131 FERC ¶ 61,226
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Denali – The Alaska Gas Pipeline LLC Docket No. PF08-26-001

ORDER APPROVING PLAN FOR CONDUCTING AN OPEN SEASON

(Issued June 7, 2010)

1. On April 7, 2010, Denali – The Alaska Gas Pipeline LLC (Denali) filed, pursuant to section 157.38 of the Commission's regulations, a request for Commission approval of its detailed plan for conducting an open season for the purpose of obtaining binding commitments for the acquisition of initial capacity on Denali's Alaska Project (Alaska Project). As discussed below, we approve the open season plan, with certain modifications.

I. Background

2. In 2005, the Commission issued regulations in Order Nos. 2005 and 2005-A[1] (Open Season regulations) to establish requirements governing the conduct of open seasons for proposals to construct Alaska natural gas transportation projects.[2] These regulations fulfilled the Commission's responsibilities under section 103(e) of the Alaska

[1] *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, Order No. 2005, FERC Stats. & Regs. ¶ 31,174 (2005), *order on reh'g*, Order No. 2005-A, FERC Stats & Regs. ¶ 31,187 (2005), Order No. 2005-B, 130 FERC ¶ 61,196 (2010).

[2] An "Alaska natural gas transportation project" is defined in section 157.31(a) of the Open Season regulations to be "any natural gas pipeline system that carries Alaska natural gas to the international border between Alaska and Canada (including related facilities subject to the jurisdiction of the Commission) that is authorized under the Alaska Natural Gas Transportation Act of 1976 or section 103 of the Alaska Natural Gas Pipeline Act.

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

3. Section 157.38 of the Open Season regulations requires that "[n]o later than 90 days prior to providing its notice of open season, a prospective applicant for an Alaska natural gas transportation project must file for Commission approval a detailed plan for conducting an open season in conformance with [the Open Season regulations]."[4] Denali's April 7, 2010 request for approval of its open season plan is the second request that has been filed with the Commission under section 157.38 of the Open Season regulations.[5]

4. The Alaska Project is an undertaking advanced on behalf of Denali, a limited liability corporation formed by BP and ConocoPhillips to bring natural gas resources from the Alaska North Slope to North American gas markets. The Alaska Project, to be constructed and operated by Denali, would interconnect at the Alaska – Canadian border with a pipeline (Canada Project) to be constructed and operated by an affiliate, Denali Canada – The Alaska Pipeline (West), Inc. (Denali Canada), transporting gas from the interconnect with the Alaska Project approximately 1,020 miles to its terminus at the Alberta, Canada hub.

II. <u>Denali's Open Season Plan</u>

5. Denali's contemplated Alaska Project will consist of: (1) two transmission lines, one, a 36-inch diameter pipeline approximately 62 miles in length and designed to deliver 1.1 billion cubic feet per day (Bcf/d) from the Point Thompson Unit to a proposed gas treatment plant, and the other, a 60-inch diameter pipeline approximately 1.2 miles in length and designed to deliver 4.6 Bcf/d from the Prudhoe Bay Unit Central Gas Facility

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

[4] 18 C.F.R. § 157.38 (2009).

[5] On March 31, 2010, the Commission approved TransCanada Alaska Company LLC's open season approval that was filed on January 29, 2010. *See TransCanada Alaska Company LLC (TransCanada)*, 130 FERC ¶ 61,263 (2010).

to the gas treatment plant; (2) the gas treatment plant, capable of treating and conditioning approximately 5.8 Bcf/d of Alaska North Slope gas and delivering 4.5 Bcf/d of pipeline quality gas on an annual average basis to the Alaska Mainline;[6] and (3) the Alaska Mainline, a 730 mile-long, 48-inch diameter, high pressure pipeline designed to transport up to 4.5 Bcf/d of pipeline quality gas from the outlet of the gas treatment plant to five downstream in-state delivery points and to the Alaska–Canada border, where the pipeline would connect with the Canada Mainline.[7]

6. Included in Denali's filing is a proposed open season notice which is intended to provide potential shippers with information about the open season. The notice includes various attachments which are required by the Commission's Open Season regulations,[8] including a study of Alaska in-state natural gas needs and the project and project sponsor information specified in sections 157.34(c)(1)-(21).

7. The proposed open season notice states that Denali seeks submission of binding precedent agreements for one or more of the following firm services: (1) gas transmission service on the transmission lines; (2) gas treating service; (3) gas compression service; and (4) gas transportation service on the Alaska Project. Attached to the open season notice is a form of precedent agreement, which directs potential shippers to provide information which will indicate the nature of the services they seek and any conditions which would require further negotiations. Additionally, the open season notice states that Denali Canada intends concurrently to conduct a separate open season for firm transportation commitments on the Canadian facilities, which will be subject to review by Canada's National Energy Board. The Canadian open season process will follow the same general timeline as the Alaska open season.

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[6] The gas treatment plant will be designed to remove acid gases and dehydrate the gas delivered by shippers and to compress and chill the treated gas before the gas enters the Alaska Mainline. The carbon dioxide and hydrogen sulfide removed in the treating process will be returned to shippers for enhanced oil recovery, disposal or sequestration. The gas treatment plant will also make available low-carbon dioxide gas to North Slope consumers for potential use as fuel, which has the potential to reduce emissions on Alaska's North Slope.

[7] Denali states that the project will be designed to provide for efficient expandability and, that following an initial successful open season and the issuance of a certificate of public convenience and necessity, Denali will solicit interest in capacity expansion every two years.

[8] *See* 18 C.F.R. § 157.34 (2009).

8. Denali has designed its project to include six delivery points within the state of Alaska. The first delivery point will be at the outlet of the gas treatment plant prior to final compression to provide treated, low-carbon dioxide gas for Alaska North Slope users. The other five in-state delivery points were identified in the In-State Gas Demand Study. Denali states that during the open season process, shippers may express interest in other receipt or delivery points and Denali will consider including such requests in its plan.

9. Denali proposes a 14 percent return on equity for its recourse rates and a 12 percent return on equity for its negotiated rates. Denali estimates a weighted average cost of debt of 5.1 percent for both recourse rates and negotiated rates. Denali states that it will finance its construction activities with a target of 70 percent debt and 30 percent equity, while it estimates that long term financing for operations will equal 75 percent debt and 25 percent equity. Denali states that rates will be designed using a straight fixed-variable cost classification. Denali further states that negotiated rates will be recalculated annually in order to assure that its rates recover all costs of providing firm service. Also, reservation charges associated with negotiated rates will be substantially levelized over the initial contract term of no less than 20 years. Denali states that its rates for service will be just and reasonable and, for the Alaska Mainline, will reasonably reflect material variations in cost due to the distance over which the transportation is provided. Denali states that the details supporting its capital and operational cost estimates will be available in the shipper reading rooms. Denali has also included a design for in-state delivery points and volumes with separately-stated rates based on the in-state natural gas needs study.[9]

10. Denali states that once the Commission approves the open season plan, it intends to issue the open season notice on July 6, 2010. Denali states that the open season will run for the minimum of 90 days required by the Commission's regulations and, thus, it is expected to close on October 4, 2010. The notice will be accessible on the project's web site, www.denalipipeline.com, and copies will be made available to any interested party.[10]

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[9] The in-state natural gas needs study has been endorsed by the appropriate governmental officials of the State of Alaska, as required by the Commission's Open Season regulations.

[10] In addition, Denali states that actual notice of the open season will be provided to the Commission, the State of Alaska and to the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects, as required by the Commission's Open Season regulations.

11. Denali proposes to establish three reading room locations where interested entities can review information relating to the proposed project.[11] It includes in its filing provisions regarding the availability of electric and hard copy information, requirements for treatment of confidential information based on two levels of confidentiality, and appointment and data room review procedures.

12. Denali states that any creditworthy shipper can submit a binding precedent agreement to reserve capacity, consistent with the open access, nondiscriminatory requirements of the Commission's Open Season regulations.

13. During the open season, any party interested in contracting for any of the firm transportation services offered must submit a bid sheet in the form of Exhibit A attached to the precedent agreement. Any bid meeting the requirements of Exhibit A and returned to Denali, along with a signed precedent agreement, before the close of the open season will be considered a conforming bid. Denali states that a bidder may amend the draft agreement by adding proposed precedent conditions without necessarily rendering a bid nonconforming. However, any bid not meeting the above requirements or containing precedent conditions that materially change the agreement will be considered nonconforming. Late bids, submitted after the open season's conclusion, will also be considered nonconforming bids.

14. Denali proposes that shippers will contract for service on the Alaska Project as either Foundation Shippers or Standard Shippers, each class having distinct rights based upon the term of their commitment to the project. Foundation Shippers will be those shippers submitting conforming bids electing to take firm service for a minimum term of 20 years. Foundation Shippers will have the option of selecting either recourse rates or negotiated rates for their services; provided, Foundation Shippers opting for negotiated rates will be committing to that rate structure for the term of their service agreements. In addition, Foundation Shippers will have the right to reconsider their participation in the project at designated points related to cost estimate updates and regulatory milestones. Those electing to discontinue their participation in the project at any of these decision points will pay their proportional share of the costs incurred (not including pre-open season costs). Foundation Shippers will also have extension rights and most favored nations rights. Those shippers taking firm service on terms other than those required of Foundation Shippers will be Standard Shippers and they will be offered only recourse rates.

15. Denali states that it has not entered into any pre-subscription agreements for capacity related to the Alaska Project. However, as required by the Open Season regulations, should Denali enter into a pre-subscription agreement with a shipper, Denali

[11] The rooms will be located in Houston, Texas; Anchorage, Alaska; and Calgary, Alberta.

will make the pre-subscription agreement public within 10 days of its execution and include it in the shipper reading room. Denali will also offer capacity to all prospective bidders at the same rates and on the same terms and conditions as contained in any pre-subscription agreements.

16. Denali explains that all conforming bids accepted by Denali in the open season will be valued on an equal basis for the purposes of awarding capacity. Denali states it may choose to accept non-conforming bids in a not unduly discriminatory manner if capacity is available, and that it will provide an explanation to any shipper who submits a nonconforming bid rejected by Denali.

17. Denali states that it will notify all bidders contemporaneously whether their bids were accepted and the amount of capacity that has been awarded. If Denali receives bids for more capacity than is available in the open season, Denali may re-design its project to provide additional capacity. In the event bids accepted by Denali for firm service received from shippers during the open season exceed the feasible design capacity and Denali chooses not to re-design the project, Denali will award capacity, on a pro rata basis, in the following order: first, to conforming bids; next, to capacity secured in pre-subscription agreements pursuant to 18 C.F.R. §157.34(c)(15); and last, to non-conforming bids that are acceptable to Denali.

18. In order to reserve capacity as part of the open season, bidders will be required to sign a binding precedent agreement before the close of the open season and then obtain all requisite internal approvals to perform their obligations under the precedent agreement by February 1, 2011. If required, post-open season discussions with shippers will continue for up to 90 days after the close of the open season, at which time final precedent agreements, including capacity amounts, will be issued to shippers.

19. Finally, the filing notes that Denali has established compliance procedures and standards of conduct for the purpose of complying with the requirements of sections 157.35(c) and (d) of the Open Season regulations. The project sponsor's Compliance Procedures and Standards of Conduct will be posted at www.denalipipeline.com.

III. Notice, Interventions, and Comments

20. Pursuant to section 157.38 of the Commission's regulations, on April 8, 2010, the Commission issued a notice of Denali's request for pre-approval of its open season plan, which notice was published in the *Federal Register* on April 15, 2010 (75 Fed. Reg. 19,645). The notice established April 30, 2010 as the comment due date, and May 13, 2010, as the date reply comments were due. The notice also established June 7, 2010, as the date on which the Commission would act on Denali's request.

21. In response to the April 8, 2010 notice, motions to intervene and comments were filed by BP Exploration (Alaska) Inc. (BP Exploration), ConocoPhillips Alaska, Inc. and

ConocoPhillips Company (ConocoPhillips), ExxonMobil Gas & Power Marketing Company a Division of ExxonMobil Corporation (ExxonMobil Gas & Power), and the State of Alaska. In addition, reply comments were filed by BP Exploration, ConocoPhillips, the State of Alaska, and Denali. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.

IV. Standard of Review

22. In *TransCanada*, we discussed in detail the standard of review that the Commission will employ in its pre-approval review of plans to conduct open seasons for Alaska natural gas transportation projects.[12] We stated that review of a prospective applicant's plan for conducting an open season pursuant to the Open Season regulations does not contemplate a close examination of the prospective applicant's costs and tariff. We further explained that it was not the Commission's intent in establishing the open season procedures to create a forum in which to pre-litigate issues that may arise during certificate and rate proceedings. Rather, the intent of the pre-open season review is to determine whether potential bidders will be treated in a non-discriminatory manner, and our task is to ensure that a proposed plan conforms to the Open Season regulations' provisions regarding transparency and non-discrimination. As we explained in Order No. 2005, it is through those requirements that the Commission sought to ensure that fair, open competition in the transportation of Alaskan gas would be achieved.[13] Thus, we determined that in the absence of a showing that specific elements of an open season plan violate those key principles, we will not examine matters best resolved at a later date.

V. Comments

23. Several parties in this proceeding have raised issues relating to Denali's proffered rates, terms, and conditions of service which they claim could create economic uncertainty if left unresolved. Parties also contend that Denali's open season bidding process should be clarified in specified respects.

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[12] *See TransCanada*, 130 FERC ¶ 61,263 at PP 34-44. The Commission noted that while the Open Season regulations did not delineate the standard of review to be employed in the pre-approval process, the intended scope of review is clear from a reading of the Open Season regulations as a whole and the purposes and goals of those regulations as expressed in Order Nos. 2005 and 2005-A.

[13] As the instant request involves an open season for the purpose of obtaining binding commitments for the acquisition of initial capacity, we are not concerned here with whether the prospective applicants have provided for the opportunity for the transportation of natural gas other than from the Prudhoe Bay and Point Thomson units.

24. BP Exploration characterizes the following issues as bidding and process deficiencies that should be corrected to reduce the uncertainty surrounding the bidding process: (1) inconsistent treatment of maximum daily quantities in Denali's proposed firm service agreement and its proposed tariff; (2) the provision requiring bidders to resubmit a bid if the Commission orders a revised open season; (3) the provision in the proposed precedent agreement requiring shippers to have already entered into agreements for upstream and downstream capacity; (4) precedent agreement termination provisions that BP Exploration characterizes as onerous and unbalanced; (5) the lack of clarity and internal inconsistency in the treatment of negotiated rates; (6) non-conforming bids and foundation shipper status; (7) obligations under the precedent agreement and a shipper's ability to challenge Denali's tariff in any subsequent proceeding; and (8) ambiguities in the effective date and term provisions in the precedent agreement.[14]

25. ConocoPhillips requests the Commission address the following topics: (1) the meaning of the phrase "design capacity" as used in the precedent agreement; (2) the rate components that may be levelized in the negotiated, levelized rates; (3) procedures relating to reduction of maximum daily quantities; (4) notice of and the process for a design reconfiguration; (5) the process for establishment of a gas component tracking system; (6) the process for the establishment of additional services; and (7) proposed restrictions on shipper challenges to certain filings.

26. ExxonMobil requests that Denali confirm that its in-state transportation rates are derived from the in-state study. ExxonMobil also states that Denali should further explain its process for allocating capacity in the case of over-subscription and clarify how it will determine whether bids are non-conforming.

27. The State of Alaska's comments focus on concerns regarding the limitations imposed in Denali's form of confidentiality agreement on access to the shipper reading room. Additionally, Alaska claims that specific provisions in the confidentiality

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[14] BP Exploration also identifies what it sees as commercial and tariff deficiencies in Denali's indicative tariff. BP Exploration states that in light of the Commission's deferral of tariff issues in *TransCanada*, it has not briefed them fully. However, BP Exploration contends that at some point the Commission will need to resolve the question of the degree to which it will allow an Alaska pipeline to diverge from the Commission's normal practices and policies. The tariff issues raised by BP Exploration include: (1) reservation charge credits; (2) development of a gas component tracking system; (3) depreciation; (4) creditworthiness; (5) *force majeure*; (6) fuel retention adjustment provisions; (7) liability and indemnification language; (8) good faith disputes in billing and payments; (9) penalty revenue crediting; and (10) responsibility for risk of upstream and downstream capacity.

agreement pertaining to liability for wrongful disclosure are unworkable and inconsistent with Commission policy.

28. In its reply comments, ConocoPhillips states that it agrees with BP Exploration's comments on the precedent agreement provision relating to upstream and downstream capacity and provides additional comments on *force majeure* provisions of Denali's tariff.

29. BP Exploration states in its reply comments it strongly supports a ruling that the Commission's approval of Denali's open season does not constitute a determination on the merits regarding Denali's proposed rates, terms and conditions of service or any other substantive element of the project.

30. In its replies and answers, Denali offers clarification or response to several of the concerns noted in the comments. However, citing to *TransCanada*, Denali responds generally that it intends to discuss and negotiate the various issues raised by the commenters with prospective shippers during the commercial negotiation process.

31. In *TransCanada*, we observed that:

> negotiations between prospective bidders and the project sponsor regarding the terms of any precedent agreements are a key element of the open season process. Through these negotiations, prospective shippers are provided an opportunity to address their particular needs and objectives. If those commercial objectives can be reached through negotiation, the prospective bidder can submit a bid. If they cannot be met during the open season period, the prospective shipper can either submit a conditional bid, or decide not to bid at all. It is important to note in this regard, that the Open Season regulations provide ample transparency to ensure that negotiations during the open season will be conducted without undue discrimination or prejudice.[15]

We agree with Denali that many of the issues raised by the commenters deal with rate and tariff matters that either we will address in the future or may be resolved through negotiations between Denali and prospective shippers. We also confirm that parties are not foreclosed from raising these issues at a later stage of our consideration of Denali's project. However, a number of concerns raised by the commenters could have a significant impact on the open season process itself rather than just the proposed terms

[15] *TransCanada* at P 39.

and conditions of service and thus merit our consideration at this time. We identify and discuss those matters below, as well those comments which raise issues of undue discrimination. We will also address the State of Alaska's concerns over Denali's form of confidentiality agreement.

A. Creditworthiness Provisions

32. BP Exploration states that Denali's precedent agreement discriminates among creditworthy, similarly-situated shippers by requiring that a Foundation Shipper that is a subsidiary carry the same credit rating as its parent, while other shippers must carry only an investment grade rating. BP Exploration contends that this requirement is arbitrary, facially discriminatory, and contrary to Commission precedent.

33. Denali replies that its creditworthiness provisions were designed to address a situation where a shipper creates a shell company to limit or avoid potential liability to Denali. As a result, Denali requires that all bidders who are subsidiaries of larger companies maintain a credit rating at least at a level of its ultimate parent company or provide a source of collateral to guarantee its obligations to Denali. Denali states this obligation applies to all similarly-situated shippers, so BP Exploration's allegation that Denali's creditworthiness requirements are discriminatory is incorrect.

Commission Response

34. Creditworthiness standards can impact a prospective bidder's ability to obtain initial capacity through the open season. However, although Denali's creditworthiness provisions establish different criteria depending on the shipper's status as a subsidiary, this differentiation is not discriminatory as long as similarly-situated shippers are treated the same. Denali's requirement that subsidiaries carry the same credit rating as their parent applies to all similarly-situated shippers, in a non-discriminatory manner. Therefore, the Commission will not require Denali to change this creditworthiness provision.

B. Limitations on Challenging Rates – Section 9.2 of the Precedent Agreement

35. BP Exploration alleges that section 9.2 of the proposed precedent agreement discriminates among recourse rate shippers, because it precludes a recourse rate shipper who also takes service under negotiated rates from challenging recourse rates, while a strictly recourse rate shipper is not so precluded. Additionally, BP Exploration claims that section 9.2 results in discrimination because it precludes negotiated rate shippers from challenging Denali's tariff terms and conditions, while recourse rate shippers are free to challenge the tariff terms and conditions.

36. In response, Denali states that its precedent agreement allows a shipper to submit multiple bids, some at recourse rates and others at negotiated rates, though for each bid the shipper must elect either negotiated rates or recourse rates. For those bids where negotiated rates are elected, the shipper must agree to not challenge before the Commission the commercial deal struck between it and Denali. Denali states that the same shipper, if acting as a recourse rate shipper, is not precluded from challenging the recourse rate-related provisions of Denali's tariff. Moreover, Denali states that it did not intend to restrict a negotiated rate shipper's right to challenge the general terms and conditions of Denali's tariff to the extent those terms are not addressed in the shipper's negotiated rate agreement. Denali asserts that since section 9.2 will apply equally to all shippers electing negotiated rates, all similarly-situated shippers will be treated the same.

Commission Response

37. In *TransCanada*, we observed that a private agreement between parties that would preclude filings before us may be enforceable as a matter of contract law, but cannot preclude an entity from making any arguments it chooses before us.[16] In any event, based on Denali's clarification that all recourse rate shippers will be entitled to challenge those rates, we find that section 9.2 of Denali's proposed precedent agreement does not discriminate among similarly-situated shippers.

C. Notice Regarding the Process for Reductions of Maximum Daily Quantities

38. In its initial comments, ConocoPhillips states that section 4.2 of the precedent agreement provides that under certain circumstances Denali can reduce a bidder's maximum daily quantity but does not provide detailed procedures for notifying bidders of any reduction made or provide bidders an option to decline a reduced maximum daily quantity. ConocoPhillips requests the Commission require Denali to provide bidders with written notice of any proposed reduction in maximum daily quantities and the option to decline any reduction. Denali, in its reply, states these claims are not within the scope of the Commission's review and do not demonstrate that the open season is discriminatory.

[16] *TransCanada* at P 42.

Commission Response

39. In response to similar concerns, the project sponsors in *TransCanada* agreed to provide shippers with the option to decline any reduced capacity awards.[17] While Denali's provisions regarding reductions in maximum daily quantities are not facially discriminatory, they are provisions which concern the open season process itself. Therefore, we will direct Denali to more clearly delineate in its open season notice the procedures it will follow for notifying bidders of any reduction in their maximum daily quantity allotment and also to explicitly provide bidders the opportunity to decline any reduced award of capacity.

D. Notice Regarding the Process for Design Reconfiguration

40. ConocoPhillips states that under section 4.3 of the precedent agreement, Denali retains the right to reconfigure the current design of the pipeline to match the capacity reservation and inform shippers of revised rate estimates if Denali receives total firm service commitments resulting in capacity reservations greater than or equal to 85 percent of the mainline's design capacity. It is not clear to ConocoPhillips whether or how Denali would notify shippers of any design reconfiguration, or whether shippers would have the right to withdraw their bids as a result of such reconfiguration or the revised rate estimates. ConocoPhillips requests the Commission to clarify that Denali must provide a detailed written notice of any Alaska Project reconfiguration to bidders and that bidders can withdraw their bids if their capacity allotment or the revised rates are not acceptable. Denali replies that these matters are not within the scope of the Commission's review and do not demonstrate the open season is discriminatory.

Commission Response

41. A reconfiguration of the project's design, even in the case that Denali receives capacity reservation commitments equal to 85 percent, may still have a significant impact on the bidder's decision to contract for capacity. That being the case, this too, is an issue relating to the open season process. Accordingly, the Commission directs Denali to modify its open season procedures to include a process for notifying bidders of any design reconfiguration that results in a material change in transportation rates or capacity allotment as a result of section 4.3 of the precedent agreement and to provide bidders an opportunity to modify or withdraw their bids if there are changes to their capacity allotment or if rates are revised due to a reconfiguration of the system.

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[17] *TransCanada* at P 56.

E. Requirement to Resubmit a Bid if the Commission Orders a Revised Open Season

42. BP Exploration states that section 4.5 of Denali's precedent agreement contains an unacceptable and unreasonable provision that requires a bidder to resubmit its bid and a signed precedent agreement in the event that the Commission requires Denali to hold a revised open season. BP Exploration states that this provision effectively requires a bidder to commit now to accept unknown changes that the Commission may impose. Because this provision interferes with a bidder's independent evaluation of the project, BP Exploration requests the Commission require Denali to delete the provision.

Commission Response

43. Requiring a bidder to commit in advance to resubmitting a bid in the event the Commission requires Denali to hold a revised open season could require a prospective shipper to bid on capacity at a rate or under terms it no longer considers sufficient to its interests or acceptable. Therefore, the Commission directs Denali to revise its precedent agreement to remove this provision.

F. Allocation of Capacity in the Case of Over-Subscription

44. Section 157.34(c)(15) of the Open Season regulations requires the applicant to provide the methodology by which capacity will be awarded in the case of over-subscription. Denali states that in the event bids accepted for firm service exceed the feasible design capacity or Denali chooses not to re-design the project, it will award capacity in the following order: (1) conforming bids; (2) capacity secured in pre-subscription agreements; and (3) non-conforming bids acceptable to Denali. Capacity awarded for each category will be handled on a pro rata basis. In addition, Denali states that it will consider capacity awarded to non-conforming bids as capacity awarded outside the open season process.

45. ExxonMobil states that Denali's discussion of the allocation of capacity to non-conforming bids may conflict with the requirements for allocation of over-subscribed capacity in that Denali proposes to allocate oversubscribed capacity to non-conforming bids outside of the open season process. ExxonMobil states that Denali does not explain how it would allocate capacity to these non-conforming bidders or how it will determine which non-conforming bids are acceptable. ExxonMobil states that Denali should explain how its proposed process would operate and how the proposal would ensure against undue discrimination or preference.

46. Denali states in its reply comments that if it accepts bids that exceed the design capacity of its proposed facilities and if it chooses not to redesign the project, it will award capacity in the following order: (1) to conforming bids submitted before the close of the open season; and (2) to non-conforming bids submitted before the close of the

open season which, through negotiations, Denali ultimately accepts on a non-discriminatory basis. Denali states that capacity awarded for each category will be handled on a pro-rata basis among all prospective shippers within the same category and presubscription and late bids will be handled in accordance with 18 C.F.R. § 157.34(c)(15) and 18 C.F.R. § 157.34(d)(2), respectively.

Commission Response

47. Denali has provided a description of the required bid information, including a description of what Denali will consider to be a non-conforming bid. Denali states that in order to qualify as a conforming bid, a prospective shipper's bid must include a signed precedent agreement containing the information required by Exhibit A and must be received by Denali by the close of the open season. Any bid not meeting these requirements or containing conditions precedent that materially change the terms of the precedent agreement will be considered a non-conforming bid. To provide transparency to the process of accepting non-conforming bids, Denali states that it will provide an explanation to any prospective shipper who submits a non-conforming bid that is rejected by Denali. Denali has clarified that in the case of an over-subscription of available capacity, it will allocate capacity first to conforming bids submitted before the end of the open season, then to non-conforming bids submitted before the close of the open season which it ultimately accepts on a non-discriminatory basis. In addition, Denali's use of pro rata allocation insures that shippers within the same category are not discriminated against. Therefore, the Commission finds that Denali has sufficiently met the requirements of section 157.34(c)(15) and will not require further clarification.

H. State of Alaska – Confidentiality Agreement

48. The State of Alaska states that under Denali's form of confidentiality agreement, access to the reading room is limited to "eligible parties," which include: (1) potential shippers able to meet certain creditworthiness requirements; (2) the State, but only in its capacity as a potential shipper (and potential shippers guaranteed by the State); and (3) regulatory agencies with "jurisdiction over the Open Season process." According to Alaska, the confidentiality agreement also expressly prohibits disclosure of any reading room information to: (1) any other Alaska pipeline project; (2) representatives of any other Alaska pipeline project; or (3) representatives of any entity of Alaska or municipality involved in oversight of an AGIA-licensed project.

49. Alaska asserts that these "eligible party" and "restricted use" provisions go further than necessary to protect Denali's competitive interests and would unreasonably deny access of state representatives with a legitimate interest in reviewing Denali's reading room materials. Specifically, Alaska claims that while it may well subscribe for a portion of the initial firm capacity in the open season to transport its royalty gas in kind, it might also acquire released capacity and backhaul capacity outside of the open season. Additionally, Alaska states that as a royalty owner and tax collector it has an interest in

the reading room materials because Denali's rates for transportation and gas treatment services are directly related to wellhead prices. Alaska asserts that Denali's proposal to limit access to only State representatives serving in a capacity as a potential shipper and to bar disclosure of information to state representatives involved in AGIA oversight is overbroad and too restrictive, since the state's resources are too limited to erect a "firewall" such as that contemplated by Denali.

50. Alaska maintains that because of the importance of the pipeline project to the state, Alaska should be an interested or affected governmental authority with access to the reading room, regardless of its status as a prospective shipper, provided that state representatives with access to the reading room do not share reading room information with a competing project or its representatives. Accordingly, Alaska urges the Commission to require Denali to modify its proposed confidentiality agreement to allow any state representative access to the data room provided the representative agrees to keep the data confidential, including by agreeing not to disclose the information to TransCanada, the Alaska Pipeline Project (the project sponsored by TransCanada), or any other competing project.

51. Alaska objects to two specific provisions of the confidentiality agreement. Section 4.01 requires parties signing the agreement to indemnify Denali against third party claims arising out of unauthorized use or disclosure. Section 4.04 requires parties reviewing documents to consent in advance that a breach of the agreement cause irreparable harm. According to Alaska, its Constitution restricts its agencies from entering into indemnification provisions. This being the case, state representatives could be precluded from reviewing reading room materials. Alaska adds that these provisions are not found in either the Commission's model protective order or in the analogous agreement required for access to the reading room in TransCanada's open season.

52. Denali states that its procedures for access to its shipper reading room, including the confidentiality agreement, have been structured to ensure that all shippers are equally informed on the matters essential to their decision whether to bid for capacity on the proposed project, consistent with the Commission's goal of establishing a level playing field. At the same time, states Denali, the procedures reasonably protect against unauthorized disclosure by any person or entity of Denali's confidential, proprietary, and competitively sensitive information consistent with the Commission's information sharing requirements in the Open Season regulations and its model protective order.[18]

53. Specifically, Denali states that it has legitimate commercial concerns about sharing confidential, proprietary, and competitively sensitive reading room information with Alaska representatives who are also involved in the management of the state's

[18] *See* http://www.ferc.gov/legal/admin-lit/model-protective-order.pdf.

interests in the Alaska Pipeline Project, to which the state is providing substantial funding. Denali states that its confidentiality agreement simply reflects the admitted relationship between Alaska and the Alaska Pipeline Project.

54. Denali contends that under the Commission's Open Season regulations, the only entities entitled to access Denali's shipper reading room are potential shippers seeking information necessary for determining whether to bid for capacity in the open season. Moreover, states Denali, the provision in its confidentiality agreement that limits a prospective shipper's use of the information to its "decision whether to bid for capacity on the proposed pipeline" is non-discriminatory and consistent with Commission practice.

55. Denali states that a number of potential shippers have already executed confidentiality agreements that contain provisions which (1) protect against disclosure of confidential reading room information to any competing project; (2) limit the purpose for which the information can be used; and (3) limit the representatives who can view the information. Denali asserts that Alaska should not be given a special right to review or use information.

56. Finally, Denali contends that while Alaska claims it does not have the resources to establish a protective order "firewall," in fact, Alaska has recently stipulated to the very protections sought here by Denali in the protective order in *TAPS Strategic Reconfiguration* matter Docket No. IS09-348-000 (Mar. 11, 2010).

Commission Response

57. We agree with Denali that under the Open Season regulations, the only entities entitled to access Denali's shipper reading room are potential shippers. In Order No. 2005, we stated that "[t]he purpose of the information-sharing requirement is to make sure that all interested parties are equally informed on matters essential to their decision whether to bid for capacity on the proposed project, with an eye toward leveling the playing field between affiliated shippers or others with prior knowledge of information to be contained in the open season notice and all other potential shippers."[19]

58. Further, given the unique competitive circumstances surrounding the two potential Alaska natural gas transportation projects and the State of Alaska's relationship to the Alaska Pipeline Project, we do not find unreasonable Denali's concerns that the confidential, proprietary, and competitively sensitive reading room information not be shared with Alaska representatives involved in the management oversight of the state's

[19] Order No. 2005 at P 72.

interests in a competing pipeline project or for purposes other than acquiring capacity in Denali's open season.

59. We are not persuaded that it is beyond Alaska's ability or resources to ensure that its representatives with access to Denali's shipper reading room materials comply with the permitted use requirements of section 1.01 of the confidentiality agreement. As Denali notes, Alaska has agreed to permitted use restrictions in a protective order issued in *TAPS* proceeding. We conclude that similar provisions are appropriate here.

60. Alaska, however, raises a legitimate concern that, to the extent Alaska's Constitution prohibits its representatives from agreeing to provisions concerning indemnification and injunctive relief, sections 4.01 and 4.04 of Denali's confidentiality agreement could exclude state representatives, even those assisting the state in its capacity as a potential shipper, from reviewing the reading room materials.

61. In the *TAPS* proceeding, representatives of Alaska were not required to sign the "non-disclosure certificate." However Alaska was required to provide a list of employees to be granted access to protected materials and those employees were required to treat protected information as confidential pursuant to Alaska's Executive Branch Ethics Act.[20] Such a provision was deemed there to be sufficient to ensure that Alaska would be able to meet the permitted use requirements, and such a provision should be workable here, as well. Moreover, given the state's unique situation, it seems reasonable that a provision making clear that the parties do not waive any right to pursue any legal or equitable remedies that may be available in the event of a breach of the confidentiality agreement, such was contained in the protective order in the *TAPS* protective order would suffice.

62. In Order No. 2005-A, we recognized that the parties would have to address the matter of dealing with confidential or sensitive "protected information,"[21] and we also stated that the Commission and its staff would assist the parties in resolving any disputes in this area.[22] We reaffirm that commitment here.

VI. <u>Standards of Conduct</u>

63. Any project applicant conducting an open season for an Alaska natural gas transportation project must ensure compliance with the Commission's no conduit,

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[20] Procedures were established for objecting to the identification of such State employees.

[21] Order No. 2005-A at P 106.

[22] *Id*.

independent functioning, non-discrimination, and transparency rules as set forth in section 157.35 of the Commission's Open Season regulations. Certain information regarding the organization of the project applicant must also be provided under section 157.34(19)-(21).

64. In Order No. 2005-B, the Commission amended part 157, Subpart B of its regulations, specifically 18 C.F.R. §§ 157.34 and 157.35 (2009), in order to clarify and reconcile them with to Order Nos. 717 and 717-A,[23] governing the Standards of Conduct for transmission providers. Section 157.35(a) requires all binding open seasons to be conducted without undue discrimination or preference in the rates, terms or conditions of service and that all capacity allocated be awarded without the same. Section 157.35(c) now requires that each prospective applicant conducting an open season must function independent of the other divisions of the prospective applicant as well as the prospective applicant's "affiliates" performing a "marketing function" except that the exemption in section 358.3(c)(2)(iii) shall not apply.[24] Where a specific entity is not created specifically to conduct an open season, 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."[25]

65. Under section 157.35(d) of the Commission's Open Season regulations, as amended by Order No. 2005-B, any project applicant conducting an open season for an Alaska natural gas transportation project must comply with the following sections of part 358 of the Commission's regulations: sections 358.4(c) and (d) (non-discrimination requirements); 358.5 (independent functioning rule); 358.6 (no conduit rule); 358.7(a), (b), and (c) (transparency rule); and 358.8(b) and (c) (implementation requirements).

66. Section 358.4(c) prohibits a transmission provider from giving undue preference to any person in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services, or balancing). Further, section 358.4(d) states that a transmission provider must

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[23] *Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63,796 (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 and clarification*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g and clarification*, Order No. 717-C, 131 FERC ¶ 61,045 (2010).

[24] Order No. 2005-B at P 15 (to be codified at 18 C.F.R. § 157.35(c)).

[25] *Id.*

process all similar requests for transmission in the same manner and within the same period of time.

67. Section 358.5 requires a transmission provider's transmission function employees to function independently of its marketing function employees. The transmission provider is prohibited from allowing its marketing function employees to conduct transmission functions or have access to the system control center or similar facilities in a manner that differs from other transmission customers. The transmission provider is also prohibited from allowing its transmission function employees from conducting marketing functions. Section 358.6 prohibits a transmission provider from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees. Further, an employee, contractor, consultant or agent of a transmission provider, and an employee, contractor, consultant or agent of an affiliate of a transmission provider that is engaged in marketing functions, is prohibited from disclosing non-public transmission function information to any of the transmission provider's marketing function employees.

68. Under section 358.7(a), (b), and (c), if a transmission provider discloses non-public transmission function information in a manner contrary to section 358.6, it must immediately post the information on its Internet Web site. A transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service without the obligation to contemporaneously disclose the information as long as the information relates solely to a marketing function employee's specific request for service. A transmission customer may also consent to the disclosure of its non-public transmission information so long as the transmission provider posts notice on its Internet Web site of the consent along with a statement that it did not provide any preferences in exchange for the consent.

69. In order to ensure that the requirements of sections 358.5 and 358.6 are met, a transmission provider is required under section 358.8 to implement measures to ensure the requirements are observed by its employees and by the employees of its affiliates. The transmission provider is required to distribute the written procedures to all its transmission function employees, marketing function employees, officers, directors, supervisory employees, and any other employees likely to become privy to transmission function information.

A. <u>Denali's Application</u>

70. Included in Denali's plan for conducting an open season is a reference to its "Implementation Procedures for Standards of Conduct" on its Internet Web site. Denali also includes Item Nos. 19, 20, and 21 of the notice as required by section 157.34(c)(19), (20), and (21) in its application. The Implementation Procedures summarize the procedures that Denali has established for implementing the regulations for conducting

an open-season for an Alaska natural gas transportation project and the applicable standards of conduct. The Implementation Procedures generally describe and set forth the implementation procedures for the rules that employees, secondees, contractors, consultants, or agents of Denali must follow including the non-discrimination rule, the independent functioning rule, the no conduit rule, and the transparency rule.

1. Compliance with Non-Discrimination Rule

71. Denali provides that it has implemented the following procedures to comply with the non-discrimination rule: (1) Denali will treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis; (2) Denali will not grant any undue preference or advantage to any person or subject any person to undue prejudice or disadvantage regarding the transportation of natural gas in interstate commerce or conduct of an open season; (3) Denali will not give undue preference to any person in matters relating to the sale or purchase of transmission service; and (4) Denali will process all similar requests for transmission services in the same manner and within the same period of time.

2. Compliance with the Independent Functioning Rule

72. Denali states that it was specifically formed as a separate company to function independently from its affiliates and is co-owned by affiliates of BP America, Inc. and ConocoPhillips Company. Denali has provided that all Denali employees must function independently from (a) all affiliates with at least one affiliated marketing function employee, and (b) all divisions of affiliates involved in the production of natural gas in the State of Alaska. Denali states that the leadership team, consisting of Denali Employees including its President and Vice-Presidents, manages Denali's business on a day-to-day basis. The owners' interests in Denali are managed by a management committee consisting of employees of affiliates of BP and ConocoPhillips. All Denali employees and all management committee employees are considered to be transmission function employees. Within each parent organization are senior officers who have corporate oversight over both the respective owner's interest in Denali and other areas but are neither transmission function employees nor marketing function employees, and support employees providing business, legal, or technical support services to Denali or management committee employees, but who are not actively and personally engaged on a day-to-day basis in conducting the Denali open season. This structural separation is intended to help ensure that it functions independent of its marketing affiliates and Alaska production affiliates.

73. To supplement this structural separation, Denali states that it has established a firewall regarding the transfer or distribution of non-public transmission function information, which for purposes of the open season means information relating to the open season that is non-public. The firewall prevents transfer between Denali employees

and management committee employees on one side and employees of Denali's marketing affiliates and Alaska production affiliates on the other side. Denali states that BP and ConocoPhillips have adopted similar procedures to Denali's procedures.

74. Denali will also require all Denali open season employees to maintain a written log regarding meetings with employees of marketing affiliates or Alaska production affiliates where employees may exchange non-public open-season information. Denali has also physically separated its employees from all employees of its marketing affiliates or Alaska production affiliates.

75. Denali states that BP and ConocoPhillips have implemented measures requiring the management committee employees to function independent of the affiliate marketing employees and Alaska production affiliates. They have also implemented measures that prohibit (a) affiliate marketing employees and Alaska production affiliates from conducting transmission functions or having access to Management Committee facilities and (b) its transmission function employees from conducting marketing functions.

76. Denali states that it currently has no marketing function employees and does not intend to have any in the near future. Denali will prohibit its employees from conducting marketing functions and currently does not conduct any transmission functions other than open season functions subject to Commission regulation.

3. Compliance with the No Conduit Rule

77. Denali states that its employees will not disclose, or use a conduit to disclose, non-public open season information to any employee of a marketing affiliate or Alaska production affiliate. Denali further provides that it will secure its non-public open season information and keep customer information confidential. Denali will also prohibit unauthorized access to any non-public open season information or to information about prospective shippers.

4. Compliance with the Transparency Rule

78. Denali states that it has adopted procedures to implement the transparency rule that depend on whether the information is shared before or during the open season. Before the open season starts, Denali may choose not to share non-public open season information with prospective shippers, whether affiliated or not, other than under a confidentiality agreement. Any non-public open season information that has been made available to, or obtained from, any prospective shipper will be made available to all prospective shippers via a shipper reading room. Nevertheless, information received from a prospective shipper as part of a confidentiality agreement will be maintained in confidence and will not be disclosed to persons outside the Denali firewall.

79. During the open season, Denali will provide equal access to non-public open season information to all its transmission customers (prospective shippers), affiliated and non-affiliated, except in the case of confidential customer information or Critical Energy Infrastructure Information. If Denali discloses non-public open season information to one prospective shipper, Denali will contemporaneously make the information available to all prospective shippers via a shipper reading room. However, Denali open season employees may discuss a specific request for transmission service (including a request for capacity as part of the open season) without being required to contemporaneously disclose the information if it relates solely to the specific request for transmission service.

5. Compliance with Implementation, Distribution, Training, and Posting Requirements

80. Denali has made the Implementation Procedures effective as of April 16, 2010. It has also distributed the Implementation Procedures to Denali employees, provided initial and annual standards of conduct training and has committed to training new employees within the first 30 days of employment. Denali states that each employee will certify or has certified that the employee has completed the training.

Commission Response

81. As noted in Order No. 2005, the purpose of imposing the standards of conduct during the open season for Alaska natural gas transportation projects is to further the Commission's goal of a non-discriminatory open season.[26] The implementation procedures for standards of conduct designed by Denali adequately protect against a discriminatory open season. The procedures, which Denali notes were created prior to the effectiveness or Order No. 2005-B, may be in some ways more restrictive (e.g., the creation of firewall domains) than would be required if wholly fashioned to correspond to the employee functional approach that now applies to conducting open seasons. Recognizing that Denali's request for approval of its open season plan was filed prior to the effective date of Order No. 2005-B and in order to avoid delay, the Commission will not direct Denali to revise its procedures so that they strictly track the current Standards of Conduct. However, the Commission requires Denali to fully comply with the applicable standards of conduct imposed under Order No. 2005-B and with the principles of Order No. 717 and its progeny.

[26] Order No. 2005 at P 74.

VII. Conclusion

82. The Commission finds that, conditioned on the modifications required herein, Denali's detailed plan for conducting an open season for the purpose of making binding commitments for the acquisition of initial capacity on the Alaska Project is in conformance with the Open Season regulations and it is therefore approved. Our approval of Denali's open season plan does not constitute a binding determination with regard to the substance of Denali's submission. We encourage Denali and potential shippers to work together to resolve any issues arising during the implementation of the open season plan, during the open season, or the during negotiations after the close of the open season.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.