UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

North Baja Pipeline, LLC	Docket No. RP02-363-013
e prime, inc. v. PG&E Transmission, Northwest Corporation	Docket No. RP03-41-004
PG&E Transmission, Northwest Corporation	Docket No. RP03-70-008

ORDER ON VOLUNTARY REMAND DIRECTING BRIEFS

(Issued May 3, 2006)

1. In 2002 and 2003, the Commission issued a number of orders in three separate proceedings concerning the creditworthiness provisions of North Baja Pipeline, LLC (North Baja) and PG&E Transmission, Northwest Corporation (GTN).[1] Specifically, the orders denied the pipelines the opportunity to recover 12 months of collateral from non-creditworthy post-construction shippers. North Baja and GTN appealed the Commission's orders and the three appeals were consolidated in *Gas Transmission Northwest Corporation , et al. v. Federal Energy Regulatory Commission*, D.C. Cir. Nos. 03-1257, *et al.* On March 9, 2006, in response to the Commission's motion, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an order granting the Commission's motion for voluntary remand to permit the issuance of a further order. This order directs North Baja and GTN to submit briefs to address certain issues concerning whether North Baja and GTN should be permitted to collect 12 months of collateral from non-creditworthy shippers as opposed to the Commission's general policy of 3 months of collateral for non-creditworthy shippers.

[1] PG&E Gas Transmission, Northwest Corporation has changed its name to Gas Transmission Northwest Corporation (GTN).

Procedural Background

2. In the orders in *North Baja Pipeline, LLC* in Docket No. RP02-363,[2] the Commission on its own motion under section 5 of the Natural Gas Act (NGA) found that North Baja's tariff requirement that non-creditworthy shippers must post collateral equal to 12 months of reservation charges in order to continue service was unjust and unreasonable. The Commission found "that requiring security equal to twelve months of service charges is excessive for shippers subscribing to service after the pipeline is in operation."[3] The Commission also found that while "requiring twelve months of security may be acceptable in the precedent agreements leading up to the issuance of a certificate, the tariff requirements that apply to shippers once the pipeline is in operation must limit the security requirements to three months of transportation charges."[4] On rehearing North Baja argued that the Commission did not take into account pipeline-specific facts and circumstances in finding the 12 month collateral requirement unjust and unreasonable, and also failed to conduct an evidentiary hearing to determine North Baja's facts and circumstances. The Commission affirmed its decision applying a 3 month collateral requirement to North Baja and, accordingly, denied rehearing.

3. In the orders in *e prime, inc. v. PG&E Gas Transmission, Northwest Corporation* in Docket No. RP03-41, [5] the Commission granted a complaint by e prime alleging that GTN unlawfully required e prime to provide 12 months of collateral in order to continue service because e prime was found to be non-creditworthy by GTN. The Commission found that GTN's tariff did not provide for 12 months of collateral from non-creditworthy shippers and, therefore, the Commission's general policy of 3 months of collateral would apply.

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[2] *North Baja Pipeline, LLC*, 102 FERC ¶ 61,239 (2003), *order on reh'g and clarification*, 105 FERC ¶ 61,374 (2003).

[3] 102 FERC ¶ 61,239 at P 14.

[4] *Id.* at P 15.

[5] 102 FERC ¶ 61,062 (2003), *order accepting compliance filing and granting complaint*, 102 FERC ¶ 61,289 (2003), *order on reh'g and clarification*, 104 FERC ¶ 61,026 (2003).

4. In the orders in *PG&E Gas Transmission, Northwest Corporation* in Docket No. RP03-70,[6] the Commission rejected GTN's filing to require 12 months of collateral for all non-creditworthy shippers. The Commission found that "requiring security equal to twelve months of service charges is excessive for shippers subscribing to service after the pipeline is in operation."[7] The Commission stated that the "policy is that for on-going shippers collateral can be required up to three months of service."[8] The Commission also found that "GTN provided no data to support its contentions that it is similar to project financed pipelines with debt obligations that specifically require a one-year prepayment of transportation charges."[9]

5. On August 23, 2003, GTN petitioned for review of the Commission's orders in *e prime, inc. v. PG&E Gas Transmission, Northwest Corporation* in Docket No. RP03-41. On February 23, 2004, North Baja and GTN filed petitions for review of the Commission's orders in *North Baja Pipeline, LLC* in Docket No. RP02-363, and *PG&E Gas Transmission, Northwest Corporation* in Docket No. RP03-70. On March 30, 2004, the D.C. Circuit consolidated the three proceedings.

6. On March 9, 2006, in response to the Commission's motion, the D.C. Circuit issued an order granting the commission's motion for voluntary remand to permit the issuance of a further order.

Creditworthiness Policy Statement

7. While the appeals in this case were still pending before the court, on June 16, 2005, the Commission issued a policy statement on creditworthiness and withdrew the proposed rulemaking on creditworthiness in Docket No. RM04-4-000.[10] As pertinent here, the order set forth the policy concerning collateral requirements for non-creditworthy shippers.

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[6] 101 FERC ¶ 61,280 (2002), *order on technical conference and reh'g*, 103 FERC ¶ 61,137 (2003), *order on compliance and reh'g*, 105 FERC ¶ 61,382 (2003).

[7] 105 FERC ¶ 61,137 at P 32.

[8] *Id.*

[9] 105 FERC ¶61,382 at P 48.

[10] *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412 (2005).

8. The Commission stated in the policy statement[11]:

> Since Order Nos. 436 and 636, the Commission's general policy in order to ensure that open access service is reasonably available has been to permit pipelines to require shippers that fail to meet the pipeline's creditworthiness requirements for pipeline service to put up collateral equal to three months' worth of reservation charges.[[12]] The Commission has viewed a customer's on-going credit risk as a business risk of the pipeline that should be reflected in its rate of return on equity.[[13]] The Commission has also recognized that in cases of new construction, particularly project-financed pipelines, [[14]] pipelines and their lenders could require larger collateral requirements from initial shippers before committing funds to the construction project.[[15]]

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[11] 111 FERC ¶ 61,412 at P 11 (2005).

[12] *See Florida Gas Transmission Co.*, 66 FERC ¶ 61,140 at 61,261 n.5&6, *order vacating prior order*, 66 FERC ¶ 61,376 at 62,257 (1994); *Southern Natural Gas Co.*, 62 FERC ¶ 61,136 at 61,954 (1993); *Valero Interstate Transmission Co.*, 62 FERC ¶ 61,197 at 62,397 (1993); *Texas Eastern Transmission Corp.*, 41 FERC ¶ 61,373 at 62,017 (1987); *Williams Natural Gas Co.*, 43 FERC ¶ 61,227 at 61,596 (1988); *Pacific Gas Transmission Co.*, 40 FERC ¶ 61,193 at 61,622 (1987); *Tennessee Gas Pipeline Co.*, 40 FERC ¶ 61,194 at 61,636 (1987); *Natural Gas Pipeline Co. of America*, 41 FERC ¶ 61,164 at 61,409, n.4 (1987); *Northern Natural Gas Co.*, 37 FERC ¶ 61,272 at 61,822 (1986).

[13] *See Ozark Gas Transmission Co*., 68 FERC ¶ 61,032 at 61,107-108 (1994) (business and financial risk determine where the pipeline should be placed within the zone of reasonableness); *Williston Basin Interstate Pipeline Co*., 67 FERC 61,137 at 61,360 (1994) ("Bad debts are a risk of doing business that is compensated through the pipeline's rate of return").

[14] Project-financed pipelines are projects in which the lender secures its loans to the pipeline by the service agreements negotiated with the contract shippers. *See Kern River Gas Transmission Co.*, 50 FERC ¶ 61,069 at 61,145 (1990).

[15] *Calpine Energy Services, L.P. v. Southern Natural Gas Co.*, 103 FERC ¶ 61,273, *reh'g denied*, 105 FERC ¶ 61,033 (2003) (30 months' worth of reservation charges found to be reasonable for an expansion project); *North Baja Pipeline, LLC*, 102 FERC ¶ 61,239 at P 15 (2003) (approving 12 months' worth of reservation charges

(continued)

The Commission further stated that[16]:

> The termination of an existing shipper's service is abandonment under the Natural Gas Act,[[17]] and, accordingly, it is important to ensure that collateral requirements do not unnecessarily cause the termination of a shipper's service. The collateral requirement asked of existing shippers whose credit status has fallen below the pipeline's credit standards must be reasonable and directly related to the risks faced by the pipeline. In many if not most cases, the existing shipper is continuing to pay for service under its contracts even though its credit status has been lowered, and that shipper should not be pressed into default by overly onerous collateral requirements.
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> For existing shippers under contract, the Commission generally finds that its traditional policy of requiring no more than the equivalent of three months' worth of reservation charges reasonably balances the shippers' right to continued service with the pipelines' risk. Three months corresponds to the length of time it takes a pipeline to terminate a shipper in default and be in a position to remarket the capacity. Three months also is an appropriate measure of the pipeline's current remarketing risk. The amount of collateral advanced by a shipper under an existing contract does not directly reduce the current risk faced by the pipeline. When a shipper's credit rating has declined so that it is no longer creditworthy under the pipeline's tariff, the pipeline faces a risk no matter what the collateral requirement. If the shipper defaults, the pipeline is faced with remarketing the capacity. Similarly, if the shipper cannot meet a higher collateral requirement, and is terminated for that reason, the

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as collateral for initial shippers on new pipeline); *Maritimes & Northeast Pipeline, L.L.C.*, 87 FERC ¶ 61,061 at 61,263 (1999) (12 months prepayment); *Alliance Pipeline L.P.*, 84 FERC ¶ 61,239 at 62,214 (1998); *Kern River Gas Transmission Co.*, 64 FERC ¶ 61,049 at 61,428 (1993) (stringent creditworthiness requirements required by lenders); *Mojave Pipeline Co.*, 58 FERC ¶ 61,097 at 61,352 (1992) (creditworthiness provisions required by lender); *Northern Border Pipeline Co.*, 51 FERC ¶ 61,261 at 61,769 (1990) (12 months' worth of collateral for new project).

[16] *Id.* at P 13-14.

[17] *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1516-18 (D.C. Cir., 1990).

> pipeline also would be faced with remarketing the capacity.[[18]] Further, requiring more collateral will increase the current risk of default from a shipper that cannot provide such expensive collateral.[[19]]

9. In the policy statement, the Commission also addressed other issues that are pertinent to the issues raised in this proceeding. The Commission stated[20] that it would "consider on a case-by-case basis any pipeline proposal to take into account a shipper's credit status in determining whether more than three months collateral can be required when shippers are bidding for available capacity on the pipeline's existing system." The Commission continued that "[a] shipper's credit status may be a relevant factor in assessing the value of its bid as compared with bids by more creditworthy shippers, and in determining the amount of collateral that a non-creditworthy shipper must provide to have its bid considered on an equivalent basis."[21]

Discussion

10. In these proceedings GTN and North Baja argued, among other things, that the Commission violated section 5 of the NGA by failing to provide North Baja with the required hearing so that North Baja could present evidence to support its existing twelve month collateral tariff provision. In addition, North Baja and GTN argued that the Commission ignored pipeline-specific evidence provided by GTN and proffered by North Baja and instead mechanically and with little discussion applied to North Baja and GTN what it referred to as its existing three month collateral policy.

11. In order to give North Baja and GTN a further opportunity to explain their positions and to provide the Commission additional information so that it can further address the issues raised in this proceeding, the Commission directs North Baja and GTN to file a brief to address, based on the specifics facts and circumstances of those two

[18] Certainly, if the shipper could put up more collateral, the pipeline would be better protected for a potential future default, since it would have a longer period to try to remarket the capacity. But such a potential future benefit does not change the current remarketing risk to the pipeline.

[19] S*ee PG&E Gas Transmission, Northwest Corporation,* 105 FERC ¶61,382, at P 18-28 (2003).

[20] *Id.* P 15.

[21] *Id.*

pipelines, why the Commission should approve a 12 month collateral requirement for non-creditworthy shippers as opposed to the Commission's general policy of three months of collateral.

12. In their brief, in addition to addressing the general issue discussed above, North Baja and GTN should address the following specific issues:

(1) Describe the specific facts and circumstances that make GTN and North Baja different from all other pipelines;

(2) With respect to North Baja, describe the material facts in dispute that would require an evidentiary hearing requiring the evaluation of witness testimony and demeanor as opposed to a paper hearing;

(3) Explain and provide evidence as to whether these pipelines face any unusual credit risk and explain why this credit risk should not be considered a business risk that the pipelines are compensated for in their rates of return;

(4) Explain why a three month collateral requirement for existing shippers is not an adequate measure of GTN's and North Baja's remarketing risk and why the Commission should authorize abandonment for an existing shipper that fails to post 12 months of collateral; and

(5) Explain whether the ability, pursuant to the policy statement, to file for a mechanism under which the pipelines can take into account a shipper's credit status in allocating available capacity among competing bidders would protect the pipelines against unnecessary credit risk.

13. In addition to providing answers to these general questions, the pipelines are required to provide the following:

(1) For each of the prior three calendar years, a schedule for each pipeline that depicts (a) the extent to which each pipeline has been fully subscribed on a firm basis, (b) availability of firm capacity by date, and (c) for each posting of available capacity, the date new contracts were signed.

(2) Provide the following information for all shipper defaults within the past ten years: amount of capacity subject to the default, the duration of the contract, the shipper's rate relative to the maximum rate, and whether the shipper's contract was an initial contract as part of an expansion and whether it was subject to construction-related collateral requirements.

(3) For each such default in Q2, indicate the length of time until the capacity was resubscribed, the duration of the new contract, and the rate relative to the maximum rate for each such resubscription.

14. GTN and North Baja must file their brief within 30 days of the date of this order. Parties to the above-captioned proceedings will be permitted to file comments within 30 days after GTN and North Baja file their brief.

<u>The Commission orders</u>:

GTN and North Baja are directed to file briefs addressing the issues discussed above within 30 days of the date of this order. Parties to the proceedings may file comments 30 days thereafter.

By the Commission.

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Magalie R. Salas,
Secretary.