)**

18. Under § 157.35(d) of the Commission’s open season regulations, any project applicant conducting an open season for an Alaska natural gas transportation project must comply with the separation of functions requirements of the Standards of Conduct found in §§ 358.4(a)(1) and (3) of the Commission’s regulations.<sup>17</sup>

19. The independent functioning requirements of § 358.4(a)(1) now appear in the new Standards of Conduct, as amended by Order No. 717, at § 358.5(a) of the Commission’s regulations.<sup>18</sup> The new standard has two minor differences from the Order No. 2004 standard. First, the exception for emergency circumstances affecting system reliability was replaced by a broader exception “as permitted in this part or otherwise permitted by Commission order.” This change should have no impact on a project applicant’s obligations since no emergency circumstances affecting system reliability would occur at the open season stage. The second difference is that reference to “Marketing and Energy Affiliates” has been replaced by reference to “marketing function

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<sup>17</sup> Old 18 CFR 358.4(a)(1) and (3).

<sup>18</sup> 18 CFR 358.5(a).

employees,” reflecting Order No. 717’s elimination of the Energy Affiliate and the adoption of an employee functional approach in lieu of a corporate functional approach. The separation of functions requirements described in § 358.4(a)(3) are now found in § 358.5(b) of the new standards,<sup>19</sup> although they, too, are now expressed in terms that reflect Order No. 717’s employee functional approach by replacing reference to “Marketing and Energy Affiliates” with reference to “marketing function employees.”

**E. Written Procedures – §§ 358.4(e)(3), (4), (5) and (6)**

20. Section 157.35(d) of the Commission’s open season regulations also imposes on any project applicant conducting an open season for an Alaska natural gas transportation project certain requirements pertaining to written procedures, training, and compliance oversight as set out in §§ 358.4(e)(3), (4), (5) and (6).<sup>20</sup> Specifically, § 358.4(e)(3) requires each project applicant to post on its internet website its written procedures describing how it will comply with the applicable Standards of Conduct and pursuant to § 358.4(e)(4), these procedures are to be distributed to specified employees. Also, under the requirements of § 358.4(e)(5), each project applicant is required 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. Finally, the

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<sup>19</sup> 18 CFR 358.5(b).

<sup>20</sup> Old 18 CFR 358.4(e)(3),(4), (5) and (6).

project applicant must also designate a Chief Compliance Officer who will be responsible for Standards of Conduct compliance as set out in § 358.4(e)(6).

21. Requirements pertaining to written procedures, training, and compliance oversight are now set out in §§ 358.7(d) (posting written procedures); 358.8(b)(2) (distribution of written procedures); 358.8(c)(1) (employee training); and 358.8(c)(2) (designation of compliance officer). Although there are some differences in the details of these procedures, they are minor, and should impose no undue burdens on project applicants conducting open seasons. Likewise, they will not dilute or alter the Commission's goal to ensure a non-discriminatory open season for an Alaska natural gas transportation project.

22. For example, the new Standards of Conduct do not specifically require that the procedures to be posted must be "in such detail as will enable customers and the Commission to determine that the Transmission Provider is in compliance with the requirements of this section."<sup>21</sup> Additionally, the training requirements of the old Standards of Conduct must now be met annually and new employees must be trained within 30 days.<sup>22</sup> Finally, in addition to designating a Chief Compliance Officer, the new Standards of Conduct require that the Chief Compliance Officer's name and contact information be posted.<sup>23</sup>

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<sup>21</sup> Compare old 18 CFR 358.4(e)(3) with 18 CFR 358.7(d).

<sup>22</sup> Compare old 18 CFR 358.4(e)(5) with 18 CFR 358.8(c)(1).

<sup>23</sup> Compare old 18 CFR 358.4(e)(6) with 18 CFR 358.8(c)(2).

**F. Information Access and Disclosure – §§ 358.5(a) and (b)**

23. The application of the information access (18 CFR 358.5(a)) and disclosure (18 CFR 358.5(b)) requirements also apply to project applicants in order to ensure that employees of Marketing/Energy Affiliates<sup>24</sup> participating in the Open Season will not have access to any transmission information that is not publicly available to non-affiliated participants and to require that any disclosure of non-public transmission information to a Marketing/Energy Affiliate will be immediately disclosed to all other actual and potential open season participants by posting that information on the project applicant's internet website. Additionally, § 157.35(d) provides that the requirements set out in § 358.5(b)(4) for written consent before releasing non-affiliated customer information to a Marketing or Energy Affiliate and posting that consent on the Internet also apply to project applicants.

24. Requirements pertaining to information access and disclosure are now set out in §§ 358.6 and 358.7(a), (b), and (c). Although reworded to reflect the elimination of the Energy Affiliate and the replacement of references to Marketing Affiliates with the concept of marketing function employees, the new Standards of Conduct similarly ensure that a project sponsor's affiliated employees who conduct a marketing function will not have access to any transmission information that is not publicly available to non-affiliated open season participants and similarly require that any

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<sup>24</sup> As explained infra, the concept of Energy Affiliate has been eliminated, and the marketing affiliate has been supplanted by the concept of the marketing function employee.

disclosure of non-public transmission information to a marketing function employee will be immediately posted on project applicant's internet website for all other actual and potential open season participants to see.

**G. Prohibition Against Discrimination – §§ 358.5(c)(3) and (5)**

25. In Order No. 2005, the Commission sought to broadly prohibit discrimination by a

project applicant conducting an open season and limit its ability to unduly favor a

Marketing/Energy Affiliate by imposing some of the non-discrimination requirements of

Order No. 2004. Specifically, under § 157.35(d), the non-discrimination

provisions of the Standards of Conduct contained in §§ 358.5(c)(3) and (5)<sup>25</sup>

were made to apply to project applicants. Section 358.5(c)(3) requires a Transmission

Provider to process all similar requests for transmission in the same manner and within

the same period of time; and § 358.5(c)(5) prohibits transmission providers from

giving their Marketing or Energy Affiliates any preference over any other wholesale

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<sup>25</sup> Old 18 CFR 358.5(c)(3) and (5).

customer in matters relating to the sale or purchase of transmission service. The

Commission felt that these provisions would ensure that a project applicant will not

provide any preferences to affiliated participants in the context of an open season. These

prohibitions remain intact under new §§ 358.4(c) and (d).

#### **H. Discounts - § 358.5(d)**

26. Finally, § 157.35(d) imposes on a project applicant the provisions of § 358.5(d),<sup>26</sup> under which a Transmission Provider is required to post an offer of a discount for transmission service at the time an offer is contractually binding.<sup>27</sup> This, too, was done to ensure the transparency of the open season process and discourage undue preferences.

27. In Order No. 717, the Commission deleted the obligation of § 157.35(d) to post discount information from the current Standards of Conducts. In P 218 of Order No. 717, we stated the following:

The Commission further clarifies that where the information called for

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<sup>26</sup> Old 18 CFR 358.5(d).

<sup>27</sup> 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. See Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161 at P 227.

under the posting requirements of the Standards is duplicative of information required to be posted by transmission providers under other provisions of our regulations or orders, such as the posting requirements of 18 CFR part 284 and 18 CFR part 37, only a single posting is required, and the transmission provider is to follow the posting requirements, inclusive of substance, venue, and timing, of the other regulations or orders. We believe the posting requirements contained in such regulations or orders are sufficient to fulfill the transparency goals of the Standards of Conduct. Inasmuch as discount information is required to be posted both for the gas and electric industries under other provisions of our regulations, we delete proposed section 358.4(b), which had set forth proposed requirements for the posting of discount information.<sup>28</sup>

28. The Commission recognizes that other provisions of our regulations or orders, such as the posting requirements of 18 CFR part 284 and 18 CFR part 37 might not attach to a prospective applicant for an Alaska natural gas transportation project. However, under the open season regulations, such an applicant may not give undue preference to any person in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price...).<sup>29</sup> Under § 157.34(d)(4) of the

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<sup>28</sup> FERC Stats. & Regs. ¶ 31,280, at P 218 (2008).

<sup>29</sup> This requirement appears in both the Order No. 2004 Standards of Conduct (18 CFR 358.5(c)(5)) and the Order No. 717 Standards of Conduct (18 CFR 358.4(d)).

Commission's regulations, a prospective applicant must submit copies of all precedent agreements to the Commission, at which time any discounted rates would be revealed, and the Commission can address any concerns or complaints regarding preferential treatment at that time.

**I. Exemptions – §§ 358.4(a)(4), (5), and (6)**

29. In addition, § 157.35(d) provides that the exemptions from §§

358.4(a)(1) and (3) set forth in §§ 358.4(a)(4), (5), and (6) also apply to each

project applicant conducting an Alaska natural gas transportation project open season.

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 (§ 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

(§ 358.4(a)(6)).

30. The new Standards of Conduct do not specifically enumerate similar categories of employees that may be shared. Instead, the sharing of these types of employees may be permitted by virtue of, and to the extent that, the employee in question is not one “who actively and personally engages on a day-to-day basis in marketing functions.”<sup>30</sup>

31. As discussed above, applying the new Standards of Conduct provisions regarding

the functional separation, information access and disclosure, and non-discrimination

provisions of Order No. 717 to the open season process will ensure, in the same way that

the Standards of Conduct currently listed in the open season regulations do, that the open

season is conducted in a manner that is non-discriminatory and provides equal access to

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<sup>30</sup> See 18 CFR 358.3(d).

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 any of these requirements, the results of the open season with regard to the

affiliates of that project applicant may be voided and a new open season held for that

capacity.

32. Therefore, in order to render the regulations governing the conduct of open seasons for Alaska natural gas transportation projects consistent with the current Standards of Conduct, the Commission is amending paragraph (d) of § 157.35 to replace the various Order No. 2004 Standards of Conduct which project sponsors conducting open seasons for an Alaska natural gas transportation project must comply with the applicable new Standards of Conduct promulgated under Order No. 717, as discussed above.

#### **IV. Information Collection Statement**

33. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.<sup>31</sup>

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<sup>31</sup> 5 CFR 1320.12.

However, this instant Final Rule does not increase or decrease the information collection requirements that are already imposed under the Commission's open season regulations for Alaska natural gas transportation projects already imposed and compliance with OMB regulations is thus not required.

## V. Environmental Analysis

34. The Commission is required to prepare an Environmental Assessment or Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.<sup>32</sup> Issuance of this instant Final Rule does not represent a major federal action having a significant adverse effect of the human environment under the Commission's regulations implementing the National Environmental Policy Act of 1969. Part 380 of the Commission's regulations lists exemptions to the requirement to draft an Environmental Assessment or Environmental Impact Statement. Included is an exemption for procedural, ministerial, or internal administrative actions.<sup>33</sup> This rulemaking is exempt under that provision.

## VI. Regulatory Flexibility Act

35. The Regulatory Flexibility Act of 1980 (RFA)<sup>34</sup> generally requires a description

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<sup>32</sup> Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

<sup>33</sup> 18 CFR 380.4(a)(1).

<sup>34</sup> 5 U.S.C. 601-12.

and analysis of final rules that will have significant economic impact on a substantial number of small entities. This instant Final Rule concerns amendments to certain provisions of the Commission's regulations governing the conduct of open seasons for Alaska natural gas transportation projects, namely, 18 CFR 157.34 and 157.35. These changes are being made in order to render the open season regulations consistent with the Commission's current Standards of Conduct by reconciling references to the specific Standards of Conduct with which a project sponsor conducting an open season for an Alaska natural gas transportation project must comply. In large measure, the amendments made in this instant rule do not impose obligations on any Alaska natural gas transportation project applicants that are different than the obligations imposed under the current open season regulations. Rather than being substantive in nature, this rulemaking merely reconciles the references to specific requirements under the Standards of Conduct imposed under Order No. 2004, with those requirements as they now appear in the Standards of Conducts as a result of Order No. 717. Other than in minor details, such as training and posting requirements, as discussed above, any differences in the responsibilities imposed as a result of this rulemaking are differences in form rather than in substance as a result of the new employee functional approach taken by Order No. 717. The Commission certifies that it will not have a significant economic impact upon participants in Commission proceedings. Therefore, an analysis under the RFA is not required.

## **VII. Document Availability**

36. 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 the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

37. From the Commission's Home Page on the Internet, this information is available on 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.

38. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll-free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

#### **VIII. Notice and Comment and Effective Date**

39. The Commission is issuing this rule as an instant Final Rule without a period for public comment. Under 5 U.S.C. 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure or practice, or where the agency finds that notice and comment is impracticable, unnecessary, or contrary to the public interest.

40. This rule concerns the amendment of 18 CFR 157.34 and 157.35

in order to clarify them in response to Order Nos. 717 and 717-A, governing the Standards of Conduct for transmission providers. The changes made in this rulemaking pertain to certain of these standards with which all project applicants conducting open seasons for an Alaska natural gas transportation project must comply.

41. Moreover, on January 29, 2010, TransCanada Alaska Company LLC filed, pursuant to § 157.38 of the Commission's regulations, a Request for Commission Approval of Detailed Plan for Conducting an Open Season in Docket No. PF09-11-001, and the Commission is aware that another potential sponsor of a proposed Alaska natural gas transportation project is preparing to soon file with the Commission its plan for conducting an open season. It is therefore important to clarify as expediently as possible exactly what is required of prospective applicants in order for them to comply with the open season regulations involving the Commission's Standards of Conduct.<sup>35</sup> For these reasons, the Commission finds that notice and public procedure on this rulemaking are impracticable, unnecessary, and contrary to the public interest.

42. The provisions of 5 U.S.C. § 801 regarding Congressional review do not apply to this Final Rule, because this Final Rule concerns agency procedure and practice and will substantially affect the rights of non-agency parties.

43. These regulations are effective [insert date that is 30 days from publication in the **FEDERAL REGISTER**].

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<sup>35</sup> In this regard, the Commission is mindful of the Alaska Natural Gas Pipeline Act's overall objective of facilitating the timely development of an Alaska natural gas transportation project to bring Alaskan natural gas to markets in Alaska and in the lower 48 states.

List of subjects in 18 CFR Part 157, Administrative practice and procedure; Natural gas; Reporting and record keeping requirements

By the Commission

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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

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

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

Authority: 15 U.S.C. 717-717w

2. In § 157.34, paragraphs (19), (20), and (21) are revised to read as

follows:

**§ 157.34 Notice of open season.**

\* \* \* \* \*

(19) A list of the names and addresses of the prospective applicant's affiliated sales and marketing units and affiliates involved in the production of natural gas in the State of Alaska. Affiliated unit means "Affiliate" as defined in § 358.3(a) of this chapter. Marketing units and or affiliates are those conducting a "marketing function" as defined in section 358.3(c) of this chapter, except that the exemption in 358.3(c)(2)(iii) shall not apply ;

(20) A comprehensive organizational chart 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 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 affiliates involved in the production of natural gas in the State of Alaska; and

(21) A statement that any officers and directors of the prospective applicant's affiliated sales and marketing units and 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."

\* \* \* \* \*

4. In § 157.35, paragraphs (c) and (d) are revised to read as follows:

**§ 157.35 Undue discrimination and preference.**

\* \* \* \* \*

(c) Each prospective applicant conducting an open season under this subpart must function independent of the other divisions of the prospective applicant as well as the prospective applicant's "affiliates" performing a "marketing function" as those terms are defined in §§358.3(a) and (c) of the Commission's regulations, except that the exemption in 358.3(c)(2)(iii) shall not apply. In instances in which the prospective applicant is not an entity created specifically to conduct an open season under this subpart, the prospective applicant must create or designate a unit or division to conduct the open season that must function independent of the other divisions of the project applicant as well as the project applicant's "affiliates" performing a "marketing function" as those terms are defined in § 358.3(a) of this chapter, except that the exemption in 358.3(c)(2)(iii) shall not apply.

(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: §§ 358.4(c) and (d), 358.5, 358.6, 358.7(a), (b), and (c), and 358.8 (b) and (c) of this chapter.