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DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

[Docket No. PL21-1-000]

Oil Pipeline Affiliate Contracts

AGENCY: Federal Energy Regulatory Commission.

ACTION: Proposed Policy Statement.

SUMMARY: In this proposed policy statement, the Federal Energy Regulatory Commission proposes guidance for oil pipeline carriers proposing rates and terms pursuant to affiliate contracts.

DATES: Initial Comments are due on or before December 14, 2020, and Reply Comments are due on or before January 28, 2020.

ADDRESSES: Comments, identified by docket number, may be filed electronically at <http://www.ferc.gov> in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426. The Comment Procedures section of this document contains more detailed filing procedures.

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1. We are proposing guidance for oil pipeline carriers proposing rates and terms pursuant to Affiliate Contracts¹ in tariff filings and petitions for declaratory order. We seek comment on the information outlined in this proposed policy statement that could be used to demonstrate that proposed terms pursuant to Affiliate Contracts are just, reasonable, and not unduly discriminatory under the Interstate Commerce Act (ICA).²

¹ “Affiliate Contract” as used in this proposed policy statement means a contract that is executed by the carrier’s affiliate(s) and not by any nonaffiliated entity. For clarification, a contract that is executed by the carrier’s affiliate along with one or more nonaffiliated entities is not an “Affiliate Contract.” “Contract” as used in this proposed policy statement includes transportation service agreements (TSA), throughput and deficiency agreements (T&D Agreement), ship-or-pay agreements, and any contract offered by a carrier under which an entity must make a term commitment associated with interstate oil pipeline transportation service subject to the Commission’s jurisdiction. *See, e.g., Saddlehorn Pipeline Co., LLC*, 169 FERC ¶ 61,118 (2019) (TSA); *BridgeTex Pipeline Co., LLC*, 156 FERC ¶ 61,121 (2016) (TSA); *EnLink Del. Crude Pipeline, LLC*, 166 FERC ¶ 61,226 (2019) (*EnLink Del*) (T&D Agreement); *NuStar Crude Oil Pipeline L.P.*, 146 FERC ¶ 61,146 (2014) (T&D Agreement); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180 (2012) (T&D Agreement). The commitment to the pipeline can take various forms such as a commitment to nominate or pay a deficiency for a certain volume or an acreage or plant dedication. *See, e.g., EnLink Del.*, 166 FERC ¶ 61,226 (monthly volume commitments); *Belle Fourche Pipeline Co.*, 162 FERC ¶ 61,091 (2018) (acreage dedication commitment); *Alpha Crude Connector, LLC*, 149 FERC ¶ 61,001 (2014) (acreage dedication and volume commitments); *Panola Pipeline Co.*, 151 FERC ¶ 61,140 (2015) (plant dedication).

² 49 U.S.C. app. 1 *et seq.*

I. Introduction

2. The proposed guidance outlines information carriers may provide to demonstrate that proposed rates and terms of service pursuant to Affiliate Contracts comply with the ICA.

The proposed guidance is based on the Commission's obligation under the ICA to ensure that oil pipeline rates and terms of service are just, reasonable, and not unduly discriminatory.³

3. The Commission has provided little guidance on what information is sufficient to support proposed rates and terms pursuant to Affiliate Contracts, and as a result, the information provided by carriers in their filings varies greatly. In response to this lack of uniformity, we are considering adopting a policy statement outlining information that can support a finding that proposed rates and terms pursuant to Affiliate Contracts are just, reasonable, and not unduly discriminatory under the ICA. We believe that issuing guidance on this topic will help clarify our processes and enable the Commission to gather information relevant to fulfilling our obligations under the ICA. This additional clarity also will promote regulatory certainty through greater transparency with industry on what information is relevant to support proposals related to Affiliate Contracts.

³ 49 U.S.C. app. 1, 2, 3(1), 5, 7, 15(1); *see also ICC v. Baltimore & O. R. Co.*, 145 U.S. 263, 276 (1892) (The principle objects of the ICA include “to secure just and reasonable charges for transportation” and “to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions”); *Texas & P. Ry. Co. v. ICC*, 162 U.S. 197, 233 (1896) (The ICA “make[s] charges for transportation just and reasonable” and “forbid[s] undue and unreasonable preferences or discriminations.”).

4. We emphasize that the proposed guidance is not designed either to prohibit Affiliate Contracts or to address any specific incidents of undue discrimination by carriers towards nonaffiliated shippers but rather to aid carriers in determining what information to consider including in their filings before the Commission to support a finding. Under the proposed guidance, affiliates may continue to participate in oil pipeline open seasons and become committed shippers on their affiliated pipelines. A lack of nonaffiliated shipper agreements is not, in and of itself, evidence that a carrier afforded an undue preference to its affiliated shipper. While the proposed guidance suggests some means for carriers to support a finding that proposed rates and terms pursuant to an Affiliate Contract are just, reasonable, and not unduly discriminatory, carriers would not be precluded from making this showing in other ways. We will continue to evaluate contract proposals, including those involving Affiliate Contracts, on a case-by-case basis based on all the facts and circumstances presented.

II. Background

A. Oil Pipeline Contracting Arrangements

5. Under the ICA, an oil pipeline is a common carrier that must provide transportation to shippers upon reasonable request.⁴ A pipeline's rates and practices must be just,

⁴ 49 U.S.C. app. 1(4) ("It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor."); *Magellan Midstream Partners, L.P.*, 161 FERC ¶ 61,219, at P 12 (2017) (*Magellan*) ("By definition,

a pipeline is a common carrier, and is bound by the ICA to ship product as long as a reasonable request for service is made by a shipper.").

reasonable, and not unduly discriminatory.⁵ Historically, interstate oil pipelines offered transportation service on a walk-up or month-to-month basis. Beginning in the mid-1990s, the Commission has also approved oil pipeline transportation rates and terms of service pursuant to long-term contracts, which has facilitated significant infrastructure development.⁶

6. In general, under Commission policy, an oil pipeline carrier can offer a contract pursuant to which any shipper can make a commitment to the pipeline for a specified term and receive rates and/or service terms different from those available to shippers that do not enter the contract. The same contract must be offered to any interested shippers in a public process, typically an open season.⁷ Shippers that enter the contract are commonly referred to as “committed shippers,” “contract shippers,” or “term shippers” because they are making a contractual commitment to the pipeline over the term of the agreement. Shippers that do not enter the contract are typically referred to as “uncommitted” or “walk-up” shippers

⁵ 49 U.S.C. app. 1, 2, 3(1), 5, 7, 15(1).

⁶ See, e.g., *Colonial Pipeline Co.*, 146 FERC ¶ 61,206, at P 35 (2014) (*Colonial*) (“The Commission recognizes that due to increased oil production in the U.S. and Canada, changing market dynamics for crude oil and refined products, and the large financial commitments necessary to increase infrastructure, oil pipelines have proposed and the Commission has approved various types of committed or contract rate structures.”); see also *Express Pipeline P’ship*, 76 FERC ¶ 61,245 (1996) (*Express*).

⁷ See *Express*, 76 FERC at 62,254 (“Although one normally regards contract relationships as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract’s terms.”) (quoting *Sea-Land Serv., Inc. v. I.C.C.*, 738 F.2d 1311, 1317 (D.C. Cir. 1984) (*Sea-Land*)).

because they have no obligation to the pipeline and can decide to ship or not on a month-to-month basis.⁸

B. Ensuring Contract Rates are Not Unduly Discriminatory

7. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has found that contract rates are not inconsistent with the ICA’s common carriage and non-discrimination requirements, provided the same rates and terms are offered to all interested shippers.⁹ To comply with these principles, a pipeline may offer a contract in a public open season in which any interested shipper has an equal opportunity to enter the contract.¹⁰ The open season process must be “open, transparent, and free of the traditional contract nullifiers such as fraud.”¹¹

⁸ *See id.* (“Term shippers are not similarly situated with uncommitted shippers because in any given month, uncommitted shippers may choose to ship on [the pipeline] or not. Uncommitted shippers have the maximum flexibility to react to changes in their own circumstances or in market conditions. Uncommitted shippers do not provide the revenue assurances, planning assurances, and a basis for constructing the pipeline that term shippers provide.”).

⁹ *Sea-Land*, 738 F.2d at 1317 (“[C]ontract rates can . . . be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract’s terms”).

¹⁰ *See Express Pipeline P’ship*, 77 FERC ¶ 61,188, at 61,756 (1996) (“The proposed term rate structure of Express does not violate the antidiscrimination or undue preference provisions of the [ICA] because such term rates were made available to all interested shippers.”); *CenterPoint Energy Bakken Crude Servs., LLC*, 144 FERC ¶ 61,130, at P 19 (2013) (the pipeline “offered its committed rates through a widely publicized Open Season that gave interested shippers notice and opportunity to sign TSA’s accepting the proposed committed rates”); *CCPS Transp., LLC*, 121 FERC ¶ 61,253, at P 19 (2007) (*CCPS*) (the pipeline satisfied the principles of *Sea-Land* because the “open season afforded all prospective shippers an equal non-discriminatory opportunity to sign a TSA”); *White Cliffs Pipeline, L.L.C.*, 148 FERC ¶ 61,037, at P 47 (2014) (*White Cliffs*) (the open season must “afford *all* potentially interested shippers . . . a fair and equal opportunity to acquire the

8. The requirement to offer the contract in a valid public process where all interested shippers have an equal opportunity to obtain the rates and terms is fundamental to meeting the ICA's nondiscrimination requirements.¹² The Commission honors a contract rate that was agreed to in a transparent open season process that involved arm's-length negotiations among sophisticated business entities, finding such rates just and reasonable.¹³ In such cases, the presence of one or more nonaffiliated contracting shippers supports a presumption of reasonableness and a finding that the contract terms do not violate the ICA's prohibition against pipelines giving unreasonable preference to one shipper over others. The Commission assumes that nonaffiliated shippers can be relied upon to protect their own interests from those of the pipeline, ensuring the agreement responds to competitive

surplus Expansion capacity”) (emphasis in original); *Enterprise TE Products Pipeline Co. LLC*, 144 FERC ¶ 61,092, at P 22 (2013) (*Enterprise TE II*) (“All prospective shippers must have an equal, non-discriminatory opportunity to review and enter into contracts for committed service.”).

¹¹ *Seaway Crude Pipeline Co. LLC*, 146 FERC ¶ 61,151, at P 37 (2014) (*Seaway*).

¹² *Enterprise Crude Pipeline LLC*, 166 FERC ¶ 61,224, at P 11 (2019) (*Enterprise Crude*) (“The vital element of the contracting arrangements . . . has been an open season that provided all shippers equal opportunity to avail themselves of the offered capacity”); *Enterprise TE II*, 144 FERC ¶ 61,092 at P 22 (“The availability of discount rates to *all* interested shippers is the fundamental requirement upon which rulings approving such rate structures have been based. Contract rates can only satisfy the principle of nondiscrimination when the carrier offering such rates is required to make them available to ‘any shipper willing and able to meet the contract’s terms.’ All prospective shippers must have an equal, non-discriminatory opportunity to review and enter into contracts for committed service.”) (quoting *Sea-Land*, 738 F.2d at 1317) (emphasis in original)); *see also Nexen Mkt. U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at PP 1, 46-49 (2007) (*Nexen*) (“The allocation of expansion capacity during the open season was inconsistent with the principles of common carriage because all shippers were not given

conditions.¹⁴ However, commercial circumstances can lead to situations in which only affiliated shipper(s) agree to the contract. In these cases, the inference of fairness is not immediately apparent, and the Commission must evaluate whether the carrier gave an undue preference to its affiliate.¹⁵

9. We acknowledge that the Commission previously approved contract rates and terms of service where the only committed shipper was the carrier's affiliate without addressing whether additional informational support would alleviate these concerns.¹⁶ We note that, in other contexts, the Commission has found that affiliate transactions require additional scrutiny.¹⁷ The Commission has recognized that there is an inherent incentive for a regulated entity to unduly discriminate in favor of an affiliate and that affiliate transactions

an equal opportunity to obtain the expansion capacity.”); *White Cliffs*, 148 FERC ¶ 61,037 at PP 47-51 (pipeline failed to meet “basic common carrier and anti-discrimination obligations” when it “afforded an undue preference to the shippers that contracted for [] capacity outside of a valid open season process”).

¹³ *Tesoro High Plains Pipeline Co. LLC*, 148 FERC ¶ 61,129, at P 23 (2014) (“The Commission honors the contract terms entered into by sophisticated parties that engage in an arms-length negotiation.”); *Seaway Crude Pipeline Co. LLC*, Opinion No. 546, 154 FERC ¶ 61,070, at PP 40-42 (2016) (a proper review of the committed rates includes investigation of whether the open season involved arm’s-length negotiations); *Seaway*, 146 FERC ¶ 61,151 at P 25 (“Absent a compelling reason, it would be improper to second guess the business and economic decisions made between sophisticated businesses when entering negotiated rate contracts.”).

¹⁴ *Express*, 76 FERC at 62,254 (“If [contract] terms result in lower costs or respond to unique competitive conditions, then shippers who agree to enter into the contract are not similarly situated with other shippers who are unwilling or unable to do so.”) (quoting *Sea-Land*, 738 F.2d at 1316); *Sea-Land*, 738 F.2d at 1316 (“The core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce

may not be the result of arm's-length negotiations.¹⁸ The Commission has adopted policies in these other contexts to mitigate concerns that affiliates may coordinate in ways that involve self-dealing and anti-competitive behavior to the detriment of other customers.¹⁹ In contrast, arm's-length transactions between nonaffiliated entities do not raise these concerns.²⁰

10. A similar potential exists for an oil pipeline carrier to afford its affiliate an undue preference.²¹ An affiliated shipper may be indifferent to any rate paid to its affiliated pipeline because the expenditures and earnings of the affiliates are combined at the parent company level under integrated company economics.²² Thus, one way for a carrier to

differential pricing where dissimilarities in those key variables exist.”); *Seaway*, 146 FERC ¶ 61,151 at P 28 (“When reviewing the justness and reasonableness of a contract rate, it is not primarily to relieve one party or another of what they deem an improvident bargain, especially in negotiations involving sophisticated business entities. However, contract negotiations must be held in good faith and not involve fraud or improper conduct.”).

¹⁵ *New York v. United States*, 331 U.S. 284, 296 (1947) (“The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations”).

¹⁶ See, e.g., *Medallion Pipeline Co., LLC*, 170 FERC ¶ 61,192 (2020) (*Medallion*); *Medallion Del. Express, LLC*, 163 FERC ¶ 61,170, at P 8 (2018); *Stakeholder Midstream Crude Oil Pipeline, LLC*, 160 FERC ¶ 61,010, at P 4 (2017) (*Stakeholder*); *Medallion Pipeline Co., LLC*, 157 FERC ¶ 61,075, at P 11 (2016); *EnLink Crude Pipeline*, 157 FERC ¶ 61,120, at P 4 (2016).

¹⁷ E.g., *Bidding by Affiliates in Open Season Bids for Pipeline Capacity*, Order No.

provide its affiliate undue preferential access to capacity is to offer a contract rate in the open season that is excessively burdensome or uneconomic for any nonaffiliated market participant. Similarly, an affiliate may not be meaningfully bound to any onerous terms in the contract such as deficiency or shortfall penalties because deficiency payments and penalties may be transfer payments within an integrated economic entity.

11. In light of the above, we are concerned that our practice of evaluating proposed rates and terms pursuant to Affiliate Contracts under the same framework as contracts supported by commitments from nonaffiliated shippers may not be sufficient to ensure such terms are not unduly discriminatory under the ICA.²³ To ensure that the Commission has the

894, 137 FERC ¶ 61,126 (2011) (rule to prevent affiliated entities from coordinating their open season bids to obtain a disproportionate share of natural gas pipeline capacity at the expense of single bidders); *Mkt.-Based Rates for Wholesale Sales of Electric Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at PP 540-543 (2007) (rule adopting guidelines and restrictions for power sale transactions of utilities with market-based rates to mitigate affiliate abuse concerns); *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, Final Policy Statement, 142 FERC ¶ 61,038, at P 34 (2013) (developer allocating capacity for new merchant transmission project has a “high burden to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of non-affiliated potential customers is just, reasonable, and not unduly preferential or discriminatory”); *Ne. Utils. Serv. Co.*, 66 FERC ¶ 61,332, at 62,089 (1994) (*Ne. Util. Serv.*) (“The Commission long has recognized, and the courts have agreed, that transactions between affiliated companies require close scrutiny.”); *Iowa S. Utils. Co.*, 58 FERC ¶ 61,317, at 62,014 (1992) (*Iowa S. Utils*) (“[I]n looking at dealings between affiliates, the Commission is presented with a different set of concerns . . . because affiliates share common corporate goals profits

information it needs in its decision making, we are considering adopting a policy statement explaining how we will evaluate proposed rates and terms that are pursuant to Affiliate Contracts consistent with our obligations under the ICA and seek comment on the proposed guidance. In proposing the guidance below, we emphasize that affiliates may continue to participate in oil pipeline open seasons and become committed shippers on their affiliated pipelines. Where one or more nonaffiliated shippers execute a contract offered in an open season along with any affiliates of the carrier, the concern that the carrier unduly discriminated in favor of its affiliate is not present. Further, as stated above, the proposed guidance would not preclude oil pipeline carriers from implementing contract rates and terms of service pursuant to Affiliate Contracts. The fact that no nonaffiliated shipper

for stockholders that own both entities — and therefore have an incentive to engage in preferential transactions.”), *reh’g denied*, 59 FERC ¶ 61,193 (1992); *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995) (“[T]he Commission gives ‘special scrutiny’ to fuel supply contracts between a utility and its subsidiary or an affiliated company”).

¹⁸ *Tapstone Midstream, LLC*, 150 FERC ¶ 61,016, at P 15 (2015) (“Because the shipper is an affiliate, there is no assurance that there was an arms-length negotiation between the entities agreeing to the rate.”); *Sw. Power Pool*, 149 FERC ¶ 61,048 at P 100 (2014) (finding that a contract between affiliates “cannot be characterized as one in which each party has sought to promote its individual economic interest, a central feature of arm’s-length bargaining”); Opinion No. 546, 154 FERC ¶ 61,070 at PP 92-96 (sales between affiliates are not arm’s-length because “arm’s length negotiations or transactions are characterized as adversarial negotiations between parties that are each pursuing independent interests”); *Ne. Utils. Serv.*, 66 FERC at 62,090 (“In arm’s-length transactions, assuming relatively equal bargaining strength between the parties, the buyer will be able to protect itself against excessive charges or unreasonable contract provisions. . . . In the case of affiliate transactions, however, the buyer has less incentive to bargain for the lowest possible rates and most reasonable contract provisions, because ultimately all provisions will benefit the common parent.”); *Iowa S. Utils.*, 58 FERC at 62,014 n.10 (“Self-dealing may arise in transactions between affiliates because such affiliates may have incentives to offer terms to one another which are more favorable than those available to other market

agrees to a contract does not, in and of itself, provide a basis for finding that the carrier unduly discriminated in favor of an affiliate.²⁴ There are many reasons that nonaffiliated shippers may choose not to make a term commitment under a contract offered by a carrier. As stated above, the proposed guidance is not intended to reflect any view of the Commission that pipelines are currently engaging in practices that afford their affiliates an undue preference and unduly discriminating against nonaffiliated shippers in open seasons,²⁵ or that Affiliate Contracts are inherently discriminatory. Instead, the proposed guidance is intended to provide clarity regarding the type of information that is relevant to the Commission's evaluation of a carrier's filing to encourage the submission of a complete

participants.”); *see also Ass'n Gas Distributors v. FERC*, 824 F.2d 981, 1009 (D.C. Cir. 1987) (discounts in favor of a pipeline's gas trading affiliate “may carry more than the usual risk of undue discrimination”); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (“A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.”); Black's Law Dictionary (11th ed. 2019) (arm's-length is defined as “involving dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power”).

¹⁹ *See, e.g., Bos. Edison Co. Re: Edgar Electric Co.*, 55 FERC ¶ 61,382, at 62,167-68 n.56 (1991) (*Edgar Electric*) (“The Commission's concern with the potential for affiliate abuse is that a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings.”); Order No. 894, 137 FERC ¶ 61,126 at P 11 (multiple affiliate bidding in natural gas pipeline open seasons harms other entities and their customers and has a “chilling effect on competition”); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 49 (2009) (heightened scrutiny applies where a merchant transmission developer's affiliates are anchor customers due to “concerns that a utility affiliate contract could shift costs to captive ratepayers of the affiliate and subsidize the merchant project inappropriately”).

²⁰ *See, e.g., Edgar Electric*, 55 FERC at 62,168 (“In an arm's-length (unaffiliated) transaction, the buyer has no economic incentive to favor anyone but the least-cost supplier

record on which the Commission can conclude that the proposed terms are just, reasonable and not unduly discriminatory under the ICA.

12. In proposing this guidance, we emphasize that an oil pipeline carrier has a burden to support its proposed rates and terms of service.²⁶ Further, “the fact that contract rates are not inherently discriminatory does not mean they must always be approved or that such rates are appropriate under all circumstances.”²⁷ In seeking approval of any rates or terms pursuant to a contract solely with an affiliate, the carrier must demonstrate that its affiliate did not receive an undue preference contrary to the ICA.²⁸

(considering price and nonprice factors).”).

²¹ See *Revisions to Oil Pipeline Regs. Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,960 (1993) (cross-referenced at 65 FERC ¶ 61,109) (recognizing “a concern . . . with allowing a pipeline that may possess market power to control prices in a market to establish an initial rate through negotiations” and requiring at least one nonaffiliated shipper to agree to a rate to “provide some measure of protection against a pipeline exercising market power to dictate the rate it will charge”), *order on reh’g*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,090, at 31,106 (1994) cross-referenced at 68 FERC ¶ 61,138) (“The purpose of requiring the one shipper who must agree to the initial rate to be unaffiliated with the pipeline is to ensure that the agreement is based upon arms-length negotiations.”), *aff’d sub nom. AOPL v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996); *Seaway*, 146 FERC ¶ 61,151 at P 30 (oil pipelines must show that a nonaffiliated entity agrees to a negotiated rate due to the “concern that potential market power could be exercised against shippers who did not agree to the negotiated rate”); *Magellan*, 161 FERC ¶ 61,219 at P 21 (finding an oil pipeline’s proposed affiliate transactions would “violate the ICA’s anti-discrimination provisions by offering pipeline transportation pursuant to customized terms, conditions, and rates unavailable to shippers who utilize [the] pipeline directly through nominating volumes under the pipeline’s published tariff”).

²² See *Magellan*, 161 FERC ¶ 61,219 at P 14 (while the marketing affiliate “would facially pay its pipeline’s filed tariff rate, and the [m]arketing [a]ffiliate would sell that capacity for less than that rate, the entire transaction could nevertheless yield a net profit to the integrated company”); see also *Williams Pipe Line Co.*, Opinion No. 154, 21 FERC ¶

III. Discussion

13. In this proposed policy statement, we provide guidance for a carrier seeking approval in a petition for declaratory order or tariff filing for contract rates or terms pursuant to an Affiliate Contract. We note that a carrier is not required to file a petition for declaratory order before proposing to implement contract rates and terms in a tariff filing.²⁹ The purpose of a declaratory order is “to terminate controversy or remove uncertainty.”³⁰ In evaluating the first proposal by an oil pipeline for long-term contract rates in 1996, the Commission found that the ratemaking issues raised by the pipeline were appropriately addressed in a declaratory order proceeding.³¹ Since then, certain proposed rate structures

61,260, at 61,660 (1982) (“If the X Oil Company charges itself a lot of money for shipping its own oil over its own line, that is just bookkeeping. But suppose that X also charges Y, an unaffiliated shipper, that same high rate for the use of its line. For Y, that high rate is very real. So we now have something that some will undoubtedly view as undue discrimination of a perniciously anticompetitive type.”).

²³ We note that Congress brought oil pipelines under the ICA to address concerns regarding affiliate collusion and competitive imbalances caused by integrated ownership of transportation facilities. See *United States v. Champlin Refining Co.*, 341 U.S. 290, 297-298 (1951) (“There is little doubt, from the legislative history, that the Act was passed to eliminate the competitive advantage which existing or future integrated companies might possess from exclusive ownership of a pipe line.”); *The Pipeline Cases (United States v. Ohio Oil Co.)*, 234 U.S. 548, 559 (1914) (“Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself.”); Opinion No. 154, 21 FERC at 61,582 (Standard Oil “kept its crude

and terms have repeatedly been found to be consistent with the ICA and Commission policy in numerous declaratory orders and have become industry standards. Therefore, for some proposals there is no controversy or uncertainty for the Commission to resolve, and it may not be beneficial for the carrier to file a petition for declaratory order in advance of a tariff filing to implement the proposed contract rates and terms. We expect that in such instances, a carrier will fully explain and support the proposed rates and terms in its tariff filing.³²

14. The proposed guidance suggests some means for a carrier to support a finding that its proposed terms are not unduly discriminatory, and carriers would not be precluded from making this showing in other ways. The Commission will continue its practice of evaluating contract proposals on a case-by-case basis based on all the facts and circumstances presented.³³

pipeline rates high, thus enabling the railroads to hold on to business that they would have lost had Standard [Oil] passed the lower costs of pipeline transit on to unaffiliated shippers” in exchange for preferential rates from the railroads).

²⁴ See *Magellan*, 161 FERC ¶ 61,219 at P 19 (The ICA does not impose “a blanket restriction on integrated company financing,” but “[t]he issue of integrated company finances is instead a ratemaking and accounting matter concerning the justness and reasonableness of a carrier’s rates and rate structures”).

²⁵ We recognize that in many circumstances, a carrier has an incentive to obtain commitments from nonaffiliated shippers. Securing term commitments from nonaffiliated shippers can mitigate a pipeline’s financial risk and provide the pipeline with a stable assured revenue stream supporting the pipeline. *E.g.*, *TransCan. Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at P 21 (2008) (committed rates “support pipelines’ efforts to attract shippers that will make long-term volume commitments to support the construction of new facilities.”); *Enbridge Pipelines (S. Lights) LLC*, 141 FERC ¶ 61,244, at P 4 (2012) (*Enbridge Pipelines (S. Lights)*) (“[I]t was necessary to obtain financial support through long-term volume commitments without which the project could not move forward.”); *Express*, 76 FERC at 62,254 (“longer term commitments provide greater assurances . . . and

15. The proposed guidance falls into four categories: (1) proposed guidance that oil pipeline carriers identify Affiliate Contracts when making filings with the Commission, (2) proposed information that could demonstrate that an open season process was not unduly discriminatory, (3) methods for showing that rates and terms pursuant to an Affiliate

hence more long-term revenue stability”).

²⁶ *E.g., Laurel Pipe Line Co.*, 167 FERC ¶ 61,210, at P 24 n. 37 (2019) (“Oil pipelines have the burden to demonstrate that proposed rates are just and reasonable.”); *ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277, at P 4 (2019) (“An oil pipeline bears the burden of demonstrating that proposed rates and changes to its tariff are just and reasonable”).

²⁷ *Colonial*, 146 FERC ¶ 61,206 at P 34.

²⁸ *See* 49 U.S.C. app. 1, 2, 3(1), 6, 10, 15(1), 15(7).

²⁹ *Seaway Crude Pipeline Co., LLC*, 139 FERC ¶ 61,109, at P 25 (2012) (“The Commission, of course, cannot require the filing of a petition for declaratory order nor prevent the filing of a tariff proposing to implement service under section 15(7) of the ICA.”).

³⁰ 5 U.S.C. 554(e) (2018).

³¹ *Express Pipeline P’ship*, 75 FERC ¶ 61,303, at 61,967 (1996), *aff’d*, 76 FERC at 62,253.

³² *See, e.g., Laurel Pipe Line Co., L.P.*, 167 FERC ¶ 61,210, at P 24 n.37 (2019) (*Laurel*) (Oil pipelines “must provide sufficient explanatory information to meet [their] burden of proof in their transmittal letters rather than their answers.”); *Chaparral Pipeline Co., LLC*, 152 FERC ¶ 61,068, at P 7 (2015) (failure to provide sufficient explanation and support for tariff changes in the transmittal letter “may result in the Commission rejecting such filings as patently deficient”); *Mars Oil Pipeline Co.*, 150 FERC ¶ 61,148, at P 7 n.7 (2015) (oil pipelines must provide “adequate explanation in their transmittal letters as opposed to waiting to justify a filing in an answer”); *Plains Pipeline, L.P.*, 168 FERC ¶ 61,201, at P 10 (2019) (“[P]ipelines must explain their tariff changes in their transmittal letters, not subsequent responses.”); *see also, Seaway*, 146 FERC ¶ 61,151 at P 15 (“By not first seeking a declaratory order approving its general rate structure prior to filing its tariff, [the pipeline] left the question of rate structure issues, including the open season process for

Contract are just, reasonable, and not unduly discriminatory, and (4) ensuring that sufficient access to pipeline capacity is reserved for uncommitted shippers. We seek comment on these and any other methods for a carrier to demonstrate that proposed terms pursuant to an Affiliate Contract are just, reasonable, and not unduly discriminatory.

A. Identifying Affiliate Contracts in Commission Filings

16. When a carrier seeks approval for contract rates or terms in a petition for declaratory order or tariff filing, we propose that the carrier disclose whether or not those terms are pursuant to an Affiliate Contract. Given that Affiliate Contracts require additional safeguards to ensure compliance with the ICA, this information is necessary for the Commission to evaluate the carrier’s proposal.

17. We propose to define an “affiliate” of a specified carrier for purposes of this proposed policy statement as any entity that, directly or indirectly, controls, is controlled by or is under common control with, the carrier.³⁴ We seek comment on how to define control and any standards or thresholds for establishing a rebuttable presumption of control or lack of control.³⁵ As explained above, if one or more nonaffiliated entities execute the contract to become committed shippers along with any affiliates of the carrier, the contract is not an

committed shippers, open to litigation.”).

³³ See *Colonial*, 146 FERC ¶ 61,206 at P 34.

³⁴ This definition is based upon the Commission’s Standards of Conduct regulations for electric utilities and natural gas pipelines. See 18 CFR 358.3 (2020). However, we welcome comments proposing an alternative definition of “affiliate” for the limited purpose contemplated by this proposed policy statement.

³⁵ Although commenters should address whether a different standard may be

Affiliate Contract. This proposed guidance only applies to rates and terms pursuant to contracts exclusively executed by the carrier's affiliate(s) and not by any nonaffiliated entity.

18. We recognize that a carrier may choose to file a petition for declaratory order requesting that the Commission approve proposed contract rates and terms before the open season has closed and where it is not definitively known whether an unaffiliated entity will execute the proposed contract. In such circumstances, we propose that a carrier could request the Commission's approval of the proposed rates and terms conditioned on at least one nonaffiliated shipper executing the contract.³⁶ If a nonaffiliate eventually executes a proposed contract, the carrier could confirm in its transmittal letter when it files its tariff implementing the proposed rates and terms that a nonaffiliated entity has agreed to such rates and terms. In the event that only an affiliated entity executes the contract, the carrier could file an amended petition to support the proposed rates and terms as an Affiliate Contract consistent with the below proposed guidance.

appropriate here, the Commission's Standards of Conduct define "control" as "the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity" and specify that "[a] voting interest of 10 percent or more creates a rebuttable presumption of control." 18 CFR 358.3.

³⁶ Of course, where a carrier believes it unlikely that any nonaffiliated entity will be interested in its proposal, a carrier could provide support for the proposed rates and terms as an Affiliate Contract in a petition for declaratory order, notwithstanding the possibility that a nonaffiliated entity could agree to the contract prior to the close of the open season.

B. Information Regarding an Open Season Process

19. We propose that by providing information regarding an open season process that resulted in the execution of only an Affiliate Contract, a carrier can demonstrate that its affiliate(s) emerged as the only committed shipper(s) via a fair, transparent, and non-discriminatory process. Below, we suggest some ways that carriers can help support such a finding by providing information regarding (1) open season advertising and participation, (2) open season timing, (3) open season negotiations and changes, and (4) additional facts. We seek comment on the items proposed below and whether such information could support a showing that a carrier did not unduly discriminate in favor of an affiliate, as well as any other information that could support such a finding.

20. We emphasize that the proposed items below are neither prescriptive nor exhaustive. The items proposed below merely illustrate some potential ways that a carrier could demonstrate that an open season process was not unduly discriminatory. In proposing the suggested items below, we also do not intend to preclude carriers from providing any other information that could demonstrate the integrity of the open season process. Furthermore, a carrier would not necessarily need to provide all the information discussed below to support its proposed rates and terms pursuant to the Affiliate Contract. We recognize that some of the items below would not be applicable to every situation and there may be considerations that enable a carrier to support its filing without including all the information discussed below.

1. Open Season Advertising and Participation

21. Information regarding a carrier's efforts to publicize its open season and nonaffiliated shipper participation in the open season may support a finding that a carrier did not afford an affiliate an undue preference. This could include:

- Describing the steps the carrier undertook to advertise the open season;
- Identifying how many (if any) nonaffiliated entities participated in the open season process;
- Describing any facts that could be relevant to explaining the lack of participation by nonaffiliated shippers, if no such nonaffiliated shippers expressed interest or participated in the open season;
- Showing that any confidentiality agreement that shippers were required to sign as a prerequisite for obtaining the proposed contract was narrowly tailored.

22. The Commission's well-established policy considers whether a contract was offered in a widely publicized open season, regardless of whether nonaffiliated shippers enter the contract.³⁷ However, the level of supporting information provided by carriers to support a finding that an open season was widely publicized varies. We propose that carriers proposing rates and terms pursuant to Affiliate Contracts provide detailed information

³⁷ E.g., *Enterprise Crude*, 166 FERC ¶ 61,224 at P 11 (“[A] carrier’s open season must be widely publicized and structured in manner that provides all shippers access to the offered capacity”); *Navigator BSG Transp. & Storage, LLC*, 152 FERC ¶ 61,026, at P 18 (2015); *ETP Crude LLC*, 153 FERC ¶ 61,261, at P 17 (2015); *Wolverine Pipe Line Co.*, 153 FERC ¶ 61,109, at P 22 (2015); *ONEOK Arbuckle II Pipeline, L.L.C.*, 170 FERC ¶ 61,010, at P 12 (2020) (*ONEOK Arbuckle II*); *White Cliffs*, 148 FERC ¶ 61,037 at P 52; *Monarch Oil Pipeline, LLC*, 151 FERC ¶ 61,150, at P 30 (2015) (*Monarch*).

showing compliance with this policy to alleviate concerns regarding affiliate favoritism.

Evidence showing an open season was widely publicized may include copies of press releases and web-postings, data on how widely the open season notice was distributed, and descriptions of the carrier's marketing efforts and efforts to contact market participants that could have a potential interest in the offered service.³⁸

23. Information regarding the level of participation from nonaffiliated entities during an open season may also indicate that the process was truly open and inclusive, rather than designed to unduly favor a carrier's affiliate. Such information could include identifying how many, if any, nonaffiliated entities (1) responded to the open season notice, (2) received the open season materials, or (3) actively participated in the open season process by engaging in discussions or negotiations with the carrier. Where no nonaffiliated entity either expressed any interest or participated in the open season, a carrier could describe any pertinent facts that could explain why the carrier's affiliate was the only participant. For

³⁸ *E.g.*, *ONEOK Arbuckle II*, 170 FERC ¶ 61,010 at P 4 (notice of the open season was provided “on the company website, in S&P Global Platts Daily, and in the Oil Price Information Service Newsletter”); *Palmetto Products Pipe Line LLC*, 151 FERC ¶ 61,090, at P 6 (2015) (pipeline represented that “[t]he open season was widely publicized through a press release reported through the trade press and extensive marketing efforts”); *Monarch*, 151 FERC ¶ 61,150 at P 14 (pipeline represented that the open season was “widely-publicized through a press release that was distributed via Business Wire, posted on [the pipeline’s] website, and through in-person meetings with potential shippers”); *Sunoco Pipeline L.P.*, 141 FERC ¶ 61,212, at P 5 (2012) (notice of the open season was “distributed in press releases to more than 200 trade and general circulation print and online publications”); *Saddlehorn Pipeline Co., LLC*, 153 FERC ¶ 61,067, at P 7 (2015) (“Notice of the open season was published on [the pipeline’s] website, reported in the trade press, and [the pipeline] launched its own marketing efforts, which included direct contact to potential shippers.”).

example, information regarding the market context, such as product liquidity, connectivity, and business operations of entities active in the region served by the pipeline, may help to explain the level of interest by nonaffiliated entities.³⁹ Where a carrier can identify specific circumstances that shed light on the lack of nonaffiliated shipper interest, such information could assist the Commission in its evaluation.

24. The Commission's policy is that confidentiality agreements used in open seasons must be narrowly tailored, regardless of whether nonaffiliated shippers make commitments.⁴⁰ However, the level of information provided by carriers in their filings regarding confidentiality agreements varies. We propose that carriers proposing rates and terms pursuant to Affiliate Contracts provide a showing that any confidentiality agreement that was a prerequisite to obtaining open season materials was narrowly tailored consistent with Commission policy. This information is particularly important in the context of Affiliate Contracts to ensure that any nonaffiliated shippers that participated in the open

³⁹ See, e.g., *ONEOK Arbuckle II*, 170 FERC ¶ 61,010 at P 3 (noting that “the Petition includes a description of the production, processing, and market for Demethanized Mix” and “explains that the Pipeline is likely to be used by only one or a very small number of shippers, not because of the terms of service or open season, but as a result of the nature of the market for Demethanized Mix in which the Pipeline operates”).

⁴⁰ The Commission has explained that while we “recognize[] a pipeline’s need for confidentiality agreements during an open season to protect the pipeline from competitive harm due to the release of potential rates, discounts, contract terms etc.,” such “confidentiality agreements should be narrowly tailored and should not prevent potential shippers from bringing to the Commission’s attention issues arising from the open season or proposed contract provisions that may conflict with applicable law, precedent or policy.” *Colonial*, 146 FERC ¶ 61,206 at P 31.

season were not prevented from raising concerns about the process or proposed terms with the Commission.

2. Open Season Timing

25. Information regarding the timing of the open season may support a finding that a carrier did not afford an affiliate an undue preference, such as:

- Showing that the open season process permitted any potential nonaffiliated committed shippers adequate time to meaningfully participate in the open season;
- Identifying whether a carrier conducted its open season before beginning construction of any pipeline facilities or infrastructure that would enable the service offerings, such that the scope could potentially be modified to accommodate requests from potential nonaffiliated committed shippers during the open season;
- Identifying whether discussions were ongoing with potential nonaffiliated committed shippers prior to the close of the open season, and whether the open season was extended to allow additional time for discussions with potential nonaffiliated committed shippers.

26. The above information regarding open season timing may support a finding that an open season was not designed to afford an undue preference to a carrier's affiliate. In general, a carrier's open season process should allow for meaningful participation by interested shippers. Where no nonaffiliated shippers make a commitment, information regarding an open season's timing could be particularly useful to illustrate that the carrier

made a good faith effort to allow participation by any interested nonaffiliated entities. The length of the open season should allow sufficient time for a potential shipper to evaluate the proposed rates and terms of service, engage in back-and-forth discussions and negotiations with the carrier, and formulate a proposed commitment. While the amount of time permitted for potential shippers to submit commitments in carriers' initial open season notices varies, industry standards appear to allow at least 30 days (not including any extensions). We propose that filings regarding Affiliate Contracts include a representation that the initial open season notice permitted potential shippers 30 days or longer to submit commitments consistent with industry standards or explain why a shorter deadline was used.

27. The relationship between the open season timing and the timing of any construction activities that will enable the new service offerings may also support a finding that the open season process allowed for meaningful participation from nonaffiliated shippers. Where a carrier conducts its open season before beginning construction on a project, the carrier may have the opportunity to modify the project's scope to respond to the business needs of potential nonaffiliated committed shippers. For example, a carrier may consider upsizing the design capacity of a planned new pipeline or expansion project in response to the level of shipper commitments received during the open season.⁴¹ Conversely, where a project's

⁴¹ See, e.g., *Enbridge Pipeline (Ill.) LLC*, 144 FERC ¶ 61,085, at P 3 (2013) (explaining that the pipeline may increase the size of the pipeline depending on the results of the open season); *Sunoco Pipeline L.P.*, 149 FERC ¶ 61,191, at P 7, n.5 (2014) (explaining that the TSA required shippers to make specific volume commitments for propane and/or butane so the pipeline could properly size the project and the receipt points). We recognize that this example would not be relevant in all circumstances, such as where a carrier undertakes an expansion and has only a finite amount of additional capacity it is able

in-service date is coincident with the close of the open season, there may be less opportunity for the project's scope to be modified based on the interest shown in the open season.

Information regarding the relationship between when the carrier conducted the open season process in relation to the timing of any construction activities may be useful in some cases to support a finding that a carrier did not unduly discriminate in favor of an affiliate.

However, we emphasize that a carrier is not precluded from conducting an open season after construction on the project has commenced.⁴² We recognize that the circumstances may vary.⁴³

28. If the open season was extended to allow for continued negotiations with potential nonaffiliated committed shippers, such information suggests that the carrier made genuine efforts to accommodate the participation of nonaffiliated potential shippers in the open season process. Accordingly, we believe it would be useful for carriers proposing terms pursuant to Affiliate Contracts to state whether discussions were ongoing with any nonaffiliated entities prior to the close of the open season and whether the open season was extended.⁴⁴ Where discussions were ongoing, but the carrier declined to extend the open

to create on its system.

⁴² See *SFPP, L.P.*, 169 FERC ¶ 61,001, at P 42 (2019) (dismissing challenge to the validity of an open season based on the fact that the pipeline conducted the open season when development of the expansion project was near completion); *SFPP, L.P.*, 168 FERC ¶ 61,058, at P 15 n.31 (2019).

⁴³ For example, market demand for a new service may be so strong that market participants request that the carrier begin the construction activities necessary to enable the new service offerings as early as possible.

⁴⁴ *E.g., Monarch*, 151 FERC ¶ 61,150 at P 14 (open season was extended to respond

season, we propose that carriers include an explanation of why the open season was not extended.

29. As explained above, we recognize that these suggestions may not be feasible for every carrier seeking to implement contract rates and terms. We do not seek to inhibit a carrier's discretion to decide the optimal timing or length of an open season process but instead seek to illustrate what type of information regarding the open season timing could be useful to support proposed terms pursuant to Affiliate Contracts where such information is available.

3. Open Season Negotiations and Changes

30. Information regarding the discussions and modifications that took place during the open season may support a finding that a carrier did not afford an affiliate an undue preference. This information could include:

- Providing the open season materials, including any *pro forma* contracts, the carrier offered in the open season;
- Describing any open season negotiations and any changes proposed or made to the offered terms;

to shipper interest); *Shell Pipeline Co. LP*, 141 FERC ¶ 61,017, at P 4 (2012) (carrier clarified terms based on shipper feedback and extended the open season); *ONEOK Arbuckle II*, 170 FERC ¶ 61,010 at PP 4, 12 (carrier was willing to extend the open season if shipper interest warranted).

- Explaining the carrier’s basis for not accepting commitments submitted by any nonaffiliated entities during the open season or providing any facts relevant to why such nonaffiliated entities did not ultimately become committed shippers;
- Describing steps taken to ensure that any relevant information or data provided or communicated to an affiliate related to the proposed contract terms was also provided to all open season participants;
- Providing all offers and commitments submitted by the carrier’s affiliates;
- Showing that a neutral, independent third-party monitored or administered the open season process.

31. While some of the above information may be confidential, carriers have filed contracts and other sensitive information with a request for privileged treatment in the past.⁴⁵ Information regarding the open season negotiations between the carrier and potential shippers could support a finding that the open season was not unduly discriminatory. For example, such information could demonstrate that the carrier was willing to consider potential modifications to a contract in response to requests or counter-proposals from nonaffiliated shippers. We emphasize that carriers have discretion to determine what services to offer.⁴⁶ We are not suggesting that a carrier is obligated to accept any suggested modifications to contract rates and terms of service, but to the extent a carrier considered

⁴⁵ 18 CFR 388.112 (2020); *see also Enbridge (S. Lights)*, 121 FERC ¶ 61,244 at P 9, n.4 (pro forma TSA was attached to the petition); *Enbridge Pipelines (N.D.) LLC*, 133 FERC ¶ 61,167, at P 19, n.30 (2010) (same); *ONEOK Elk Creek Pipeline, L.L.C.*, 169 FERC ¶ 61,105, at P 4, n.3 (2019) (same).

⁴⁶ *Enterprise TE Products Pipeline Co. LLC*, 143 FERC ¶ 61,191, at P 23 (2013)

counter-proposals from nonaffiliated shippers and engaged in a back-and-forth communication with nonaffiliated shippers, such information may support a finding that the carrier did not afford an undue preference to its affiliate.

32. Similarly, information regarding any commitments, offers, or bids submitted by affiliated or nonaffiliated entities could be relevant to the Commission's evaluation of proposed rates and terms pursuant to an Affiliate Contract. If a nonaffiliated entity submitted a commitment that was not accepted by the carrier, we propose that the carrier explain its basis for rejecting the nonaffiliate's submission, including describing any method that was used to allocate requests, such as net present value.⁴⁷

33. Finally, although we are not aware of any oil pipeline open season that was monitored or administered by a neutral, independent third party, in other contexts the Commission has recognized that "[a]n independent third party can ensure meaningful participation by non-affiliates and eliminate characteristics that improperly give an advantage to the affiliate."⁴⁸ We seek comment on whether independent, third-party monitors could play a role in ensuring that oil pipeline open seasons afford meaningful participation by nonaffiliates and prevent undue discrimination in favor of pipeline affiliates.

(*Enterprise TE I*) ("[I]t is the oil pipeline's choice what services it will offer."); *SFPP, L.P.*, 169 FERC ¶ 61,001, at P 45 ("[A] pipeline possesses discretion to decide whether or not to offer a particular service.").

⁴⁷ See, e.g., *Shell Pipeline Co. LP*, 139 FERC ¶ 61,228, at P 22 (2012).

⁴⁸ *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082, at P 25 (2004).

4. Additional Facts

34. Under this proposal, a carrier could provide any other information to support a finding that the open season provided an equal opportunity for nonaffiliated shippers to enter a contract and did not unduly discriminate in favor of the carrier's affiliates. The above list is neither exclusive nor exhaustive, and we invite comments on any information pertinent to demonstrating the integrity of an open season that does not result in commitments from nonaffiliated shippers.

C. Information Regarding the Committed Terms

35. We also seek comment on the below proposed guidance for a carrier seeking to implement rates and terms pursuant to an Affiliate Contract to demonstrate that it did not unduly discriminate in favor of an affiliate by offering excessively burdensome or uneconomic contract terms designed to prevent nonaffiliated shippers from becoming committed shippers. A contract rate or term that appears to impose excessive burdens and departs from industry standards could be an indication that the carrier was seeking to exclude any nonaffiliated shippers from entering the contract and unduly discriminating in favor of its affiliate.

36. The following proposed guidance highlights key areas where carriers proposing rates and terms pursuant to Affiliate Contracts could demonstrate they closely adhered to industry standards and Commission policy: (1) minimum commitment requirements, (2) rate requirements, (3) penalty and deficiency provisions, and (4) duty to support clauses. Some of the below guidance is based on Commission policies that are generally applicable, including to carriers implementing contracts supported by nonaffiliated shipper

commitments. However, the level of information and support provided by carriers in their filings before the Commission varies. For the reasons discussed above, we propose that carriers seeking to implement rates and terms pursuant to Affiliate Contracts expressly address the below items and demonstrate in their filings that such terms are consistent with the Commission’s policies and industry standards. We seek comment on the guidance as well as on any other information that could support a finding that a carrier did not unduly discriminate in favor of its affiliate.

1. Minimum Commitment Requirements

37. The Commission has explained that a contract that requires an excessively high minimum commitment for a shipper to become a committed shipper may violate the anti-discrimination provisions of the ICA.⁴⁹ In *Enterprise Crude*, the Commission found that a contract offered in an open season that included a large minimum volume requirement that was not justified by operational requirements and only allowed the carrier to accept one committed shipper “had the effect of conferring an undue or unreasonable preference or advantage to large shippers.”⁵⁰

38. Where a carrier’s affiliate is the only committed shipper, a high minimum volume commitment that is not operationally justified may be an indication that the carrier intended to unduly discriminate in favor of its affiliate. Likewise, a long minimum term commitment that departs from industry standards without any explanation raises similar concerns. For

⁴⁹ *Enterprise Crude*, 166 FERC ¶ 61,224.

⁵⁰ *Id.* P 8.

example, an affiliated shipper may incur no additional risk when agreeing to a 20-year contract with its affiliated pipeline, but a 20-year term could impose significant risk on a nonaffiliated shipper that would be required to pay the contract rate for its committed volumes (or incur significant shortfall penalties) throughout the term.⁵¹

39. Accordingly, we propose that carrier filings proposing terms pursuant to an Affiliate Contract (1) describe the minimum commitment (volume and term length) required to enter the contract in their filings, (2) state the maximum number of committed shippers the minimum requirements would allow the carrier to accept (e.g., if multiple interested shippers submitted a minimum bid), and (3) explain whether the minimum commitment requirements are consistent with Commission policy and industry standards or, where not consistent with industry standards, any operational or other considerations or circumstances that would justify the requirements.⁵² We seek comment on whether this proposal will provide sufficient assurance that minimum commitment requirements in Affiliate Contracts do not unduly discriminate against potential nonaffiliated shippers.

⁵¹ We estimate that less than five percent of oil pipeline contract terms filed with the Commission include initial term lengths of 20 years or more.

⁵² See *ONEOK Arbuckle II*, 170 FERC ¶ 61,010 at P 6 n.7 (pipeline represented that “the minimum volume commitment is a small percentage of the initial capacity of the Pipeline and roughly corresponds to the average output of a typical natural gas processing plant in Oklahoma”).

2. Rates

a. Standards Applicable to Affiliate Contract Rate Terms

40. To fulfill its obligations under the ICA, the Commission must look at (1) the rate information provided by the carrier during the open season and (2) the burden the contract imposes over the life of the contract, not just on the first day of service. Potential committed shippers must decide whether to agree to the contract rate based on the information provided during the open season process, not when the tariff is ultimately filed with the Commission.⁵³ During the open season process, a shipper is faced with the decision whether to commit to pay the contract rate, including any rate increases permitted by the contract over the entire term of the agreement, not merely on the first day of service. Therefore, to ensure that a contract rate is just, reasonable, and not unduly discriminatory under the ICA, the Commission must evaluate the full obligation that a potential contracting shipper would incur by agreeing to the rate terms offered by the carrier in the open season over the life of the agreement, including the burden imposed by any rate escalation provisions.

41. As discussed above, where a nonaffiliated shipper agrees to a contract, the Commission can generally presume that the open season process afforded shippers

⁵³ As discussed above, the process of offering the contract rates to all interested shippers is essential to meeting the common carrier duty of nondiscrimination. *Sea-Land*, 738 F.2d at 1317 (“Although one normally regards contract relationships as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract’s terms.”).

sufficient information to evaluate the contract rate and that the agreed-to rate terms, including any escalation provisions, respond to competitive conditions because the contract reflects arm's-length bargaining.⁵⁴ In contrast, an affiliated shipper may evaluate any rate paid to its affiliated pipeline differently than an arm's-length third party because the expenditures and earnings of the affiliates are combined at the parent company level. Thus, where a carrier seeks to provide an affiliated shipper preferential access to capacity, the carrier may offer a contract rate, including escalation terms over the life of the contract, that do not reflect market factors and would be excessively burdensome or uneconomic for any nonaffiliated market participants.⁵⁵ This is one means for the carrier to provide an undue preference to an affiliate over a non-affiliate through its open season rate offerings.

42. Thus, in the absence of an arm's-length transaction, the Commission must have some means for evaluating the Affiliate Contract rate and rate escalation provisions that will apply over the term of the agreement as offered by the carrier in the open season to ensure that they are just and reasonable under the ICA and were not structured to unduly discriminate against nonaffiliates.

⁵⁴ See, e.g., *Seaway*, 146 FERC ¶ 61,151 at PP 13, 25, 28; *Tesoro*, 148 FERC ¶ 61,129 at P 23.

⁵⁵ See *Magellan*, 161 FERC ¶ 61,219 at P 14 (while the marketing affiliate “would facially pay its pipeline’s filed tariff rate, and the [m]arketing [a]ffiliate would sell that capacity for less than that rate, the entire transaction could nevertheless yield a net profit to the integrated company”); Opinion No. 154, 21 FERC at 61,660.

b. Proposed Method for Demonstrating Affiliate Contract Rate Terms are Consistent with ICA Principles

43. We propose that offering a cost-of-service rate over the term of the agreement to any interested shippers in an open season would support a finding that such rate offering is just, reasonable, and not unduly discriminatory under the ICA. The Commission has long recognized that cost-of-service ratemaking provides one mechanism for protecting against an exercise of market power.⁵⁶ A cost-of-service rate can serve as a substitute for a competitive market rate where the indicia of fair dealing that accompanies arm's-length, non-affiliate transactions is absent.⁵⁷ Therefore, where a carrier chooses to offer a cost-of-service rate over the term of the agreement to any interested shippers in an open season, such rate offering is entitled to a presumption that it is just, reasonable, and not unduly discriminatory under the ICA.⁵⁸ Although we are proposing that offering a cost-of-service rate over the term of the contract as described further below provides a safe harbor method

⁵⁶ See *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 961 (D.C. Cir. 2007) (“[T]he purpose of a cost-of-service rate . . . is to simulate what a pipeline’s economic behavior would be in a competitive market.”); *SFPP, L.P.*, 121 FERC ¶ 61,240, at P 14 (2007) (“cost-of-service rate making seeks to replicate a competitive rate”).

⁵⁷ See *Phila. Elec. Co.*, 58 FERC ¶ 61,060, at 61,134 (1992) (The concern “for the potential for self-dealing or other forms of abuse arising from an affiliated relationship between the buyer and seller of electric power . . . is particularly acute where the seller seeks to charge rates for service that are based on negotiation in the marketplace rather than the traditional measure of the seller’s costs of providing service.”).

⁵⁸ We note that a carrier must provide cost-of-service support to justify an Affiliate Contract rate in order to comply with section 342.2(a) when it files its tariff implementing the new service. 18 CFR 342.2(a) (2020); see also *Targa NGL Pipeline Co. LLC*, 166 FERC ¶ 61,179, at P 21 (2019) (explaining that because the pipeline’s “only committed shipper is an affiliate,” the pipeline would be “required to file its initial rates as cost-of-service rates”); *Medallion Midland Gathering, LLC*, 170 FERC ¶ 61,048, at P 33 n.58

of supporting an Affiliate Contract rate for purposes of applying a presumption that the rate complies with the ICA, we recognize that there can be other ways to justify Affiliate Contract rates where the Commission cannot rely on the presence of arm's-length bargaining. The proposed guidance is not intended to require a carrier to offer a cost-of-service rate as outlined below in order to demonstrate the rate is just, reasonable and not unduly discriminatory or to preclude a carrier from supporting an Affiliate Contract rate on different grounds consistent with Commission precedent and regulations.

44. We propose that a carrier can demonstrate that it offered a cost-of-service rate over the term of the contract as follows: (1) provide cost-of-service support for the contract rate in the materials provided to potential shippers during the open season, (2) stipulate in the contract that adjustments to the rate over the term of the contract by the carrier would be pursuant to the Commission's cost-of-service and indexing regulations,⁵⁹ (3) stipulate in the

(2020) (Because “the only committed shipper is an affiliate of [the pipeline],” the pipeline is “required to file the data required under section 342.2(a).”); *Medallion Del. Express, LLC*, 170 FERC ¶ 61,047, at P 30 n.57 (2020); *Medallion*, 170 FERC ¶ 61,192 at P 15 n.25. In adopting these regulations, the Commission recognized “a concern . . . with allowing a pipeline that may possess market power to control prices in a market to establish an initial rate through negotiations” and required at least one nonaffiliated shipper to agree to a rate to “provide some measure of protection against a pipeline exercising market power to dictate the rate it will charge.” See Order No. 561, FERC Stats. & Regs. at 30,960, *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,090, at 31,106 (“The purpose of requiring the one shipper who must agree to the initial rate to be unaffiliated with the pipeline is to ensure that the agreement is based upon arms-length negotiations.”), *aff'd sub nom. AOPL v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996); see also *Seaway*, 146 FERC ¶ 61,151 at P 30 (oil pipelines must show that a nonaffiliated entity agrees to a negotiated rate due to the “concern that potential market power could be exercised against shippers who did not agree to the negotiated rate”).

contract that the committed shipper has the right to directly challenge the committed rate on a cost-of-service basis under 18 CFR 343.2, and (4) provide that whenever the rate is changed during the contract term on a cost-of-service basis, the new cost-of-service rate will be set at a 100% load factor (or some other reasonable limit) so the committed shipper is not at risk for future reductions in the pipeline's throughput.⁶⁰ We seek comment on the above proposed criteria for offering a cost-of-service rate over the life of the contract for purposes of applying a presumption of compliance with the ICA. In particular, regarding the first criteria (providing cost-of-service support for the rate in the open season), we recognize that a carrier may not be able to precisely calculate its cost of service for pipeline projects that are not yet constructed. We seek comment on how, in such instances, the open season documents could contain sufficient cost-of-service information for a potential shipper to evaluate the proposed rate. For example, a carrier could potentially include a reasonable estimated rate range based on construction cost projections determined using methods consistent with Commission policy. The contract could also provide a committed shipper an option to terminate the contract if the actual cost-of-service committed rate determined when construction is completed was not within the estimated range. The Commission could also consider evidence that the carrier's proposed rate is reasonably in line with the

⁵⁹ 18 CFR 342.3, 342.4(a).

⁶⁰ Without setting the rate at a 100% load factor or something similar, a cost-of-service contract rate would place all of the risk for reductions in the pipeline's throughput on the committed shipper, which could deter participation by nonaffiliated entities.

estimates provided in the open season, or whether the carrier provided adequate explanation where the proposed rate materially diverges from the open season estimates.

45. Although we propose a safe harbor method for supporting Affiliate Contract rates on a cost-of-service basis, we invite comments on any other methods that would warrant a presumption of compliance with the ICA in the absence of arm's-length negotiations.

Comments proposing alternative methods should address (1) the criteria for justifying Affiliate Contract rate terms using the proposed method, (2) the information a carrier would need to provide in order to support the proposed rate terms under the proposed method, (3) how such a showing would support a finding that the rate terms offered in the open season mitigate the potential for undue discrimination towards potential nonaffiliated shippers, (4) why the proposed method is necessary given the availability of the cost-of-service safe harbor, and (5) whether such method is consistent with the Commission's regulations or, if not, changes that would be necessary to permit such method.

3. Penalties and Deficiency Provisions

46. Surcharges, additional fees, deficiency provisions, or other penalties could potentially be designed to impose unreasonable financial burden or risk on the contracting shipper, thus ensuring that a carrier's affiliate (who may not be affected by such provisions in the same manner as unaffiliated entities) emerges from the open season process as the only committed shipper. We propose that carrier filings regarding Affiliate Contracts include a showing that any such terms are consistent with Commission policy and industry standards, and are reasonably tailored to meet legitimate objectives, so as to demonstrate that they do not impose an excessive or disproportionate burden on potential nonaffiliate-committed

shippers. For example, the Commission has explained that penalties must be reasonably tailored to deter conduct that is detrimental to shippers or pipeline operations.⁶¹ Similarly, the Commission’s prior precedents describe when costs can be appropriately recovered through a surcharge.⁶² We seek comment on this proposal.

4. Duty to Support

47. The Commission has explained that it “will . . . look with disfavor upon duty to support clauses that require too broad a waiver of a shipper’s statutory rights to seek redress before the Commission.”⁶³ In particular, “[w]hile it appears to be reasonable for contract shippers to support the specific rates to which they agreed, requiring those shippers to also waive their statutory rights as to past rates or other rates of the pipeline to which they have not specifically agreed is likely too broad.”⁶⁴ Although this policy applies to all contract proposals as a general matter, the level of information carriers provide to the Commission regarding duty to support clauses varies.

⁶¹ See *Bridger Pipeline LLC*, 135 FERC ¶ 61,188, at P 16 (2011); *Enbridge Pipelines (North Dakota) LLC*, 118 FERC ¶ 61,162, at PP 15-16 (2007); *Platte Pipe Line Co.*, 80 FERC ¶ 61,036, at 61,082 (1997); *Colonial Pipeline Co.*, 92 FERC ¶ 61,289, at 62,022 (2000); *Mars Oil Pipeline Co.*, 150 FERC ¶ 61,148, at P 8 (2015); *Williams Pipe Line Co.*, 76 FERC ¶ 61,023, at 61,160 (1996).

⁶² See, e.g., *Chevron Pipe Line Co.*, 163 FERC ¶ 61,238 (2018), *reh’g denied*, 165 FERC ¶ 61,069 (2018); *Tesoro Logistics Nw. Pipelines LLC*, 153 FERC ¶ 61,118 (2015); *Magellan Pipeline Co., L.P.*, 115 FERC ¶ 61,276 (2006); *Chevron Pipe Line Co.*, 115 FERC ¶ 61,117, at P 31 (2006); *SFPP, L.P.*, 121 FERC ¶ 61,162 (2007).

⁶³ See *Colonial*, 146 FERC ¶ 61,206 at P 32; *Nexen*, 121 FERC ¶ 61,235 at PP 51-52.

⁶⁴ *Colonial*, 146 FERC ¶ 61,206 at P 32.

48. We propose that carrier filings proposing terms pursuant to an Affiliate Contract provide a showing that any duty to support clause included in the contract was narrowly tailored consistent with Commission policy. In the context of Affiliate Contracts, such showing could be particularly useful to the Commission to support a finding that no nonaffiliated entities were unreasonably deterred from entering the contract on the basis that the contract required an overbroad waiver of a shipper's statutory rights to seek redress before the Commission. We seek comment on this proposal.

D. Prorationing Rules

49. When the only committed shipper is the carrier's affiliate, we are concerned about prorationing rules that may unduly hinder an uncommitted shipper's (i.e., unaffiliated shipper's) access to pipeline capacity. When a carrier proposes rates and terms pursuant to an Affiliate Contract, the only way for nonaffiliates to access the pipeline is through the capacity reserved for uncommitted shippers. Accordingly, when a carrier proposes rates and terms pursuant to an Affiliate Contract, the carrier should ensure that it has included a full explanation for how the Affiliate Contract is integrated into the pipeline's prorationing rules.

50. The Commission has approved various proposals to provide committed shippers preferential prorationing terms, such as firm or priority service,⁶⁵ or deemed regular shipper

⁶⁵ *E.g.*, *CCPS*, 121 FERC ¶ 61,253 at P 19; *EnLink NGL Pipeline, LP*, 167 FERC ¶ 61,024, at PP 19, 22 (2019); *Sunoco Pipeline L.P.*, 169 FERC ¶ 61,088, at P 13 (2019); *Plantation Pipe Line Co.*, 167 FERC ¶ 61,025, at P 17 (2019).

status.⁶⁶ The Commission’s policies require that sufficient capacity be reserved for uncommitted shippers. This addresses the concern that the carrier is exercising market power by ensuring that shippers have an alternative to the terms the carrier is offering in a committed contract. Although each proposal is addressed based on the facts and circumstances presented,⁶⁷ Commission precedent and industry standards generally support a carrier reserving at least 10% of capacity for uncommitted shippers.⁶⁸ In particular, the Commission rejected a proposed prorationing policy where committed shippers would have access to 95% of the capacity as of the in-service date of the project, finding that such proposal “undermines the Commission’s committed rate policy, which allocates a minimum 10 percent reservation of the pipeline’s total capacity to uncommitted shippers to ensure

⁶⁶ *E.g.*, *Kinder Morgan Pony Express*, 141 FERC ¶ 61,180 at PP 33-41; *Bayou Bridge Pipeline, LLC*, 153 FERC ¶ 61,322, at P 30 (2015); *Permian Express Terminal LLC*, 162 FERC ¶ 61,112, at P 17 (2018).

⁶⁷ *CCPS Transp., LLC*, 122 FERC ¶ 61,123, at PP 14-15 (2008) (“Each proposal presented to the Commission is appraised on its own merits regarding the amount of set-aside capacity planned to be reserved for spot volumes.”).

⁶⁸ *See, e.g.*, *CenterPoint*, 144 FERC ¶ 61,130 at P 24 (“The Commission previously found that a reservation of at least 10 percent of the pipeline’s capacity for uncommitted shippers is sufficient to provide reasonable access to the pipeline.”); *CCPS*, 121 FERC ¶ 61,253 at P 17 n.33 (requiring 10% of the expansion volumes to be reserved for uncommitted shippers in order “to preserve the common carrier obligation”); *EnLink*, 157 FERC ¶ 61,120 at P 15 (approving “proposal to allow committed shippers priority access for up to 90 percent of the Project’s capacity, with at least 10 percent of the capacity reserved for uncommitted shippers”); *Stakeholder*, 160 FERC ¶ 61,010 at P 16 (same); *Enterprise Liquids Pipeline LLC*, 142 FERC ¶ 61,087, at P 27 (2013) (approving a rate structure guaranteeing a reservation of 10% of capacity for uncommitted shippers); *Kinder Morgan Cochin LLC*, 141 FERC ¶ 61,056, at P 18 (2012) (stating that “Cochin provides an appropriate amount of capacity for Uncommitted Shippers, at least

reasonable access to the pipeline consistent with its common carrier obligation.”⁶⁹ As with several of the other proposals discussed herein, these policies apply to all committed shipper contracts, not just Affiliate Contracts. However, carriers seeking to implement contract rates and terms do not always discuss the prorationing policy in detail in their filings, such as where there is already a prorationing policy in the pipeline’s tariff that applies to committed shipper contracts.

51. Accordingly, we propose that carriers proposing rates and terms pursuant to Affiliate Contracts fully explain any prorationing terms applicable to committed shippers and the committed volume levels to which these terms apply. We also propose that carriers explain how the prorationing terms are consistent with Commission policy and the pipeline’s common carrier obligations and will ensure that any unaffiliated shippers that request transportation will have reasonable access to the pipeline as uncommitted shippers.

IV. Conclusion

52. We seek input on the above proposals or any other approaches for oil pipeline carriers to demonstrate that Affiliate Contracts are not the result of undue discrimination to exclude potential nonaffiliated committed shippers. We welcome comments on any other

[10%] , while affording benefits to Committed Shippers who enter into long-term TSAs.”); *EnLink NGL Pipeline, LP*, 167 FERC ¶ 61,024, at P 22 (2019) (finding “[t]he policy is consistent with Commission precedent and ensures that uncommitted shippers moving crude oil in interstate commerce will continue to have access to at least 10 percent of the Expansion Project’s capacity during times of prorationing”).

⁶⁹ *White Cliffs Pipeline, L.L.C.*, 168 FERC ¶ 61,087, at P 36 (2019).

issues or factors related to these issues that the Commission should consider for inclusion in the policy statement.

V. Comment Procedures

53. The Commission invites comments on this proposed policy statement by December 14, 2020 and Reply Comments by January 28, 2020. Comments must refer to Docket No. PL21-1-000 and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

54. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

55. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

56. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VI. Document Availability

57. 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>). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

58. 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.

59. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at 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.

By the Commission.

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Nathaniel J. Davis, Sr.,
Deputy Secretary.

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