

134 FERC 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kern River Gas Transmission Company

Docket Nos. RP10-817-001
RP10-945-001

ORDER ON REHEARING

(Issued March 25, 2011)

1. The Commission order issued June 25, 2010 (June 25 Tariff Order) in Docket No. RP10-817-000 addressed Kern River Gas Transmission Company's (Kern River) filing to clarify the creditworthiness criteria in section 29 of the General Terms and Conditions (GT&C) of its tariff. The order referred to GT&C section 29.1 and stated that subsection (c) "provides another option for a shipper to establish 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."¹ On July 2, 2010, in Docket No. RP10-945-000, Kern River filed to remove GT&C section 29.1(c) from its tariff. On July 26, 2010, Kern River filed for rehearing or clarification of the June 25 Tariff Order asking the Commission to withdraw the finding that Kern River is obligated to seek a creditworthiness determination from its lenders before deeming a shipper non-creditworthy. On July 29, 2010, the Commission rejected the July 2, 2010 filing to delete section 29.1(c).² On August 30, 2010, Kern River filed a request for rehearing and clarification of the July 29 Order. As discussed below, the Commission denies both of Kern River's requests for rehearing and clarifies the June 25 Tariff Order.

Background

2. Commencing in 2009, Kern River filed to consolidate the creditworthiness provisions of its tariff into a new GT&C section 29. Section 29.1 of Kern River's

¹ *Kern River Gas Transmission Co.*, 131 FERC ¶ 61,269, at P 21 (2010).

² *Kern River Gas Transmission Co.*, 132 FERC ¶ 61,080 (July 29 Order).

proposal sets forth how Kern River will determine if a shipper is creditworthy. Section 29.2 details alternate security requirements for non-creditworthy shippers for Long Term Firm Service and section 29.3 for other services.

3. On June 25, 2010, the Commission issued two separate orders pertaining to Kern River's creditworthiness provisions in section 29 of its GT&C, the June 25 Tariff Order, and an order in Docket No. RP09-466-000 *et al.* (June 25 Rehearing Order). That order 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) of its GT&C. That section provides that a non-creditworthy shipper may still receive service if it either furnishes a guaranty satisfactory to Kern River or "furnishes other security acceptable to Transporter's lenders." 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.³ 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.⁴ 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.⁵

4. 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, including "not only ...original and expansion shippers, but also new shippers."⁶ The Commission found that it would be unreasonable to question the collateral requirements set forth in the original lending documents for the construction

³ *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats & Regs., Regulations Preambles 2001-2005 ¶ 31,191, at P 11 (2005) (*Policy Statement*).

⁴ *Id.* P 17.

⁵ *Kern River Gas Transmission Co.*, 127 FERC ¶ 61,103, at P 31 (2009).

⁶ June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 65.

project.⁷ The Commission therefore determined that Kern River could require collateral as specified in these initial lending documents for all shippers.⁸

5. In its July 2 filing Kern River proposed to remove the provision permitting creditworthiness to be established via approval by Kern River's lenders under section 29.1(c). 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.

6. The July 29 Order rejected Kern River's proposal to eliminate section 29.1(c) from its tariff. The Commission found that removal of this provision 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. The Commission stated that 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. On August 30, 2010, Kern River filed a request for rehearing or, in the alternative, clarification of the July 29 Order.

Discussion

A. Request for Rehearing or, in the Alternative, Clarification of the June 25 Tariff Order

1. Kern River's Request

7. Kern River states that the Commission should grant rehearing or clarification of the June 25 Tariff Order by finding that Kern River is not obligated to seek a creditworthiness determination from its lenders before deeming a shipper non-creditworthy. Kern River states that the Commission's determination in the June 25 Tariff Order is inconsistent with both the intent of the tariff provision and the

⁷ *Id.* P 66.

⁸ 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.

Commission's previous findings in *Reliant Energy Services, Inc. v. Kern River Gas Trans. Co.*⁹ Kern River also requests the Commission clarify that shippers are required to establish their creditworthiness, and that even if Kern River has an affirmative duty to seek lender creditworthiness determinations, that does not allow shippers to be considered creditworthy in the interim.

8. Kern River argues that in *Reliant*, the Commission found that there is nothing in the lending documents that requires Kern River to seek approval from its lenders of the proposed substitute credit. Thus, there is no basis to require Kern River to approach its lenders to seek approval as stated in the June 25 Tariff Order.¹⁰ Kern River contends that in *Reliant* the Commission dealt with the interpretation of a provision in section 29.4(b) of Kern River's tariff which involves the security required when a shipper is no longer creditworthy. The issue presented was whether Kern River had an affirmative obligation to seek lender approval of collateral proposed by shippers. Kern River states that while the *Reliant* case involved an interpretation of another provision of the tariff, the same principle applies.

9. Kern River asserts that it is virtually inconceivable that Kern River's lenders, which are currently estimated to consist of at least seventy five to one hundred large financial institutions, would overrule Kern River's business judgment, which is based on an objective assessment of creditworthiness. Kern River argues that the Commission's finding in the June 25 Tariff Order that "Kern River is obligated to seek a creditworthiness determination from its lenders before deeming a shipper non-creditworthy"¹¹ is contrary to the express language of Kern River's tariff, which requires that *shippers* must establish creditworthiness before receiving service. Kern River contends that the Commission's finding in the June 25 Tariff Order inappropriately shifts the burden of proving creditworthiness from the shipper to Kern River and would be impracticable and unworkable.

2. Commission Determination

10. The Commission grants clarification and finds that Kern River is not obligated to seek a creditworthiness determination from its lenders before deeming a shipper non-creditworthy. Consistent with our holding in the July 29 Order, Kern River is required only to facilitate the ability of a non-creditworthy shipper to contact the lender or lenders

⁹ 120 FERC ¶ 61,056 (2007) (*Reliant*).

¹⁰ Kern River cites to *Reliant*, 120 FERC ¶ 61,056 at P 32.

¹¹ Kern River cites to the June 25 Tariff Order, 131 FERC 61,269 at P 21.

that require collateral greater than three months to seek that lender or lenders review of the individual circumstances of that shipper.¹² The July 29 Order intended to allow a shipper that could not establish creditworthiness under sections 29.1(a) or (b) to avoid the higher collateral requirement applicable to a non-creditworthy shipper under section 29.2 by obtaining acquiescence to a lower collateral level from the lender whose lending documents were the source of the higher collateral requirement.

11. The July 29 Order, which was issued after the above rehearing request by Kern River addressed the issue of responsibility for obtaining such lender approval as it relates to section 29.1(c) of Kern River's tariff. In that order, the Commission found that section 29.1(c) requires only that "Kern River permit the *shipper* to obtain the agreement of that lender to a lower collateral requirement."¹³ Therefore, we find that the responsibility to request and receive lender approval for a lower collateral requirement is placed on the shipper. However, the July 29 Order further stated that Kern River should "establish reasonable provisions governing how it will facilitate providing shipper access to its lenders."¹⁴

12. Kern River also maintains that it should not be required to permit the shipper to maintain its status as a creditworthy shipper on Kern River's system while a determination is sought from the lenders. It argues that such an interpretation would be arbitrary, unreasonable, and not required by the tariff language in section 29.1(c), and that maintaining that status would create incentives for shippers to delay providing the requisite financial information to Kern River and to dispute Kern River's process for seeking lender determination. Kern River concludes that the determination of creditworthiness made by Kern River should stand, unless and until Kern River's determination is overruled by the lenders.

13. The Commission finds that as discussed above, it is the responsibility of the *shipper* to establish creditworthiness under section 29.1 of Kern River's tariff. The Commission agrees with Kern River that allowing a shipper to maintain its status as a

¹² As stated above, the Commission required that Kern River modify its tariff to specify that its collateral requirement applies only when the lending documents require greater collateral and to define "current lending documents" in the definitions section of its tariff. June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 69. Kern River filed in compliance with this requirement, which the Commission accepted by letter order issued August 12, 2010.

¹³ July 29 Order, 132 FERC ¶ 61,080 at P 23.

¹⁴ *Id.* P 24.

creditworthy shipper on Kern River's system with no collateral requirement while it seeks a determination from the lenders would create incentives for shippers to delay seeking that determination. Accordingly, a determination of uncreditworthiness of a shipper by Kern River and its consequences will stand until there is a change in that determination, or the applicable lender assents to a lower collateral level for that shipper.

B. Request for Rehearing of the July 29 Order

1. Kern River's Request

14. Kern River states that the Commission erred in refusing to allow Kern River to remove section 29.1(c) from its tariff. Kern River explains that the criteria for determining creditworthiness and the amount of credit support that must be provided by non-creditworthy shippers are two completely separate concepts. First, a shipper is determined to be creditworthy or non-creditworthy pursuant to section 29.1 of Kern River's tariff. If a shipper is not able to establish creditworthiness under the criteria set forth in section 29.1, Kern River requests security based on the provisions of section 29.2 or 29.3, depending on the type of shipper. Kern River further asserts that the Commission's finding in the July 29 Order at P 23, that "creditworthiness is a continuum" and that a shipper might be "sufficiently creditworthy so that a full twelve months collateral is not required," has introduced concepts not recognized by Kern River's tariff or by Commission policy.

15. Kern River states that the Commission's *Policy Statement* recognizes that the concepts of creditworthiness and credit support are separate and distinct since these two concepts are addressed separately.¹⁵ Kern River contends that the idea that creditworthiness could be a floating status subjectively determined by lenders based on factors not included in the tariff is completely contrary to the Commission requirement that creditworthiness criteria be objective. Finally, Kern River argues that contrary to the Commission's finding in the July 29 Order that section 29.1(c) must remain in the tariff in order to ensure parity for shippers providing one year of collateral under section 29.2(b),¹⁶ the two sections are not directly tied. Kern River states that it also uses section 29.1 as the basis for creditworthiness determinations for shippers covered by precedent collateral requirements and references the provision in other agreements, such as Operational Balancing Agreements, for purposes of determining creditworthiness. Kern River explains that section 29.1 applies to many more shippers than those that have

¹⁵ Kern River cites to the *Policy Statement* P 9-10 (Criteria for Determining Creditworthiness) and P 11-20 (Collateral Requirements for Non-Creditworthy Shippers).

¹⁶ Kern River cites to the July 29 Order, 132 FERC ¶ 61,080 at P 21.

provided security under section 29.2(b). Kern River further explains that the Commission's finding also applies to shippers providing guarantees under section 29.2(a), to short-term firm and interruptible shippers and to shippers providing security pursuant to precedent agreements.

16. Kern River argues that the Commission erred in refusing to allow Kern River to remove section 29.1(c) from its tariff because such finding is inconsistent with the Commission's previous orders¹⁷ and its lending documents. Kern River refers to the June 25 Rehearing Order as stating that Kern River's lending documents warrant an exception to the general policy of three months security.¹⁸ Kern River contends that by this the Commission recognized that it is Kern River's lending documents that control the collateral that must be provided by long-term firm shippers, not Kern River's lenders. Kern River states that requiring the lenders to assume responsibility for evaluating shipper credit is directly contrary to the Commission's findings in the June 25 Rehearing Order, where it stated that as the *Ozark* decision made clear, it is unreasonable for the Commission to expect pipelines to renegotiate their lending agreements to comply with a later approved Commission policy. Kern River concludes that the Commission's finding that a lender could make a subjective determination that a shipper was sufficiently creditworthy so as not to have to provide one year's collateral would in effect be an amendment to the lending documents.

2. Commission Determination

17. The Commission denies rehearing, finding that Kern River has failed to establish that given the specific circumstances of its tariff, it is just and reasonable to eliminate outright the ability of a shipper to seek recourse from Kern River's lenders. We held in Kern River's favor that when a lending agreement executed to finance the original construction contains a provision requiring more collateral for existing shippers than permitted under Commission policy, Kern River may exceed the ordinary collateral requirements permitted by the Commission. Kern River then filed to eliminate the provision in its tariff permitting shippers to have access to lenders so that the lenders can review the shipper's creditworthiness. In these circumstances, Kern River failed to show that removal of the existing provision regarding access to lenders is just and reasonable.

¹⁷ Kern River cites to the June 25 Rehearing Order, *Reliant*, and *Ozark Gas Transmission System v. FERC*, 897 F.2d 548 (D.C. Cir. 1990).

¹⁸ Kern River cites to the June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 65-66.

As the Commission stated in the July 29 Order:

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.¹⁹

18. Kern River maintains that the Commission should not have found that the creditworthiness determination and credit support are linked. In essence, it argues that under its tariff, there cannot be a linkage between the credit position of a company and the amount of collateral it can be required to produce.

19. First, the Commission did not link the creditworthiness determination with credit support. Rather, the Commission linked the maintenance of the lender recourse provision with Kern River's reliance on the lenders' agreements to obtain larger amounts of collateral than permitted under Commission policy. We held only that if Kern River were going to rely on those lending agreements to justify a higher amount of collateral, it had not shown that changing its tariff provision regarding lender access is just and reasonable.

20. Second, there is an obvious link, as recognized by the Commission and by Kern River, between credit determinations and collateral. All standard credit reporting agencies rate credit according to a sliding scale and the Commission has recognized that different amounts of collateral may be justifiable based on differences in credit ranking.²⁰ At the very least, we cannot find it reasonable for Kern River to deny shippers the right to contact the lender when Kern River is relying on that lender to impose a more onerous collateral requirement.

21. The *Policy Statement* also recognizes this linkage. The *Policy Statement* links the criteria used by pipelines to establish creditworthiness and collateral requirements for non-creditworthy shippers since it states that "the Commission's general policy in order to ensure that open access 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 (italics added).²¹

¹⁹ July 29 Order, 132 FERC ¶ 61,080 at P 23.

²⁰ See *Saltville Gas Storage Co., L.L.C.* 126 FERC ¶ 61,181 (2009).

²¹ *Policy Statement*, FERC Stats. & Regs., Regulations Preambles 2001-2005

(continued)

That the concepts of creditworthiness and credit support are addressed in separate paragraphs does not mean that they are not related as Kern River argues. The *Policy Statement* also recognizes that pipelines may use credit status in determining the value, and the amount, of collateral needed when evaluating competing bids for new capacity.²²

22. Moreover, the criteria in section 29.1 used in determining whether a shipper is creditworthy to receive its requested service triggers the collateral requirements in sections 29.2 and 29.3 for non-creditworthy shippers. The Commission stated in the June 25 Rehearing Order that by Kern River seeking to change the criteria it uses to determine if a shipper is creditworthy pursuant to section 29.1, Kern River “may have changed the trigger for subjecting shippers to the alternative collateral requirements for non-creditworthy shippers.”²³ Even Kern River admits that there is a link between the establishment of creditworthiness and collateral requirements for non-creditworthy shippers since Kern River states in its rehearing request that “creditworthiness determinations under section 29.1 *form the basis of* security requests that are made under Section 29.2 ... and Section 29.3....(italics added).”²⁴

23. Kern River again brings up the issue of lender intervention that was addressed in *Reliant*. Kern River cites to the statement in *Reliant* that there is nothing in the collateral agreement or any of the other financing documents produced by Kern River that “requires Kern River to seek such lender approval or to present to the lenders alternatives offered by creditors.”²⁵ We clarified above that we do not find that Kern River itself has an obligation to seek approval from its lenders. However, Kern River’s tariff links the amount of collateral required with its lending documents, and therefore we cannot find it reasonable for Kern River to remove a tariff provision that merely provides the shipper with access to the lenders whose agreements impose the higher collateral requirement.

24. Kern River argues that the Commission’s conclusion in the July 29 Order²⁶ that when the Commission allowed Kern River to impose the more stringent collateral

¶ 31,191 at P 11.

²² *Id.* P 15.

²³ June 25 Rehearing Order, 131 FERC ¶ 61,271 at P 36.

²⁴ Rehearing Request p. 4.

²⁵ Kern River cites to *Reliant*, 120 FERC ¶ 61,056 at P 32.

²⁶ Kern River cites to the July 29 Order, 132 FERC ¶ 61,080 at P 23.

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,” is incorrect. Kern River argues that its tariff contains no reference to an alternative of requiring three months of collateral from its long-term firm shippers.

25. The Commission finds that as discussed above, there is a link between the provisions in section 29.1 of Kern River’s tariff pertaining to the establishment of credit and the collateral requirements for non-creditworthy shippers set forth in sections 29.2 and 29.3 of Kern River’s tariff. As pointed out, section 29.2 specifically links the amount of collateral required to Kern River’s lending documents. If a long-term firm shipper does not satisfy the criteria under section 29.1 to be deemed creditworthy that shipper would be required to provide either a written guarantee or collateral pursuant to sections 29.2 to secure service. However, a lender whose lending documents require the more stringent collateral requirement would have the option to waive its stringent collateral requirement (i.e. 12 months) set forth in its lending documents in order to permit the shipper to provide a lower amount of collateral more consistent with the Commission’s general policy of 3 months collateral as established in the *Policy Statement*.²⁷ Such a decision to waive the more stringent collateral requirement by the lender would not constitute an amendment or renegotiation of the lending agreement as Kern River claims, but would rather be consistent with the tariff’s reliance on the lending agreement to establish the amount of collateral. A lender’s determination does not constitute a renegotiation of the lending agreement, since the lender is the one insisting on an amount of collateral greater than that ordinarily permitted by the Commission.

The Commission orders:

- (A) Kern River’s requests for rehearing are denied.
- (B) The June 25 Tariff Order is clarified as set forth above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁷ *Policy Statement*, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,191 at P 11.