

139 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Kern River Gas Transmission Company

Docket No. RP12-250-000

ORDER ON COMPLIANCE FILING

(Issued June 15, 2012)

1. On December 16, 2011, Kern River Gas Transmission Company (Kern River) filed revised tariff records to modify section 29 of the General Terms and Conditions (GT&C) of its tariff to specify the rights and procedures of non-creditworthy shippers to contact Kern River's lenders to seek approval to provide less security than that required by Kern River's lending documents. On January 13, 2012, the Commission accepted and suspended the tariff records subject to refund and subject to Kern River providing additional information.¹ On February 13, 2012, Kern River filed the additional information required by the January 13 Order. For the reasons discussed below, the Commission finds that the additional information submitted by Kern River complies with the January 13 Order.

2. Additionally, because statements made by Kern River in its compliance filing indicate that Kern River may interpret its tariff as allowing for an open-ended exemption from the Commission's policy that pipelines may require no more than three months' reservation charges from new and existing firm shippers, the Commission acts under section 5 of the Natural Gas Act to require Kern River to revise its tariff as directed below, or explain why it should not be required to do so.

¹ *Kern River Gas Transmission Co.*, 138 FERC ¶ 61,024 (2012) (January 13 Order).

I. Background

3. Since 2009, Kern River has been in the process of revising its creditworthiness provisions, which are set forth in section 29 of its GT&C.² These revisions have addressed both the manner in which Kern River will determine whether a shipper is creditworthy (section 29.1), and the collateral requirements that will be imposed on shippers deemed to be non-creditworthy (section 29.2).

4. On June 25, 2010, the Commission issued two separate orders pertaining to Kern River's creditworthiness provisions.³ In the June 25 Rehearing Order, the Commission denied rehearing of its acceptance of a number of tariff revisions: (1) addition of Fitch Ratings to the list of ratings agencies used to determine creditworthiness;⁴ (2) requirement for shippers rated by multiple credit ratings agencies to meet the investment-grade criteria for each agency that rates them; and (3) requirement for shippers with a minimum investment-grade rating to also have a short-term and long-term Outlook and CreditWatch of Stable or Positive from each agency rating it at that level.

5. The June 25 Rehearing Order also addressed a filing made by Kern River in response to a proceeding established under section 5 of the Natural Gas Act related to section 29.2(b), which provided non-creditworthy shippers the opportunity to furnish "other security acceptable to Transporter's lenders," in order to qualify for service from Kern River. The Commission initiated the section 5 proceeding to determine whether this provision should be applicable to shippers on the Kern River system that are not subject to specific collateral requirements as part of an expansion project.⁵ The Commission's general policy is that a pipeline may not require non-creditworthy shippers to provide as collateral any more than the equivalent of three months of reservation

² See, e.g., *Kern River Gas Transmission Co.*, 127 FERC ¶ 61,103 (2009) (May 1 Order); *Kern River Gas Transmission Co.*, 131 FERC ¶ 61,060 (2010) (April 22 Order).

³ *Kern River Gas Transmission Co.*, 131 FERC ¶ 61,271 (2010) (June 25 Rehearing Order); *Kern River Gas Transmission Co.*, 131 FERC ¶ 61,269 (2010) (June 25 Tariff Order).

⁴ The other two credit ratings agencies in section 29.1 are: (1) Moody's Investors Service; and (2) Standard and Poor's Corporation (S&P).

⁵ May 1 Order, 127 FERC ¶ 61,103 at P 31.

charges.⁶ The policy is based on the fact that the financing requirements necessary for original or expansion shippers are not applicable to shippers on which the pipeline did not rely for financing.⁷ However, the Commission has recognized that with respect to new construction projects, pipelines and their lenders may, when necessary, require more than three months of collateral from expansion shippers on the project.⁸

6. Upon review of the lending documents submitted by Kern River, the Commission found that one of the lending documents associated with a system expansion project contained a provision requiring Kern River to maintain collateral in excess of three months reservation charges from all non-creditworthy shippers on its system, regardless of whether they are expansion shippers.⁹ Specifically, the Commission found:

Kern River's lending documents require the security provided to be equal to one year of reservation charges. Moreover, the lending agreements state that Kern River provided its lenders with a continuing security interest in its service agreements "whether now existing or hereafter arising, now owned or after-acquired, and wherever located..." Thus, the collateral requirement of one year's reservation charges in Kern River's lending documents applies not only to original and expansion shippers, but also new shippers.¹⁰

7. The Commission found that these lending documents warranted an exception to the Commission's general policy that pipeline tariffs may not impose on new, non-creditworthy shippers a collateral requirement of more than three months' reservation charges.¹¹ The Commission explained that it would be unreasonable to expect pipelines to renegotiate their lending agreements to comply with a later-approved Commission

⁶ *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs. ¶ 31,191, at P 11 (2005) (Creditworthiness Policy Statement).

⁷ June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 63 (citing *Southeast Supply Header, LLC*, 119 FERC ¶ 61,153, at P 43 (2007) (*Southeast*)).

⁸ Creditworthiness Policy Statement, FERC Stats. & Regs. ¶ 31,191 at P 17.

⁹ June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 65.

¹⁰ *Id.* (internal citations omitted).

¹¹ *Id.* P 66.

policy.¹² The Commission emphasized that pipelines and their lending institutions have a reliance interest in the collateral pledged for expansion or construction projects, concluding that it would be unreasonable to question such collateral requirements after financing has been obtained and the project is completed.¹³ Finding that Kern River relied on the revenue stream from future shippers in obtaining financing, the Commission accepted the parameters of Kern River's collateral requirements for new, non-creditworthy shippers.¹⁴

8. The Commission, however, rejected a proposal by Kern River to modify its tariff to require existing non-creditworthy shippers to provide collateral for 12 months of reservation charges because that would not allow for any future changes that may occur to its lending documents or to the collateral requirements therein.¹⁵ Accordingly, the Commission directed Kern River to modify its tariff to state that a non-creditworthy, long-term firm shipper may receive service if it "furnishes security as required by Transporter's current lending documents," and to define "current lending documents" in the definitions section of the tariff.¹⁶

9. In compliance with this order, Kern River modified section 29.2 of its GT&C to state that a non-creditworthy, long-term firm shipper may receive service if it "furnishes security as required by Transporter's current lending documents." Kern River also proposed the following: "For purposes of this Section 29.2, 'Transporter's Current Lending Documents' means the Trust Indenture dated as of August 13, 2001, among Kern River Funding Corporation, Kern River Gas Transmission Company, as guarantor, and the trustee, as amended and supplemented from time to time."¹⁷ The Commission accepted this filing by delegated letter order.¹⁸

¹² *Id.* (citing *Ozark Gas Transmission Sys. v. FERC*, 897 F.2d 548, 552 (D.C. Cir. 1990) (*Ozark*)).

¹³ *Id.* (citing *Reliant Energy Services, Inc. v. Kern River Gas Transmission Co.*, 120 FERC ¶ 61,056, at P 29 (2007) (*Reliant*)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* P 69.

¹⁷ Kern River Gas Transmission Co., FERC Gas Tariff, General Terms and Conditions § 29.2 (1.0.0).

¹⁸ *Kern River*, Docket No. RP09-466-006 (Aug. 12, 2010) (delegated letter order).

10. Also on June 25, 2010, the Commission issued a separate order accepting a revision to the creditworthiness criteria in section 29.1 of the GT&C.¹⁹ The June 25 Tariff Order addressed a proposal to modify section 29.1 to state that an investment-grade credit rating will be based on the shipper's *senior unsecured* debt rating (rather than the *corporate* debt rating). The Commission found Kern River's proposal to be just and reasonable and consistent with other pipelines' tariffs. As part of its discussion, the Commission referenced section 29.1(c), which allows a determination of shipper's creditworthiness to be based upon "approval by Transporter's lenders." The Commission stated that this provision provides another option for a shipper to demonstrate creditworthiness if it is unable to do so under sections 29.1(a) and 29.1(b) and that Kern River is obligated to seek a creditworthiness determination from its lenders before deeming a shipper non-creditworthy.²⁰

11. Kern River subsequently proposed to remove section 29.1(c) of its GT&C, which permits shippers to establish creditworthiness via approval by Kern River's lenders. Kern River asserted that the Commission misinterpreted section 29.1(c) in the June 25 Tariff Order by placing the burden on Kern River to seek approval from its lenders for a creditworthiness determination rather than placing the responsibility on the shipper. Kern River also asserted that as it is described in the June 25 Tariff Order, section 29.1(c) would be unworkable.

12. On July 29, 2010, the Commission issued an order rejecting Kern River's proposal to eliminate section 29.1(c) from its GT&C.²¹ The Commission found that removal of this provision would be inconsistent with other provisions of Kern River's tariff, which permit Kern River to require collateral greater than the three months' reservation charges permissible under Commission policy based on collateral requirements contained in Kern River's lending documents.²² The Commission explained that eliminating this provision would remove the parity between Kern River's use of its lending agreements to obtain a more stringent level of collateral than the Commission ordinarily would permit and its creditworthiness provisions, which permit a shipper to seek relief from the higher collateral requirement from Kern River's lenders.

¹⁹ June 25 Tariff Order, 131 FERC ¶ 61,269 at PP 18-19.

²⁰ *Id.* P 21.

²¹ *Kern River Gas Transmission Co.*, 132 FERC ¶ 61,080 (2010) (July 29 Order).

²² *Id.* PP 22-23.

13. On March 25, 2011, the Commission issued an order denying Kern River's requests for rehearing of the June 25 Tariff Order and the July 29 Order.²³ The Commission did, however, grant clarification that Kern River is not obligated to seek a creditworthiness determination from its lenders before deeming a shipper non-creditworthy.²⁴ Instead, the Commission explained, Kern River is required only to facilitate the ability of a non-creditworthy shipper to contact the lender or lenders that require greater than three months worth of collateral to seek that lender or lenders' review of the individual circumstances of that shipper.²⁵

II. Initial Filing in this Proceeding

14. It is within this context that Kern River again filed revised tariff records to modify section 29 of its GT&C. Specifically, Kern River proposed to remove section 29.1(c), which allowed shippers to seek a creditworthiness determination from Kern River's lenders, and replace it with new language in section 29.2 that specifies the rights and procedures of shippers deemed non-creditworthy by Kern River to contact Kern River's lenders to seek approval to provide less security than the 12 months' reservation charges required under the applicable lending documents. Kern River's proposal specifically addressed credit for long-term firm service, which Kern River stated is the only service affected by the lender approval requirement.

15. WPX Energy Marketing, LLC (WPXM) protested Kern River's Filing.²⁶ WPXM challenged the adequacy and clarity of Kern River's proposed lender contact process. WPXM argued that the manner in which Kern River proposed to facilitate shippers' appeal of a non-creditworthiness determination to Kern River's lenders lacks basic fairness, rendering it effectively meaningless. WPXM set forth a number of specific concerns regarding the lender appeal process, timeline, and costs, among other things, which WPXM believed were unanswered by Kern River's proposal.

²³ *Kern River Gas Transmission Co.*, 134 FERC ¶ 61,231 (2011) (March 25 Rehearing Order).

²⁴ *Id.* P 10.

²⁵ *Id.*

²⁶ WPXM is a wholly-owned subsidiary of the Williams Companies, Inc. WPXM is a shipper on Kern River's system with firm transportation service agreements under Rate Schedule KRF-1.

III. January 13 Order

16. In the January 13 Order, the Commission accepted and suspended Kern River's proposed tariff provisions, subject to Kern River's providing further explanation and support for its proposed lender appeal process.²⁷ The Commission found that moving the lender appeal provision from the section addressing whether a shipper is creditworthy (section 29.1) to the section addressing collateral requirements for non-creditworthy shippers (section 29.2), was consistent with the Commission's March 25 Rehearing Order.²⁸ The Commission also found that because Kern River will continue to provide non-creditworthy shippers with an avenue to seek relief from Kern River's lenders from collateral requirements in excess of three months' reservation charges, this maintained the "parity" between collateral requirements in excess of Commission policy and non-creditworthy shippers' ability to seek relief from those requirements.²⁹

17. While accepting the broad outline of Kern River's proposal, the Commission also found that Kern River failed to adequately support the reasonableness of its proposed lender appeal process.³⁰ The Commission, therefore, required Kern River to provide a detailed explanation as to how the appeal process will work, and to meaningfully respond to WPXM's concerns about its proposal.³¹ Specifically, the Commission required the following:

After explaining how the lender appeal process works, Kern River must explain why the process is just and reasonable and how it preserves the overall "parity" between Kern River's collateral requirements and the process shippers can use to seek relief from those requirements. Kern River must explain why this process, in which Kern River acts as an intermediary and in which shippers have no direct access to Kern River's lenders, sufficiently facilitates shippers' ability to communicate their specific circumstances to the relevant lenders. Additionally, Kern River must explain how many of its original lending documents require collateral in excess of

²⁷ January 13 Order, 138 FERC ¶ 61,024 at P 26.

²⁸ *Id.* P 27.

²⁹ *Id.* P 30.

³⁰ *Id.* P 33.

³¹ *Id.* P 34.

three months, and how many of its existing 75 to 100 lenders would need to be contacted should a non-creditworthy shipper seek relief from a collateral requirement imposed by the current lending documents. Kern River must also explain when the original lending documents requiring collateral in excess of three months' reservation charges will expire and whether, in Kern River's view, such documents are subject to change.³²

IV. Kern River's Compliance Filing

18. On February 13, 2012, Kern River provided additional information pertaining to its lending documents and the lender appeal process. Kern River explains that its current long-term debt is issued pursuant to one set of lending documents that were initiated in 2001 when Kern River was owned by the Williams Companies.³³ Kern River explains that it currently has two outstanding series of notes (one scheduled to expire in 2016 and one scheduled to expire in 2018), but only one set of lending documents that applies to both series of notes. Kern River states that the lending documents have no specified expiration date, and will continue in force and effect until payment and performance in full of all obligations under debt issued pursuant to the documents. Kern River states that it intends to issue a third series of notes to finance its Apex Expansion that would be subject to the same set of lending documents and that would not be scheduled to expire for approximately 20 years.³⁴

19. Kern River explains that all of its debt is secured by the same collateral—all long-term firm transportation service agreements and related shipper credit support—regardless of the date the debt was issued. Kern River further states that all of its debt is secured, *pari passu*, because new lenders would be unwilling to loan significant sums of money to Kern River during the time when other lenders are secured by virtually 100 percent of Kern River's income.

20. Kern River describes its lending documents as a set of documents that work together, referencing each other and in most cases subject to each other.³⁵ Key lending documents include a trust indenture (which contains the requirement for 12 months of

³² *Id.*

³³ Kern River Compliance Filing at 2.

³⁴ *Id.* at 3.

³⁵ *Id.* at 3-4.

security, either a letter of credit or cash in escrow), collateral agency agreement, credit agreement, and assignment of contracts, pledge and security agreement (which actually assigns the shipper credit support to lenders as collateral).³⁶

21. Kern River states that its lending documents can only be amended through a cumbersome process and argues that amending the documents to eliminate the credit support requirements would be unreasonable. Kern River contends that it would be extremely unlikely that Kern River's lenders would voluntarily agree to accept security of lesser value than that specified in the lending documents, regardless of the credit condition of the shipper.³⁷ Kern River also notes that there is no requirement for its lenders to even consider such requests.

22. Kern River next responds to concerns raised by WPXM about Kern River's proposed lender appeal process. Attached to its response, Kern River provides four documents: (1) procedures for shippers to request lender determinations; (2) a letter to lenders that will accompany a lender credit request; (3) a lender credit application; and (4) a notice to non-creditworthy shippers advising them of the right to request relief from collateral requirements from Kern River's lenders.³⁸ Kern River also prefaces its response by noting that it has no experience pursuing a dialogue with its lenders and therefore cannot predict whether the lenders would be receptive to considering shipper requests for alternate credit assurance. Kern River states that it has discussed the possibility of alternate credit assurance with the trustee (who coordinates communication among the lenders), but obtained very limited information since the trustee was unable to speak for the lenders and was unaware of any similar process ever being implemented.

23. With regard to WPXM's concern about establishing a time frame for the lender appeal process,³⁹ Kern River proposes to give lenders the deadline requested by each shipper, up to but not exceeding 20 business days. Kern River explains that if experience suggests that this period is too short, Kern River will recommend extending the time

³⁶ *Id.* Kern River notes that with the exception of the credit agreement, Kern River filed these agreements with the Commission on May 29, 2009 in Docket No. RP09-466-002.

³⁷ *Id.* at 4. Kern River notes that the Commission has previously found that "it is unlikely that Kern River's lenders would be amenable to substituting credit security of admittedly lesser value for the Centerpoint Guaranty." *Id.* (citing *Reliant*, 120 FERC ¶ 61,056 at P 32).

³⁸ *Id.* at Attachments A – D.

³⁹ *Id.* at 6.

period. Kern River notes that because its lending documents do not provide for exceptions to credit support requirements, any exception approved by lenders would constitute a “supplement” to the lending documents, requiring approval of all senior parties.

24. Kern River next explains that communication with its 75 to 100 different lenders is accomplished through a specialized website designed for this purpose. Kern River states that the responsibility for seeking approval for a change in its credit support requirements lies with the non-creditworthy shipper. Kern River explains that the shipper is in control of its request and, therefore, it is appropriate for the shipper to directly bear the related costs. Kern River states that these costs will include the use of a third-party service to ensure impartiality in the process. Finally, Kern River states that it has already posted a notice on its external website informing non-creditworthy shippers that they may have a right to approach Kern River’s lenders.

25. Kern River states that the application process set forth in its filing provides Kern River the opportunity to provide additional information to the lenders (e.g., shipper’s payment history).⁴⁰ Kern River contends that it is appropriate for it to be involved in the shipper’s request in order to ensure that lenders receive all relevant information and to ensure that all requests submitted to the lenders are authorized by Kern River’s tariff. Finally, Kern River has proposed that any approval granted by the lenders be limited either to a time certain or if the shipper’s financial condition deteriorates.

V. WPXM Comments

26. In its comments on Kern River’s compliance filing, WPXM argues that Kern River essentially confirms that its proposed lender appeal process has no meaningful substance. WPXM states that Kern River drafted a few pages of forms and notices, made a short call to the trustee, and drafted its long list of reasons why nothing will actually happen when a shipper appeals to Kern River’s lenders. WPXM contends that this does not demonstrate justness and reasonableness. WPXM states that if the Commission allows Kern River to implement this substance-free process, it will have effectively cancelled or reversed its prior requirement that there be parity between Kern River’s collateral requirements and the process shippers can use to seek relief from those requirements.⁴¹

⁴⁰ *Id.* at 9.

⁴¹ WPXM Comments at 3.

27. WPXM contends that given the lengthy arguments Kern River offers to convince the Commission that the lenders will not respond at all, Kern River's proposed time frame of 20 days is meaningless. WPXM also contends that the expected cost of the appeal process is inadequately described and the third-party process management is flawed. WPXM also states that Kern River does not explain the specific services rendered by the third-party service provider to Kern River and its lenders and the fees that might apply. WPXM believes that the shipper should not have to bear the full cost of the appeal process and that perhaps a 50/50 sharing of the costs between Kern River and the shipper would be the best way to ensure the timeliness and impartiality that is required to make this process fair.⁴²

28. WPXM contends that Kern River's proposed involvement in the lender credit application is blatantly partial. WPXM explains that according to Kern River, the shipper would complete the proposed lender credit application form and then return it to Kern River, at which time Kern River would complete its section and forward it to the third-party provider. WPXM contends that this sequence ensures that Kern River gets the last word and the shipper is given no opportunity to rebut anything Kern River adds to the application. WPXM states that whereas there is no reference to any opportunity for the shipper to directly communicate with the third-party service provider, much less any of the lenders, there is nothing prohibiting Kern River from having extensive interaction with the third-party service provider to influence its review of the appeal process. WPXM states that the lender is not bound by Kern River's tariff, and the lender can use whatever approach it desires to determine how it feels about the financial strength of a potential guarantor. WPXM further states that the lender is under no obligation to assign the term creditworthy or non-creditworthy to a potential guarantor. WPXM contends that the lender merely needs to decide if it will accept the proposed guarantor's guaranty.

29. Finally, WPXM acknowledges that Kern River has not demanded additional credit assurances from WPXM because it believes that the Williams Companies (WPXM's former parent and still its guarantor) will return to creditworthy status after the spin-off of WPX Energy, which occurred on January 1, 2012.

VI. Kern River's Answer

30. Kern River filed a response stating that WPXM overlooks the fact that shippers are required to establish creditworthiness and that Kern River is not required to accept a guaranty from a guarantor that does not meet the creditworthiness standards set forth in Kern River's tariff. Kern River states that the Commission has found that lenders may agree to accept 3 months' collateral in lieu of 12 months' collateral, or may agree to

⁴² *Id.* at 5-6.

allow a shipper to substitute collateral in lieu of a guaranty.⁴³ Kern River states however, there is no basis for WPXM's argument that the lenders can require Kern River to accept a guaranty from a non-creditworthy guarantor. Kern River concludes that a shipper should not be allowed to approach the lenders directly because the shipper could confuse the lenders by making requests the lenders are not authorized to grant.

31. Kern River also provides additional clarification to the lender appeal process. Kern River explains that third-party service provider is a website service designed to be a communication vehicle for financial entities. Kern River states that it does not have a contract with the service provider nor is one required for communications to occur. Kern River further explains that the third-party service provider will not limit or prevent access to the lenders, but rather, will assist with such access, since its website is strictly a one-way communication vehicle. Kern River states that it must be involved in the lender appeal process because these are Kern River's lenders and the collateral requirement is contained in a binding contract between Kern River and its lenders. Kern River does not believe that it should be required to bear a cost from the lender appeal process that is being imposed upon its customers as a result of the customer's voluntary action. Finally, Kern River states that with regard to the lender appeal process, the 20-business day maximum time frame for lenders to respond will be extended if it proves inadequate.

VII. Commission Determination

32. The Commission finds that the additional information submitted by Kern River complies with the January 13 Order. Kern River has sufficiently addressed the concerns raised by the Commission and has provided further explanation as required by the January 13 Order.

33. The Commission has long held the view that there is a link between Kern River's tariff provisions that allow it to require collateral of non-creditworthy shippers that is: (1) based on its current lending documents; and (2) in excess of the standard three months reservation charges authorized by Commission policy, and other tariff provisions that allow a shipper to seek relief from these above-normal collateral requirements from the lenders themselves.⁴⁴ For this reason, the Commission rejected Kern River's attempts to simply remove the tariff provision providing non-creditworthy shippers with that right.⁴⁵

⁴³ Kern River Response at 3 (citing March 25 Rehearing Order, 134 FERC ¶ 61,231 at P 25).

⁴⁴ See, e.g., July 29 Order, 132 FERC ¶ 61,080 at P 23, *order denying reh'g*, March 25 Rehearing Order, 134 FERC ¶ 61,231 at P 25.

⁴⁵ *Id.*

34. In the instant proceeding, Kern River does not seek to change the balance or “parity” between Kern River’s above-normal collateral requirements and non-creditworthy shippers’ ability to seek relief from those requirements from Kern River’s lenders. Instead, Kern River simply proposed to move its lender appeal provisions from the section of its tariff that provides for the establishment of creditworthiness to the more appropriate section dealing with collateral requirements for non-creditworthy shippers. At the same time, Kern River accepted the Commission’s invitation to establish reasonable provisions governing the lender contact process.⁴⁶ Kern River’s compliance filing sets forth a sufficient explanation as to how the process will work, including details as to the timing and steps in the application process as described above.

35. Throughout these proceedings, the Commission sought to strike a balance between allowing Kern River to honor the terms of its existing debt and providing firm shippers with access to the existing lenders that impose this collateral requirement to see if those lenders will grant relief from the 12-month requirement based on the specific circumstances of the shipper.

36. Kern River’s proposal maintains that balance and provides a reasonable process by which non-creditworthy shippers can seek relief from the 12-month collateral requirement from Kern River’s lenders. We find that Kern River’s proposed lender appeal process provides a mechanism for non-creditworthy shippers to provide all relevant information to Kern River’s lenders and “make its case” as to why those lenders should accept less than 12 months’ reservation charges as collateral. We also find that Kern River has provided reasonable notice to non-creditworthy shippers of their right to appeal the collateral requirements to Kern River’s lenders and appropriately commits to facilitating this process. We therefore disagree with WPXM’s contention that this process is not meaningful. Nothing in our previous orders requires Kern River to establish the type of quasi-judicial procedures sought by WPXM. Rather, the Commission has simply required Kern River to provide for some method for non-creditworthy shippers to make their case to Kern River’s lenders. In light of the additional information provided by Kern River in its compliance filing, we find that Kern River has done so.

37. Kern River has acknowledged that its proposed time period for lenders to respond to shipper requests may not be perfect and has committed to reviewing these time periods in the future and adjusting them as appropriate. We find it reasonable for Kern River to allow for some flexibility in the timing of the lender appeal process. Such a process is new to Kern River, and Kern River rightly acknowledges that overly rigid time requirements may work to the shipper’s disadvantage.

⁴⁶ See July 29 Order, 132 FERC ¶ 61,080 at P 24.

38. Moreover, we find it reasonable for Kern River to be involved in the lender appeal process, and that WPXM's concerns that Kern River's involvement would undermine the fairness of the process are misplaced. Ultimately, the lenders at issue hold Kern River's debt. It is appropriate for Kern River to provide its lenders with relevant information regarding a non-creditworthy shipper's request for relief. All that is required by Kern River's tariff and by the orders that have addressed this issue is for shippers to have the opportunity to make their case for relief to Kern River's lenders. Shippers do not have an open-ended right to prolong the process by endless appeals, nor do they have the right to review communications between Kern River and its lenders.

39. The Commission also agrees with Kern River that it should not be required to bear the costs from the lender appeal process since Kern River is acting solely as an intermediary and it is the shipper that is requesting relief from Kern River's lenders. Accordingly, we find that Kern River has supported its lender appeal process in a manner that complies with our January 13 Order.

40. As part of its compliance filing, Kern River states that it interprets the past Commission orders and its tariff as allowing it to continue the 12-month collateral requirement in any *new* debt issued or refinanced by Kern River.⁴⁷ Such an understanding, however, is at odds with the Commission's prior orders, its policy, and Kern River's tariff. The Commission never intended that Kern River's exception from the generally applicable 3-month collateral requirement would persist indefinitely.

41. In the June 25 Rehearing Order, the Commission, proceeding under section 5 of the Natural Gas Act, found "that Kern River's lending documents warrant an *exception* to the general policy that pipeline tariffs may not impose on new, non-creditworthy shippers a collateral requirement of more than three months' reservation charges."⁴⁸ The Commission further found that "Kern River and its lenders have reliance interests in their *existing* lending agreements and the Commission will not question the criteria in those documents at this late stage."⁴⁹ The Commission made clear that this exception is based on the fact that it would not be reasonable to require pipelines and lenders to have to renegotiate its lending agreements to comply with later-approved Commission policy.⁵⁰

⁴⁷ Kern River Compliance Filing at 3 (stating that Kern River intends to issue a third series of notes to finance its Apex Expansion subject to the same set of lending documents, which would not be scheduled to expire for approximately 20 years).

⁴⁸ June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 66 (emphasis added).

⁴⁹ *Id.* P 73 (emphasis added).

⁵⁰ *Id.* P 66.

42. Because these lending documents were the source of the 12-month security requirement, the Commission required Kern River to specifically reference its “*current lending documents*” in its tariff.⁵¹ In response Kern River filed tariff revisions, which were accepted by delegated letter order, and which state: “‘Transporter’s Current Lending Documents’ means the Trust Indenture dated as of August 13, 2001, among Kern River Funding Corporation, Kern River Gas Transmission Company, as guarantor, and the trustee, as amended and supplemented from time to time.”⁵²

43. The Commission understands the June 25 Rehearing Order, as well as section 29.2 of Kern River’s tariff, as allowing Kern River to require 12 months of reservation charges as collateral from non-creditworthy shippers only to the extent that Kern River’s existing lending agreements as of August 12, 2010 impose these collateral requirements and remain outstanding. These are the current lending documents that are incorporated into the Trust Indenture. The Commission was clear that it was allowing Kern River an exception to its general policy based on the reliance interest of Kern River and its lenders in maintaining the terms of this existing debt. The June 25 Rehearing Order was not an open-ended exemption from the Commission’s general creditworthiness and collateral requirements that would apply either to refinancing of existing debt or the issuance of new debt by Kern River, as suggested by Kern River in its compliance filing.

44. While Kern River’s tariff specifically bases the collateral requirements on the trust indenture “as amended and supplemented from time to time,” we interpret that clause as referring to changes to the Trust Indenture related to Kern River’s debt as it existed August 12, 2010, not to the addition of future lending documents or the modification of existing lending documents to incorporate new or refinanced debt. Interpreting this clause as applying to future or refinanced debt would be contrary to the Commission orders requiring Kern River to limit the exception only to current lending documents. Indeed, as Kern River itself recognizes, any reduction in collateral from a non-creditworthy shipper would require a “supplement” to the lending documents.⁵³ The

⁵¹ *Id.* P 69 (emphasis added).

⁵² Kern River Gas Transmission Co., FERC Gas Tariff, General Terms and Conditions § 29.2 (1.0.0).

⁵³ Kern River Compliance Filing at 6 (“Kern River’s lending documents do not provide for exceptions to be made to the credit support requirements imposed thereby. Therefore, any exception approved by the lenders would constitute a ‘supplement’ to the lending documents. The process for supplementing the trust indenture is set forth in Article VII of the trust indenture.”).

Commission interprets the phrase “as amended and supplemented from time to time,” as referring to this type of modification.

45. Thus, we do not find that any future refinanced or new debt will serve to extend the date upon which the 12-month collateral requirement for existing or new firm shippers will apply. At the expiration of Kern River’s debt as it existed on August 12, 2010, Kern River will no longer be able to require collateral of 12 months’ reservation charges from existing or new firm shippers, but must adhere to the Commission’s policy applicable to all pipelines of no more than 3 months’ collateral.

46. We recognize that Kern River interprets its tariff as providing an open-ended exemption from the Commission’s 3-month collateral requirements. However, if that interpretation were accepted, the tariff provision would be unjust and unreasonable and contrary to the Commission’s earlier orders in the proceeding for the reasons discussed above. Therefore, in order to avoid any ambiguity in the tariff language, the Commission acts under section 5 of the Natural Gas Act to require Kern River to clarify the tariff language consistent with our interpretation. We shall therefore require Kern River to revise its tariff to remove any ambiguity in this regard, and to make clear that the 12-month collateral requirement will end when Kern River’s debt as it existed on August 12, 2010 ends, or explain why it should not be required to do so.

The Commission orders:

(A) The additional information provided by Kern River complies with the Commission’s January 13 Order.

(B) Within 30 days of this order, Kern River must file revised tariff records to clarify the limitation on its 12-month collateral requirement, as discussed in the body of this order, or explain why it should not be required to do so.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.