

132 FERC ¶ 61,080  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Kern River Gas Transmission Company

Docket No. RP10-945-000

ORDER REJECTING TARIFF SHEET

(Issued July 29, 2010)

1. On July 2, 2010, Kern River Gas Transmission Company (Kern River) filed a revised tariff sheet<sup>1</sup> to modify the creditworthiness criteria in section 29.1 of the General Terms and Conditions (GT&C) of its tariff. Kern River proposes to remove the provision that allows shippers to establish creditworthiness by means of “approval by Transporter’s lenders.” The Commission rejects the revised tariff sheet because it is inconsistent with the other provisions of Kern River’s tariff, which permit it to establish more stringent collateral requirements based on Kern River’s lending documents.

**I. Background**

2. For more than a year, Kern River has been in the process of revising its creditworthiness provisions, which are set forth in section 29 of its GT&C.<sup>2</sup> 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).

3. Most recently, on June 25, 2010, the Commission issued two separate orders pertaining to Kern River’s creditworthiness provisions in section 29 of its GT&C. In the June 25 Rehearing Order, the Commission denied rehearing of objections to the

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<sup>1</sup> Second Revised Sheet No. 215 to FERC Gas Tariff, Second Revised Volume No. 1.

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

acceptance of a number of tariff revisions: (1) addition of Fitch Ratings to the list of ratings agencies used to determine creditworthiness;<sup>3</sup> (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.<sup>4</sup>

4. 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 that non-creditworthy shippers furnish “other security acceptable to Transporter’s lenders.” The Commission initiated the section 5 proceeding to determine whether the provision relating to security acceptable to Kern River’s lenders should be applicable to shippers on the Kern River system that are not subject to specific collateral requirements as part of an expansion project.<sup>5</sup> 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 charges.<sup>6</sup> 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.<sup>7</sup>

5. Upon review of the lending documents submitted by Kern River, the Commission found in the June 25 Rehearing Order, 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.<sup>8</sup> The Commission found that it would be unreasonable to question the collateral requirements

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<sup>3</sup> 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).

<sup>4</sup> *Kern River Gas Transmission Company*, 131 FERC ¶ 61,271 (2010) (June 25 Rehearing Order).

<sup>5</sup> May 1 Order, 127 FERC ¶ 61,103 at P 31.

<sup>6</sup> *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412, at P 11 (2005) (*Policy Statement*).

<sup>7</sup> *Id.* P 17.

<sup>8</sup> June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 65.

set forth in the original lending documents for the construction project.<sup>9</sup> The Commission therefore determined that Kern River could require collateral as specified in these initial lending documents for all shippers.<sup>10</sup>

6. Also on June 25, 2010, the Commission issued a separate order (June 25 Tariff Order) accepting a revision to the creditworthiness criteria in section 29.1 of the GT&C.<sup>11</sup> 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 states that a determination of shipper's creditworthiness will 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.<sup>12</sup>

## II. Details of the Filing

7. Section 29.1 of Kern River's GT&C provides that a shipper's creditworthiness is based on the level of service requested by shipper and (a) to the extent rated by the certain listed credit agencies, a credit rating (the shipper's senior unsecured debt rating if available, otherwise the shipper's issuer rating) of investment grade from each, and, if at the minimum investment grade rating, a short-term and long-term outlook or credit watch of stable or positive from that agency; or (b) if the shipper does not have a senior unsecured rating or issuer rating from one of the listed credit agencies, an equivalent rating of investment grade as determined by Kern River; or (c) approval by Transporter's lenders.

8. In this filing, Kern River proposes to remove the provision permitting creditworthiness to be established via approval by Kern River's lenders in section 29.1(c). Kern River asserts that the Commission misinterpreted section 29.1(c) in the

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<sup>9</sup> *Id.* P 66.

<sup>10</sup> The Commission, however, did require Kern River to modify its tariff slightly to specify that it applied only when the lending documents required greater collateral and to define "current lending documents" in the definitions section of its tariff. *Id.* P 69.

<sup>11</sup> See *Kern River Gas Transmission Company*, 131 FERC ¶ 61,269 (2010) (June 25 Tariff Order).

<sup>12</sup> *Id.* P 21.

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 states that this interpretation is inconsistent with the Commission's *Policy Statement* on creditworthiness.<sup>13</sup> Kern River argues that as it is described in the June 25 Tariff Order, section 29.1(c) would be unworkable. Kern River states that numerous entities (anywhere from 75 to 100) hold its notes at the present time and that making requests to these lenders and expecting any response, let alone a prompt response, would be impractical. Kern River also contends that it has no method of assuring the confidentiality of shipper financial information if it were to be transmitted to its numerous lenders.

9. Kern River argues that the Commission has previously found that requests made to lenders to approve lesser security would be futile,<sup>14</sup> and that it would be inconceivable that Kern River's lenders would overrule Kern River's business judgment on a shipper's creditworthiness, which is based on objective assessment of specific information defined in the tariff. Kern River contends that with the removal of section 29.1(c), its creditworthiness criteria will be objective, transparent, just and reasonable, and in compliance with the *Policy Statement*. Kern River also contends that removal of section 29.1(c) is consistent with both its lending documents, which do not contemplate lender assessment of shipper creditworthiness, as well as with other pipelines' definitions of creditworthiness.<sup>15</sup>

10. Kern River requests waiver of the Commission's notice requirements to allow its proposed tariff revision to become effective July 19, 2010, arguing that the evaluation of shippers' credit is an ongoing process of critical importance to Kern River's financial integrity and that the revision will not result in a material change to Kern River's historic credit practices.

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<sup>13</sup> Kern River, July 2, 2010 Transmittal Letter at 3 (citing *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412 (2005) (*Policy Statement*)).

<sup>14</sup> *Id.* at 3-4 (citing *Reliant Energy Services, Inc. et. al. vs. Kern River Gas Transmission Company*, 120 FERC ¶ 61,056, at P 32 (2007)).

<sup>15</sup> *Id.* at 4 (citing Natural Gas Pipeline Company of America LLC's FERC Gas Tariff, Seventh Revised Volume No. 1, Original Sheet Nos. 398-399; Columbia Gas Transmission, LLC's FERC Gas Tariff, Third Revised Volume No. 1, Original Sheet No. 311; and Gulf South Pipeline Company LP's FERC Gas Tariff, Sixth Revised Volume No. 1, Fourth Revised Sheet No. 1201 *et seq.*).

### **III. Notice, Interventions and Comments**

11. Public notice of Kern River's filing was issued on July 6, 2010. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2010). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2010), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

12. On July 12, 2010, Williams Gas Marketing, Inc. (Williams) filed a protest. Williams requests that the Commission reject Kern River's filing because Kern River offers no meaningful justification for its proposed change to the creditworthiness criteria. Williams indicates that despite Kern River's assertions, its proposed revision of section 29.1(c) represents a significant change to its tariff that implicates a significant shipper right. Williams further protests the continued ramping up of the strictness of Kern River's creditworthiness criteria, and it points out that these revisions result in the imposition of new collateral requirements on Williams that are four times the amount required by Commission policy. Williams requests that the Commission order Kern River to leave section 29.1(c) in place, with an added provision that Kern River must perform that creditworthiness evaluation step only as a condition to imposing the lender-driven collateral requirements of section 29.2(b). Williams argues that where Kern River chooses not to perform that creditworthiness evaluation step, it should be limited to imposing a collateral requirement of three months of reservation charges, consistent with Commission policy.

13. Williams disputes Kern River's assertion that it could not satisfy section 29.1(c) unless it is able to obtain responses from all of the entities that currently hold one of its notes and argues that the June 25 Tariff Order does not state that Kern River must obtain a one hundred percent response rate with unanimous consent. Williams contends that the June 25 Tariff Order merely states that Kern River is obligated to seek a creditworthiness determination from its lenders before deeming a shipper non-creditworthy.<sup>16</sup> Williams believes that a reasonably short list of the larger note holders would likely represent a majority of debt ownership and that those holders could be solicited for majority approval in a fashion similar to what Kern River is reasonably required to do to amend its lending agreements. Williams argues that Kern River cannot be allowed to continue, on one hand, to trumpet the importance of demanding four times the Commission policy level of collateral to protect its lenders, while on the other hand complaining that it would be overly burdensome to solicit input from these same lenders on behalf of a shipper.

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<sup>16</sup> Williams, July 12, 2010 Protest at 7 (citing June 25 Tariff Order, 131 FERC ¶ 61,269 at P 21).

14. Furthermore, Williams states that Kern River mischaracterizes the June 25 Tariff Order in its assertion that a presumption of creditworthiness is imposed by the Commission's interpretation of section 29.1(c). Williams contends that while the burden is on the shipper to demonstrate creditworthiness, the obligation to perform that evaluation is Kern River's responsibility. Williams concludes that Kern River has an obligation to complete the step of soliciting its project lenders on behalf of the shipper before it has completed its evaluation of that shipper's creditworthiness.

15. On July 14, 2010, BP Energy Company (BP) filed a protest. BP states that Kern River's proposal will deprive its shippers of an alternative means of establishing creditworthiness. BP also states that Kern River does not specify how its proposal will impact current shippers who have established their creditworthiness under section 29.1(c). BP also points to language in section 29.2(b), which specifies that non-creditworthy shippers may receive service if they furnish security acceptable to Kern River's lenders, and argues that Kern River's filing fails to explain why requiring its lenders' approval is acceptable under the collateral requirements (i.e. when it benefits Kern River), but not acceptable to establish creditworthiness of a shipper (i.e. when it benefits Kern River's shippers). BP states that it supports Williams' proposal to require Kern River to either (1) comply with section 29.1(c) of its GT&C before applying the collateral requirements of section 29.2(b) of its GT&C or (2) limit Kern River's collateral requirements to the Commission's general policy of three months worth of reservation charges.

16. On July 15, 2010, Kern River filed an answer to Williams' and BP's protests. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Kern River's answer because it has provided information that assisted us in our decision-making process.

17. Kern River contends that the existing tariff language in section 29.1(c) is not limited to approval by only some of its lenders. Kern River further argues that seeking approval of all of its lenders may result in a process that could take months, if not years, to complete.

18. Kern River also disputes Williams' distinction between the burden to demonstrate creditworthiness, and the obligation to perform the evaluation of creditworthiness under section 29.1(c). Kern River contends that because a shipper has the burden to demonstrate creditworthiness, the shipper cannot be deemed creditworthy prior to demonstrating its creditworthiness. Kern River explains that in a situation such as the one Williams is facing, where a shipper is already receiving service, any delay in seeking lenders' approval of the shipper's creditworthiness would work to the detriment of the pipeline, which would increase the risk for the pipeline.

19. Kern River next responds to BP's assertion that removal of section 29.1(c) will deprive shippers of an alternative means of establishing creditworthiness, potentially resulting in an artificial increase in the number of shippers deemed non-creditworthy. Kern River argues that since its lenders have not overruled Kern River's judgment with respect to creditworthiness determinations, there will be no change in the number of non-creditworthy shippers on Kern River's system.

20. Kern River refers to language in the June 25 Rehearing Order indicating that Kern River is not required to justify the creditworthiness criteria in section 29.1 on the requirements of its lending documents.<sup>17</sup> Kern River contends that its lenders have agreed to accept Kern River's determinations of creditworthiness based on the standards set forth in its tariff and therefore, there is no link between the creditworthiness criteria in section 29.1(c) of its tariff and the collateral requirements in section 29.2(b) of its tariff.

#### **IV. Discussion**

21. The Commission finds that in the context of Kern River's tariff, its proposal to remove section 29.1(c) of its GT&C is unjust and unreasonable. Eliminating this provision in its entirety would remove the parity between Kern River's use of its lending agreements to obtain a more stringent level of collateral (currently twelve months of reservation charges) than the Commission ordinarily would permit (three months of reservation charges) and its creditworthiness provisions, which permit a shipper to seek from Kern River's lenders relief from the higher collateral requirement.

22. In the June 25 Rehearing Order, the Commission found that the requirements of Kern River's lending documents warrant 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.<sup>18</sup> The Commission based this exception on its examination of the collateral requirements in Kern River's original lending documents for its construction project, which provided a continuing security interest in Kern River's service agreements "whether now existing or hereafter arising, now owned or after-acquired, and wherever located..." and required security equal to one year of reservation charges from all non-creditworthy shippers.<sup>19</sup> Accordingly, the

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<sup>17</sup> Kern River, July 15, 2010 Answer at 5-6 (citing June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 36).

<sup>18</sup> See June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 66.

<sup>19</sup> *Id.* P 65.

Commission directed Kern River to explicitly reference those documents in setting the collateral requirements for non-creditworthy shippers.<sup>20</sup>

23. Having based its higher collateral requirement on requirements of its lenders, Kern River has failed to show that it would be just and reasonable for it, at the same time, to eliminate shippers' abilities to approach those lenders requiring greater collateral to obtain relief from the more onerous collateral requirement. The provision allowing greater collateral based on lending documents parallels the requirement that Kern River permit the shipper to obtain the agreement of that lender to a lower collateral requirement. Creditworthiness is a continuum. It may well be that the lender will not automatically adopt Kern River's assessment of a shipper's creditworthiness, and may recognize that a shipper is sufficiently creditworthy so that a full twelve months collateral is not required. We recognize that we have not required other pipelines to include recourse to lenders in their tariffs. However, Kern River's situation is different from that of other pipelines because it argued for and relied upon its lenders' requirements to obtain Commission authorization for a larger amount of collateral from existing shippers not covered by precedent collateral requirements.<sup>21</sup> When the Commission allowed that more stringent collateral requirement it was cognizant that a shipper could utilize section 29.1(c)'s "approval by Transporter's lenders" provision to maintain the normal three months' collateral requirement.

24. Kern River argues that requiring it to seek approval of its lenders, as the Commission intimated in the June 25 Tariff Order, would present administrative difficulties, given the large number of its lenders. But such administrative difficulties are not sufficient to support its proposal to eliminate this shipper right entirely, particularly since it serves as a counterweight to other unusually stringent collateral requirements on Kern River, which are also based on lenders' requirements. As discussed above, it may not be important for the shipper to seek approval from all of Kern River's lenders, only those lenders upon whose documents Kern River relies for imposing a more significant collateral requirement. Kern River may file to establish reasonable provisions governing how it will facilitate providing shipper access to its lenders. In sum, Kern River has not demonstrated that it is just and reasonable to eliminate its obligation to facilitate an evaluation of creditworthiness under section 29.1(c), given the unique existing balance of its lender-based creditworthiness provisions.

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<sup>20</sup> *Id.* P 68-69.

<sup>21</sup> If Kern River utilized the standard three-month collateral requirement for existing shippers, it would not be required to retain a provision providing recourse to its lenders.

The Commission orders:

The tariff sheet referenced in footnote one is rejected for the reasons discussed in the body of this order.

By the Commission. Commissioner LaFleur is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.