

106 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell and Joseph T. Kelliher.

Natural Gas Pipeline Company of America Docket Nos. RP03-7-002 and
RP03-7-003

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued February 18, 2004)

1. On April 30, 2003, Natural Gas Pipeline Company of America (Natural) filed tariff sheets¹ in compliance with the Commission's March 31, 2003 Order in this proceeding, requesting a June 27, 2003, effective date. The March 31, 2003 Order² conditionally accepted Natural's proposal to implement more stringent creditworthiness provisions in its tariff, subject to modification. Natural and Calpine Energy Services, L.P. (Calpine) filed requests for rehearing.

2. As discussed below, the Commission denies rehearing, finds that Natural has generally complied with the March 31 Order, and conditionally accepts the proposed tariff sheets listed in footnote No. 1, effective June 27, 2003. This order benefits the public because it balances the need to assure shippers reasonable opportunity to obtain pipeline services with Natural's need to ensure the shipper's creditworthiness.

Background

3. On October 1, 2002, Natural filed tariff sheets to revise the credit evaluation provisions in its tariff. The filing implemented more stringent creditworthiness provisions for credit evaluation and payment assurance in sections 5.11, 5.12 and 16 of the General Terms and Conditions (GT&C) of its tariff. Natural requested the revised tariff sheets become effective of November 1, 2002. A number of parties protested Natural's filing.

¹ Substitute Second Revised Sheet No. 241A, Substitute First Revised Sheet No. 241B, Substitute Original Sheet No. 241C, Substitute First Revised Sheet No. 279, Original Sheet No. 279A, Substitute First Revised Sheet No. 280, Substitute Original Sheet No. 280A, and Original Sheet No. 280B to FERC Gas Tariff, Sixth Revised Volume No. 1.

² 102 FERC ¶ 61,355 (2003)(March 31 Order).

4. On October 30, 2002, the Commission accepted and suspended the tariff sheets, subject to refund, conditions and a technical conference.³ The order accepted the tariff sheets effective the earlier of April 1, 2003, or a date the Commission specifies in an order issued after the technical conference. The Commission found that the protesting parties raised a number of issues that required further consideration and directed staff to convene a technical conference.

5. On March 31, 2003, the Commission issued its order denying requests for rehearing and accepting Natural's proposed creditworthiness provisions effective April 1, 2003, subject to further modification. The Commission directed Natural to file revised tariff sheets within 30 days of the date of the order. The Commission found that the proposed tariff sheets, as modified, would allow Natural to implement reasonable tariff provisions ensuring that its shippers will have the financial ability to pay for the pipeline services that they use.⁴

Notice of Filing, Interventions and Protests and Requests for Rehearing

6. Notice of Natural's compliance filing was published in the Federal Register, 68 Fed. Reg. 25,364 (2003), with motions to intervene and protests due on or before May 12, 2003. Calpine; Process Gas Consumers Group, American Iron and Steel Institute, and International Paper Company (together, the Industrials); and The Peoples Gas Light and Coke Company and North Shore Gas Company (Peoples) protested the compliance filing.

Natural's Compliance Filing

7. Natural's compliance proposes to: (1) limit security for non-creditworthy shippers to 3 months of service charges, except where Natural constructs new facilities or a replacement shipper accepts permanent assignment of expansion capacity;⁵ (2) terminate a shipper's service after a 30 day notice period;⁶ (3) establish timelines for suspension and termination of service that provide 5 days notice for the first month's prepayment and a 30-day notice for 3 months of service prepayment;⁷ (4) delete section 5.12(e), which

³ 101 FERC ¶ 61,095 (2002).

⁴ March 31 Order at P 2.

⁵ Section 5.12(a)(1), Sheet No. 241B; Section 16(b), Sheet No. 280B.

⁶ Section 5.11(b), Sheet No. 241A; Section 5.12(d), Sheet No. 241C.

⁷ Section 5.12(a)(1), Sheet Nos. 241A and 241B.

permitted Natural to assign terminated capacity;⁸ (5) implement a revised credit rating analysis procedure;⁹ (6) not pay interest on cash prepayments but permit a shipper to deposit prepayments in an interest bearing escrow account;¹⁰ (7) delete section 16(d), which allowed Natural to confiscate the gas of defaulting shippers;¹¹ (8) permit shippers to provide a letter of credit as security for new facilities, stipulate that Natural can recover the cost only once, reduce the level of security as Natural recovers the cost, and limit an individual shipper's security obligation to no more than its proportionate share of the cost of the facilities;¹² and (9) delete sections 5.11(a)(4) and 5.12(f), which prohibited shippers from recalling capacity, and, allows shippers to choose the form of security desired, without Natural's approval.¹³

Rehearings

8. Natural filed a timely request for rehearing of the March 31 Order and Calpine filed a request for clarification, or in the alternative, a request for rehearing of the March 31 Order.

DISCUSSION

9. Natural raises the following issues and argues the Commission erred in: (1) rejecting collateral requirements for existing capacity non-creditworthy shippers in excess of 3 months of service; (2) requiring Natural provide a 30-day notice of termination to defaulting shippers before terminating the contract; and (3) requiring Natural pay interest on prepayments received from non-creditworthy shippers, or allow prepayments to be placed in interest bearing escrow accounts.¹⁴

⁸ Original Sheet No. 241C.

⁹ Section 16(a), Sheet Nos. 279, 279A, 280 and 280A.

¹⁰ Section 16(c), Sheet No. 280A.

¹¹ First Revised Sheet No 280.

¹² Section 16(e), Sheet No. 280B.

¹³ Sections 5.11 and 5.12, Sheet Nos. 241A and 241C, 280 and 313A.

¹⁴ Natural Rehearing at 2.

10. Calpine's request for clarification or rehearing asserts the Commission erred in requiring shippers in mainline expansion projects to submit security up to the cost of the facilities.¹⁵

11. In their protests to Natural's compliance filing, shippers: (1) urge the Commission to prohibit Natural from deciding if an escrow account is satisfactory, if it meets the tariff's criteria in section 16(c) of the GT&C;¹⁶ (2) believe Natural should add a provision prohibiting collection of reservation charges when it suspends service;¹⁷ (3) suggest modifying section 5.12(a)(1) to require that during the time a shipper is in bankruptcy, Natural cannot require the shipper to pay outstanding billings and the current monthly charges which were incurred before the shipper filed for bankruptcy protection;¹⁸ (4) consider unreasonable Natural's proposal that a shipper must provide credit data to Natural within 3 days;¹⁹ (5) believe Natural's credit evaluations under section 16(a) performed during shipper bankruptcy are inconsistent with Commission orders;²⁰ (6) urge the Commission to disallow the section 16 credit evaluation procedure because the proposal is both vague and unreasonable;²¹ (7) believe proposed section 5.12(a)(1)'s requirement that a shipper provide advance payment for the next month's service even though the shipper posted 3 months of collateral or letter of credit, exceeds of the Commission's policy on collateral of non-creditworthy shippers;²² (8) consider proposed section 5.12(a)(1)'s requirement that a shipper pay two months security within 5 days improperly accelerates current payables;²³ (9) claim the tariff does not allow proposed section 16(b) and 16(e), concerning security for expansion capacity;²⁴ (10) believe the section 5.12(c) provision that allows Natural 20 business days to re-evaluate a shipper's

¹⁵ Calpine Rehearing at 5.

¹⁶ Peoples Protest at 3-4.

¹⁷ Industrials Protest at 1-2.

¹⁸ Industrials Protest at 2.

¹⁹ Industrials Protest at 3.

²⁰ Industrials Protest at 4.

²¹ Industrials Protest at 4.

²² Calpine Protest at 3; Peoples Protest at 2; Industrials Protest at 2-3.

²³ Calpine Protest at 4.

²⁴ Calpine Protest at 5.

creditworthiness is excessive;²⁵ (11) consider unreasonable the section 5.12(c) provision that allows Natural 10 business days to return collateral to a shipper who reacquires a good creditworthiness rating;²⁶ (12) urges rejection of the section 16(a) credit criteria employing tangible net worth as unreasonable and vague;²⁷ (13) view as unreasonable and prohibit the section 16(a)(8)(viii) proposal that requires shipper affiliates to provide credit data;²⁸ (14) view as unreasonable, vague and ambiguous, the section 16(a)(8)(xv) requirement that shippers provide credit information;²⁹ and, (15) believe language deleted in sections 16(a)(1) and 5.12(a)(1) requiring Natural to provide shipper with information on the determination that the shipper is non-creditworthy should remain in the tariff.³⁰

12. The Commission finds that Natural generally complies with the directives in the March 31 Order, and accepts Natural's compliance filing subject to Natural filing revised tariff sheets within 30 days of the date this order issues, as discussed below. The rehearing requests, request for clarification, and protests are addressed in the sections below.

A. REHEARING AND CLARIFICATION REQUESTS

1. Collateral Requirements for Non-creditworthy Shippers

Natural's Rehearing Request

13. Natural argues that the Commission erred in rejecting collateral requirements for existing capacity, non-creditworthy shippers in excess of 3 months of service.³¹ The Commission held that Natural's proposal for security up to 12 months of service is excessive and that the 3-month prepayment amount has been the standard used

²⁵ Calpine Protest at 6-7; Peoples Protest at 3; Industrials Protest at 3.

²⁶ Calpine Protest at 7.

²⁷ Calpine Protest at 8-12

²⁸ Calpine Protest at 12-13; Industrials Protest at 5.

²⁹ Calpine Protest at 13.

³⁰ Calpine Protest at 14-14; Peoples Protest at 2; Industrials Protest at 2.

³¹ Natural Rehearing at 2.

throughout the natural gas industry, finding that this security will accommodate the concerns of shippers while protecting the pipeline in the event that a firm shipper defaults on its obligations.³²

14. Natural states that the Commission erred in restricting collateral for existing firm shippers to 3 months of transportation charges.³³ Natural argues that the Commission erred when it reduced the amount of collateral it can demand from non-creditworthy shippers because 3 months of security is inadequate to cover a default in payments or the credit risk in relation to long term contracts, all because of the rapid deterioration in a shipper's credit.³⁴ Natural also contends that the Commission's policy fails to address current industry conditions, where the top gas marketing companies have exited the gas marketing business. Natural further asserts that the Commission's policy fails to allow Natural to differentiate between differences in credit profiles of shippers.³⁵ Natural states the Commission should consider a sliding scale of security requirement for different lengths of contracts.

Commission Ruling

15. We deny Natural's request for rehearing. The Commission's policy is that a pipeline can require a shipper on existing facilities to post collateral for up to 3-months of service. The Commission's general policy since Order Nos. 436 and 636 requires no more than 3 months of collateral for service on existing facilities.³⁶ The Commission

³² March 31 Order at P 29-30.

³³ Natural Rehearing at 6-10. Natural's tariff prior to the filing in this docket required only 3 months of prepayment or security for non-creditworthy shippers. See First Revised Sheet No. 280, effective 12-1-93, Section 16(b)(1). Its filing in this docket, Natural proposed to add the following payment in advance requirement: "or such other period [not to exceed one year] as Natural reasonably determines to be appropriate in light of shipper's commitments on Natural (length of contract, total firm MDQ, etc.) and financial condition...."

³⁴ Natural Rehearing at 6-7.

³⁵ Natural Rehearing at 8.

³⁶ 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 Company, 62 FERC ¶ 61,136 at 61,954 (1993); Valero Interstate Transmission Company, 62 FERC ¶ 61,197 at 62,397 (1993); Texas Eastern Transmission Corporation, 41 FERC ¶ 61,373 at 62,017 (1987); Williams Natural Gas Company, 43 FERC ¶ 61,227 at 61,596 (1988); Pacific Gas Transmission Company, 40 FERC ¶ 61,193 at 61,622 (1987);

(continued...)

chose this standard for existing service to balance the risks to the pipeline from potential contract default against the need under open access service to ensure that existing pipeline services are reasonably available to all shippers. The Commission adopted the 3-month collateral requirement, because 3 months corresponds to the time period it takes a pipeline to terminate a shipper in default and be in a position to remarket the capacity.³⁷ Three months of collateral thus protects the pipeline against revenue loss while it completes the termination process and is in position to remarket the capacity. A pipeline reflects in its return on equity the business risk of remarketing capacity.³⁸ The rate of return component of the pipeline's base rates, in part, reflects normal financial risks associated with business operations, including contracting risks. To the extent Natural believes that its allowed rate of return is too low, it can file a general rate case to support a higher rate of return.

16. Moreover, the amount of collateral demanded of a shipper does not directly reduce the remarketing risk of the pipeline. For example, suppose a shipper's credit rating falls so that it is no longer creditworthy under Natural's tariff. Certainly, if the shipper could cobble together the 12-months of collateral proposed by Natural,³⁹ Natural 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 its current remarketing risk. If the shipper defaults, Natural is subject to the risk of remarketing the

(...continued)

Tennessee Gas Pipeline Co. (Tennessee), 40 FERC ¶ 61,194 at 61,636 (1987); Natural, 41 FERC ¶ 61,164 at 61,409, n.4 (1987); Northern Natural Gas Co. (Northern), 37 FERC ¶ 61,272 at 61,822 (1986).

³⁷ The 3-months for termination are as follows. The first month's collateral reflects the practice of billing shippers after the close of the prior month. See 18 C.F.R. § 284.12(a)(1)(iii), Standard 3.3.14 (billing by the 9th business day after the end of the production month). The second month accounts for the time period given the shipper to pay, and an opportunity to cure a default. The third month reflects the requirement that the pipeline provide 30 days notice prior to termination. See Northern, 102 FERC ¶ 61,076 at P 49, n.10; 18 C.F.R. section 154.602.

³⁸ See Ozark Gas Transmission Company, 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 Company, 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").

³⁹ Even a one-year prepayment could not guarantee recovery of costs of facilities with service lives of 30-50 years or contracts in excess of one year.

capacity. Further, requiring 12 months of collateral increases the current risk of default from a shipper that cannot provide such expensive collateral. In short, the Commission determined that in balancing the interests of the pipeline and subsequent shippers on existing facilities, the potential benefit to the pipeline of longer collateral requirements for service on existing facilities is not sufficient to offset the harm to shippers and to the principle of open access service from having shippers required to provide larger collateral.

17. Natural maintains that the Commission failed to justify reducing its collateral requirement to 3 months of service.⁴⁰ The Commission, however, is acting in this case on a filing by Natural under Section 4 of the NGA to establish a collateral requirement up to 12-months of service. It is not acting under section 5 to reduce a prior approved collateral requirement. In its original tariff filing in this docket, Natural would have the authority to set the prepayment between 3 months and 1 year of service depending solely on Natural's evaluation of the shipper's credit, the length of the contract and the MDQ. This proposal was rejected, as was Natural's "compromise proposal" (which Natural insisted must be accepted as a package).⁴¹ The Commission declined the entire package.⁴² In its request for rehearing, Natural now asks the Commission to consider alone the sliding scale contract length proposal.⁴³ Natural fails to carry its burden of proof that the Commission should grant it the discretion to set prepayment obligations of non-creditworthy shippers in excess of 3 months of service. In this instance, Natural fails under Section 4 of the NGA, to justify a longer security requirement, as more fully described below.

18. Natural argues that the Commission's policy fails to allow Natural to differentiate between differences in credit profiles of shippers when shippers first obtain capacity rights or when a shipper holding capacity becomes non-creditworthy.⁴⁴ Natural also

⁴⁰ Natural Rehearing at 6.

⁴¹ In its January 24, 2003, reply comments filed after the technical conference, Natural proposed an overall compromise package of provisions which would (1) set a sliding scale of payments (from 4 to 12 months) based on the term and type of contract; (2) shorten the notice periods for suspension and termination of service as proposed in the filing; and (3) require Natural to withdraw its proposal to use a shipper's gas as collateral. (Reply comments at 4-7).

⁴² March 31 Order at P 23, 29-30.

⁴³ Natural Rehearing at 9.

⁴⁴ Natural Rehearing at 8.

states the Commission should permit a sliding scale of security requirements for different lengths of contracts.

19. As to the first part of Natural's argument (parties seeking to obtain capacity on the pipeline), the Commission allowed pipelines to allocate available capacity based on the highest valued bid for the capacity, without distinction as to customer class.⁴⁵ For example, in a situation when multiple shippers bid for available capacity, Natural might consider the bid by a creditworthy shipper more valuable than an equal or greater bid by a non-creditworthy shipper. In a Notice of Proposed Rulemaking (NOPR) in Docket No. RM04-4-000, issued contemporaneously with this order, the Commission requests comment on whether, and in what circumstances, should it allow pipelines to take creditworthiness into account with respect to bids for available capacity.

20. But Natural does not present this issue in this case. Natural proposes to require up to 12-months collateral in all situations, for instance, for a shipper seeking to continue existing service as well as shippers bidding for available capacity.⁴⁶ It did not limit its proposal only to bidding situations where it allocates available capacity among various bidders. Since the statutory standards governing abandonment of service are stricter than those governing acquisition of capacity, Natural fails to justify a change from the traditional 3-months collateral requirement for shippers seeking to retain service.⁴⁷ Moreover, since Natural's tariff filing did not propose a method for evaluating bids by non-creditworthy shippers (or a method of establishing differences in credit standing of competing shippers), as compared to creditworthy shippers, or the length of contracts, it failed to justify its proposal for 12-months collateral for shippers bidding on new capacity, and therefore, the Commission denies rehearing. Natural should comment in the Rulemaking docket if it believes that different creditworthiness standards should be applied when shippers are bidding for unsubscribed pipeline capacity.

⁴⁵ See Tennessee, 76 FERC ¶ 61,101, at 61,518 (1996) (accepting NPV formula for allocating capacity, aff'd, Process Gas Consumers Group v. FERC, 292 F.3d 831 (D.C. Cir. 2002) (affirming no length of contract cap for NPV bids); Texas Eastern Transmission Corporation, 79 FERC ¶ 61,258 (1997), aff'd on rehearing, 80 FERC ¶ 61,270 (1997) (use of net present value to allocate capacity), aff'd, Municipal Defense Group v. FERC, 170 F.3d 197 (D.C. Cir. 1999) (finding use of NPV allocation method not unduly discriminatory when applied to small customers seeking to expand service).

⁴⁶ See Section 16(b) of the proposed tariff.

⁴⁷ See Process Gas Consumers Group v. FERC, 292 F.3d 831, 838 (D.C. Cir. 2002), affirming, Tennessee, 94 FERC ¶ 61,097 at 61,400 (2001) (different bidding standards apply to abandonment than to acquisition of capacity).

2. 30-Day Notice of Termination

21. Natural argues that the Commission erred in requiring it to provide a 30-day notice of termination of contracts to defaulting shippers before terminating service.⁴⁸

22. Natural in its original creditworthiness filing made October 1, 2002, proposed to insert a new section 5.12 into its GT&C. Section 5.12(a) provided that if at any time Natural questions a shipper's credit or ability to pay, Natural may notify the shipper in writing that it has 10 days either to: (1) demonstrate that it is creditworthy; or, (2) comply with the means for adequate assurances of future performance. If the shipper fails to satisfy this requirement by the end of the 10-day notice period, Natural may suspend or terminate service. Section 5.12(b) provided that any time Natural reasonably determines that a shipper is not creditworthy, Natural may notify the shipper in writing that it has 10 days to comply with the means for adequate assurance of future performance. If the shipper does not comply, Natural may terminate service. Sections 5.12(a) and (b) both contained language stating that if the shipper fails to maintain any assurance of future performance, Natural may terminate service within 5 business days after providing notice hereunder of its intent to do so unless shipper restores the assurance of future performance within that time period. Section 5.12(c) provided that if a shipper experiences a rapid deterioration of financial condition, Natural has the right to suspend or terminate service within 3 business days after a written notification, unless a shipper provides adequate assurance of future performance within the notice period.

23. The March 31 Order found unacceptable the proposed timelines for termination of service and required Natural to remove all such provisions and return its notice of termination provisions to a requirement for 30 days written notice of termination to non-creditworthy shippers.⁴⁹

Natural Rehearing Request

24. Natural asserts that it can protect itself from the risk of shipper bankruptcy⁵⁰ where the continuing contract obligations of the pipeline remain in effect after a bankruptcy filing, only if it can promptly terminate service.⁵¹ Natural cites its experience with Enron where Enron held capacity for 3 months without Natural receiving payment for that

⁴⁸ Natural Rehearing at 2.

⁴⁹ March 31 Order at P 36, 38, 39, 51, 52, 54, 55, 56.

⁵⁰ Natural's Rehearing at 3 states that six of its shippers have filed for bankruptcy in the past 3 years.

⁵¹ Natural Rehearing 3-4.

capacity, and it could not release the capacity to other shippers. Natural also asserts that commercial industry practices require a non-creditworthy customer to provide collateral within two days, and if the demand is not satisfied, the provider can terminate the contract immediately on notice.⁵²

Commission Ruling

25. The Commission disagrees with Natural's contentions. The March 31 Order rejected the proposals because Natural did not justify how a period less than 30 days was a reasonable time period for a shipper to obtain collateral and allow a Commission response to a shipper complaining of unfair treatment by the pipeline.⁵³ In addition, the shipper could face requests from other pipelines to provide collateral, and Natural failed to show 5 days provided sufficient time to arrange for collateral for all pipelines. Natural failed to demonstrate that its experience with the Enron bankruptcy, if replicated in the future, would result in any different outcome under its proposed procedures and timelines. The prepayment of one month's service within a 5-day notice period, and the pre-payment of 3-months service provisions, which Natural adopted in its compliance filing, fully satisfies Natural's assertions regarding other bankrupt shippers on its system. Further, under §154.602 of the Commission's Regulations, a natural gas company must notify the Commission of the proposed termination at least 30 days prior to the proposed effective date of such termination. Natural's compliance filing follows our suggestion for the appropriate notice periods, balancing the needs of the pipeline and shippers, and therefore, its revised tariff on this procedure will be accepted, with the necessary modifications described below.

3. Interest on Prepayments

Natural Rehearing Request

26. Natural argues that the Commission erred in requiring that it pay interest on prepayments received from non-creditworthy shippers, or allowing the placing of prepayments in interest bearing escrow accounts.⁵⁴ The Commission directed Natural to provide shippers with an opportunity to either earn interest or give the shipper the option to deposit prepayment funds into an interest-bearing escrow account (established by the shipper), which Natural could access if the shipper defaulted.⁵⁵ Natural contends that the

⁵² Natural Rehearing at 4-5.

⁵³ 102 FERC ¶ 61,137 at P 52-56.

⁵⁴ Natural Rehearing at 2.

⁵⁵ March 31 Order at P 72.

Commission erred in requiring Natural to afford shippers an opportunity to earn interest on prepayments.⁵⁶

27. Natural asserts that applying interest to a prepayment could affect converting the prepayment to a deposit for bankruptcy purposes.⁵⁷ Natural states that it might consider such funds a deposit where interest is earned. Based on this, Natural claims a bankruptcy court may order that such monies belong to the bankrupt shipper, rather than Natural. As such, Natural asserts that requiring a pipeline to pay interest on prepayments or deposit in an interest-bearing escrow account vitiates the object of obtaining prepayments.⁵⁸

Commission Ruling

28. We deny Natural's request for rehearing. The Commission addressed these same issues in Tennessee and found that payment of interest on collateral held by the pipeline, as a matter of policy, is appropriate.⁵⁹

29. Under current rules, Natural would hold the 3-month's collateral, while continuing to charge the shippers a monthly demand charge. This entitles the shipper to a return of the withheld payments if it satisfies Natural's creditworthiness requirements. The amounts provided Natural by non-creditworthy shippers are therefore designed to provide collateral or security against potential default, not prepayments of future demand charges. Accordingly, we hold the pipeline responsible for paying the shipper interest to cover the time value of the money it holds as security.⁶⁰ Moreover, the Commission generally requires pipelines to pay interest on amounts held for shippers to ensure that the shippers are not unduly harmed by having the pipeline hold monies due and pipelines are not unduly enriched.⁶¹ The Commission finds no basis for treating collateral put up by non-creditworthy shippers differently from other amounts held by the pipeline. Indeed, the pipeline may well hold such collateral for long periods of time (depending on the shipper's contract duration and whether they can satisfy the pipeline's creditworthiness

⁵⁶ Natural Rehearing at 2.

⁵⁷ Natural Rehearing at 10.

⁵⁸ Natural Rehearing at 10.

⁵⁹ Tennessee, 105 FERC ¶ 61,120 at P 17-19 (2003).

⁶⁰ See Commissioner of Internal Revenue v. Indianapolis Power & Light Co., 493 U.S. 203, 209 (1990) (amounts held by utility were not considered prepayments when the timing and method of refund are within the control of the customer).

⁶¹ See Anadarko Petroleum Co. v. FERC, 196 F.3d 1264, 1267-68 (D.C. Cir. 1999) ("interest is merely a way of ensuring full compensation").

requirements), and it would be inequitable for the pipeline to hold monies for such an indeterminate time without affording the shipper the opportunity to earn interest on the amounts held.⁶²

30. Natural's argument regarding the treatment of interest on prepayments by a bankruptcy court⁶³ is not persuasive. Whether the funds are considered a deposit belonging to the shipper, or prepayment for services to be rendered by the pipeline by a bankruptcy court, the Commission has found that these "prepayments" for up to 3 months of service are not in fact prepayments, but constitute a security. The Commission's determination of how properly to treat collateral held by the pipeline cannot be governed by how a bankruptcy court may possibly treat the transaction, but on the Commission's determination of whether the pipeline's holding of such funds without the payment of interest is just and reasonable. And, as discussed above, the Commission finds that Natural must pay interest to ensure that the pipeline's rates are just and reasonable and not unduly discriminatory. The Commission, however, previously permitted pipelines flexibility in structuring their collateral provisions, as long as the pipeline gives the shipper earned interest on transactions where the pipeline holds the collateral.⁶⁴

31. The Commission imposes this interest requirement to mitigate the cost to the shipper of providing collateral when it lacks creditworthiness. This requirement also removes the profit incentive from this form of collateral (a prepayment) versus other forms, such as, irrevocable letters of credit. The actions of the Commission in providing just and reasonable creditworthiness provisions are independent of the hypothetical actions of a bankruptcy court. Further, Natural is not prevented from pursuing any remedies it may have for contract breach in the event of non-payment. We find that prepayments to cure lack of creditworthiness are not Natural's revenues, since Natural has not yet provided service to the shipper related to the prepayments.

⁶² See, e.g., Trailblazer Pipeline Co. (Trailblazer), 103 FERC ¶ 61,074 at P 69 (2003) (requiring pipeline to pay interest on penalty revenues retained for only one year).

⁶³ Natural Rehearing at 10.

⁶⁴ See Northern, 102 FERC ¶ 61,076 at P 38-39 (2003) (shipper can deposit funds in an interest bearing escrow account where the principal is maintained by the pipeline and the interest is paid to the shipper).

4. Collateral Required for the Construction of New Facilities

March 31 Order

32. The Calpine's request for clarification or rehearing of the March 31 Order asserts that the Commission erred in requiring shippers in mainline expansion projects submit security up to the cost of the facilities.⁶⁵ The March 31 Order required Natural to modify its provision to provide a shipper with other credit options for providing collateral for the construction of new facilities other than a letter of credit.⁶⁶ Further, the order required Natural to clarify that it may recover the cost of the facilities only once: either through transportation rates or in the event the shipper defaults, by means of one of the assurances of future performance provided Natural.⁶⁷ In addition, the order required Natural to include language that provides that as Natural begins recovering the cost of the new facilities through its rates, it must allow a corresponding reduction in the amount of the guarantee required from a shipper. Lastly, the order directed Natural to include language providing where it would construct facilities to serve multiple shippers, and restrict an individual shipper's obligation to no more than the proportionate share of the cost of facilities.

Request for Clarification or Alternatively Rehearing

33. Calpine requests the Commission clarify that proposed section 16(e) is limited to require security up to the cost of newly constructed appurtenant facilities (such as meters, valves for interconnections under section 7.2, Delivery Facilities and section 6.1, Facilities At Receipt Points of the GT&C), and does not apply to other pipeline construction, such as mainline expansions.⁶⁸ Alternatively, Calpine requests rehearing, if the Commission intended to expand Natural's proposal by authorizing the pipeline to require security from non-creditworthy shippers up to the cost of newly constructed facilities associated with mainline expansions.

Compliance Filing

34. Natural revised section 16(e) to include the above required tariff revisions consistent with the March 31 Order.⁶⁹ In addition, Natural proposed new language in

⁶⁵ Calpine Rehearing at 5.

⁶⁶ March 31 Order at P 30, 85 (2002).

⁶⁷ March 31 Order at 85.

⁶⁸ Calpine Rehearing at 2.

⁶⁹ Substitute Original Sheet No. 280A.

section 16(b)(4) that permits Natural to require more than 3 months of fees and charges as security in agreements supporting an application for a certificate to construct new or expanded facilities, including on any replacement contract entered into upon a permanent release of capacity under such an initial contract.

Protest

35. Calpine objects to proposed section 16(b)(4), because it does not comply with the March 31 Order. Calpine contends this language exceeds the scope of the March 31 Order and therefore the Commission should reject it outright without prejudice, to Natural submitting a new Section 4 filing.

36. Calpine has requested rehearing on tariff section 16(e) and its application to appurtenant facilities such as interconnection costs and expansion facilities.⁷⁰ Calpine states that regardless of the decision on that rehearing request, the Commission should require Natural to include explicit language on how the pipeline will account for the collection of facility costs, and effect the corresponding reduction in a shipper's security requirement. If section 16(e) is applicable only to appurtenant facilities constructed under Natural's currently effective tariff section 6.1(b) and section 7.2(b), then the economic analysis performed by Natural should be used in determining the facility payback provided to the pipeline through transportation revenues.

37. If section 16(e) is applicable to major system expansions or greenfield projects, Calpine requests the Commission require Natural to state in its tariff that any dollar recovered in rates is a corresponding dollar recovered in facility costs such that each dollar invoiced as transportation revenue will lower the amount of collateral required in an equal amount.⁷¹ Calpine argues that posting collateral to the full cost of the facilities removes all risk of recovery from the pipeline and therefore the excess return should reduce the collateral required. In addition, the fixed cost components of the rates whether incremental or rolled-in are also recovered on a dollar for dollar basis. Calpine also states that Natural should include language that it will effect a reduction in the collateral on a quarterly basis. Calpine's collateral should not be maintained unnecessarily and for purposes of asset management, shippers need a clear understanding of their collateral requirements, which is not provided through the tariff language proposed by Natural.

⁷⁰ Calpine Rehearing at 3-5.

⁷¹ Calpine is not proposing that fuel charges, penalties, ACA, or the commodity portion of transportation rates be included in the collateral reduction calculation.

Commission Ruling

38. Natural's section 16(b)(4), which provides that it is not precluded from requiring and enforcing for the term of an initial contract, more than 3 months of fees and charges as security in agreements supporting an application for a certificate to construct new or expanded facilities, including on any replacement contract entered into upon a permanent release of capacity under such an initial contract is not inconsistent with Commission policy. There are two issues here: (1) whether new mainline facility security provisions are permitted in the tariff, and (2), the mechanism for adjusting security requirements as a new facility is paid off.

39. As to the first issue, the Commission has found that collateral requirements for mainline system expansions should not be in a pipeline's tariff.⁷² Specific risk sharing arrangements are more appropriately negotiated and agreed to in the context of precedent agreements that may be reviewed in a certificate proceeding.⁷³ We find that section 16(e) of Natural's tariff, which provides that in the event Natural constructs new facilities to accommodate a shipper it may require security in an amount up to the cost of the facilities, is unclear as to whether this provision is intended to apply to lateral or mainline expansion facilities.⁷⁴ As requested by Calpine, we clarify that Natural's collateral requirement applies only to lateral facilities.⁷⁵ Therefore, Natural is directed to revise its tariff language to make this clarification.

40. As to lateral line facilities (which must be included in the tariff⁷⁶), the Commission's policy has been that pipelines are not required to construct lateral facilities

⁷² North Baja at P 15. In a contemporaneously issued order, the Commission addresses a complaint regarding the level of collateral that a pipeline can require from a non-creditworthy shipper that requests the construction of mainline system expansion facilities. One consideration in determining the level of collateral would be the amount of time that the pipeline would reasonably need to remarket the capacity. See Calpine Energy Services, L.P. v. Southern Natural Gas Co., 103 FERC ¶ 61,273 (2003).

⁷³ Tennessee, 103 FERC ¶ 61,275 at P 26 (2003); PG&E, 105 FERC ¶ 61,382 at P 55 (2003).

⁷⁴ See 18 C.F.R. § 154.109(b) (2003) ("the tariff must contain a statement of the company's policy with respect to the financing or construction of laterals including when the pipeline will pay or contribute to the construction cost").

⁷⁵ A lateral would include facilities as defined in 18 C.F.R. § 154.109(b) and 18 C.F.R. § 157.202 (2003). Natural's section 16(e) is appropriate for these purposes.

⁷⁶ 18 C.F.R. § 109(b).

and that the shipper must be willing to pay the full cost of such construction.⁷⁷ Thus, when pipelines agree to construct lateral facilities for the shipper, the Commission has found it appropriate for the pipeline to receive collateral up to the full cost of the facilities.⁷⁸ The Commission, therefore, finds Natural's tariff provision providing for collateral up to the cost of the facilities acceptable as to lateral line facilities.

41. The March 31 Order further directed Natural to revise its tariff to provide for a reduction in the collateral requirements as the shipper pays off the facilities.⁷⁹ Natural was advised it could recover the cost of the facilities once either through transportation rates, or in the event the shipper defaults, by means of the assurances of future performance provided. However, Natural has not included in its tariff the mechanism for a reduction in the collateral requirements as a shipper pays off the facilities.

42. Collateral is required to protect the pipeline against the potential loss of revenue should the shipper default during the term of its contract. Collateral, therefore, should be returned to the shipper in proportion to the reduction in contract term. For example, if the shipper signs a 36-month contract for the expansion, it should receive a return of collateral of 1/36 per month. We find Natural's tariff lacks specificity about how Natural intends to reduce a shipper's collateral requirement. Therefore, we require Natural to revise its tariff to include the mechanism by which it will reduce a shipper's collateral requirements, as Natural begins recovering the cost of the new facilities through its rates.

⁷⁷ Panhandle Eastern Pipe Line Co., 91 FERC ¶ 61,037 at 61,141-42 (2000); Tennessee 103 FERC ¶ 61,275 at P 26 (2003).

⁷⁸ See Natural, 102 FERC ¶ 61,355 at P 80-85 (2003) (where the Commission accepted a proposal allowing a pipeline to request security in an amount up to the cost of the new facilities from its customers prior to commencing construction of new interconnecting facilities). See also, Tennessee, 103 FERC ¶ 61,275 at P 26; PG&E Gas Transmission, Northwest Corp. (PG&E), 105 FERC ¶ 61,382 (2003).

⁷⁹ March 31 Order at P 85.

B. COMPLIANCE FILING AND PROTESTS

43. Shippers raise the following issues in their protests to Natural's compliance filing.

1. Deterioration of Credit Tariff Provisions**March 31 Order**

44. The Commission rejected the portion of proposed section 5.12(b) of the GT&C which would have required that a shipper provide security within 10 days after Natural's notification to the shipper that Natural has determined the shipper is no longer creditworthy. The Commission allowed Natural to refile on the same basis provided in several recent cases. Specifically, Natural can require one month of advance payment within 5 business days, with the full security (3 months) to be provided within 30 days. If the shipper fails to meet these deadlines, Natural could suspend service, but 30 days' prior notice to the shipper and to the Commission is required for termination of service.

Compliance Filing

45. Natural proposed section 5.12(a)(1) providing that at any time Natural reasonably determines based on adequate information available to it that a shipper is not creditworthy under section 16(a) or if Shipper fails to maintain assurance of future performance under section 16(b), Natural may notify such shipper in writing that it has 5 business days to provide Natural with security consistent with section 16(b) which is adequate to offset any outstanding billings (excluding any amounts as to which there is a good faith dispute), all charges for the current month's service and all charges for one month's advance service. In addition, Natural proposes that within 30 days after such notification, the shipper must fully comply with the means for adequate assurance of future performance, covering 3 full months of advance service from the end of such 30-day notice period, as provided under section 16(b). If the shipper has not satisfied the requirements of the prior two sentences by the end of the specified prior notice period, Natural may immediately suspend service to the shipper. A shipper which is providing security under section 16(b) shall, in addition, continue to pay for the current month's service by one business day prior to the date nominations are due for that month's service, adjusted for reconciliation of prior billings to actuals.

a. **Acceleration of the Monthly Invoice Payment**

Protest

46. Calpine contends that Natural's proposed tariff violates the March 31 Order limiting collateral to no more than 3 months of estimated service charges.⁸⁰ Calpine claims that Natural proposes to require a non-creditworthy shipper to pay in advance for the next month of service even after a shipper has posted the 3 months of security. Calpine states that this results in Natural effectively holding four months of security. Calpine contends that the Commission did not rule that pipelines could accelerate current payables in addition to prepayments.

47. Calpine objects to Natural's requirement in section 5.12(a)(1) requiring shippers to pay two months of security within 5 days as an improper acceleration of current payables and inconsistent with the Commission's directive regarding the proper method for obtaining security from a shipper which becomes non-creditworthy.⁸¹ Calpine contends that section 5.12(a)(1) of Natural's proposed tariff states that upon notification by Natural, a shipper has 5 days to pay the current month's invoice payment (regardless of when it was due) and a one month advance payment.⁸² Calpine claims that the Commission did not rule that pipelines could accelerate current payables in addition to prepayment of one month of service charges as part of a reasonable balance.

48. Both the Industrials and Peoples take exception with Natural's requirement that a shipper which is providing security must continue to pay for the current month's service by one business day prior to the date nominations are due for that month's service. The Industrial's question whether this provision is consistent with the intent of the Commission's approved prepayment provisions. The Industrials argue that if a shipper posts 3 months security, the shipper should be able to pay for monthly service on the schedule normally set forth in the pipeline tariff.⁸³ Peoples claim that section 15.4 of Natural's GT&C requires payment to be made 10 days after the shipper's receipt of billing. People's states that nothing in Natural's proposed tariff should be construed to require payment prior to the due date that would otherwise be applicable under the tariff.⁸⁴

⁸⁰ Calpine Protest at 3.

⁸¹ Calpine Protest at 4.

⁸² Substitute Second Revised Sheet 241A and Substitute First Revised Sheet No. 241B.

⁸³ Industrials Protest at 3.

⁸⁴ Peoples Protest at 2.

Commission Ruling

49. The Commission agrees with the shippers that Natural's section 5.12(a)(1) is inconsistent with our policy, which in general Natural has adopted, namely, that a shipper which becomes non-creditworthy can be required to pay one month's advance payment within a 5-day notice period, and prepayment of 3 months of service within 30 days of that date. In addition to the above requirements, Natural is proposing that shippers must also pay for the current month's service by one business day prior to the date nominations are due for that month's service. The March 31 Order required Natural to justify any proposal that differs from the Commission's policy as providing shippers with a reasonable opportunity to provide the required collateral.⁸⁵ Natural has failed to show that requiring an advance payment, within 5 days, of essentially two-months of demand charges is reasonable, and the Commission, therefore rejects this proposal. Accordingly, Natural is directed to revise its tariff to remove the provisions requiring payment, or other security, within 5 days of anything more than one month's service charges.

50. In the NOPR in Docket No. RM04-4, the Commission is requesting comment on whether, as a variant to our traditional policy of requiring no more than 3 months' worth of reservation charges, pipelines should be permitted to require a non-creditworthy shipper to provide an advance payment for one month of service.⁸⁶ Natural has the opportunity to submit comments on this issue. But, unless the Commission, after reviewing comments, decides to change its policy, it will continue with its current collateral policy.

b. Charges for Service During Suspension

51. Neither Natural's creditworthiness tariff language originally proposed October 1, 2002, nor the March 31 Order addressed whether Natural could continue to charge a shipper whose service was suspended.

Protest

52. Shippers assert that Natural should be required to add a provision to its tariff that it cannot collect reservation charges when service to a shipper is suspended.⁸⁷ The Industrials claim that in recent orders, the Commission has directed pipelines to revise credit provisions to provide that shippers are not responsible for payment of reservation

⁸⁵ March 31 Order, at P 52.

⁸⁶ See Trailblazer Pipeline Co., 103 FERC ¶ 61,225 at P 42 (2003).

⁸⁷ Industrials Protest at 1-2.

charges when a pipeline suspends a shipper's service.⁸⁸ In order to ensure Natural's compliance with this requirement, the Industrials request that the Commission direct Natural to add language providing that a shipper whose service has been suspended by the pipeline is not responsible for payment of reservation charges for the period of the suspension.

Commission Ruling

53. We agree with the Industrials that the Commission has required other pipelines to revise their tariffs to provide that shippers are not responsible for payment of reservation charges when a pipeline suspends a shipper's service.⁸⁹ It is not clear from Natural's tariff if it intends to charge or not charge a shipper as it suspends service to that shipper. Thus consistent with our ruling in Gulf South, and Tennessee, we direct Natural to revise its tariff to clarify that shippers are not responsible for reservation charges after service is suspended.⁹⁰

c. Interaction with the Bankruptcy Code

Protest

54. The Industrials are concerned that the language requiring a shipper to provide security amounts "adequate to offset any outstanding billings . . . , all charges for the current month's service . . ." could be inconsistent with bankruptcy procedures that require a shipper in Chapter 11 proceedings to deal with all debts for the pre-petition consistent with the Bankruptcy Code and Court orders. The Industrials request that the Commission clarify that a shipper in Chapter 11 proceedings cannot be obligated as a condition of continued service to provide payment or security for pre-petition amounts, payment for which must be resolved pursuant to Bankruptcy procedures.⁹¹

⁸⁸ E.g., Gulf South Pipeline Company, LP (Gulf South), 103 FERC ¶ 61,129 at P 56 (2003).

⁸⁹ See Gulf South, 103 FERC ¶ 61,129 at P 56 (2003); Tennessee, 102 FERC ¶ 61,075 at P 32 (2003).

⁹⁰ Ibid.

⁹¹ Industrials Protest at 2.

Commission Ruling

55. The Industrial's requested rehearing of a January 29, 2003, Tennessee order presenting an argument similar to the one its making in this proceeding. There, the Industrial's requested clarification that Tennessee's tariff (which requires a shipper to pay past-due amounts within 5 businesses days of notice of non-creditworthiness, and suspend service if past-due amounts are not paid as required) would not apply to the pre-petition debts of a shipper that has declared bankruptcy. Tennessee argued such a clarification was unnecessary in light of language it had proposed in order to clarify how Tennessee's creditworthiness provision and the U.S. Bankruptcy Code interacted. This language is contained in section 4.10 of Tennessee's tariff and provides that, "[t]ransporter intends that this section 4 shall be read in harmony, and not in conflict, with the Bankruptcy Code."⁹² The Commission agreed that the clarification was unnecessary and denied rehearing. The Commission stated, "Once a shipper has filed for bankruptcy, the Bankruptcy Court has jurisdiction. Section 4.10 makes it clear that Tennessee does not intend to use section 4 to circumvent the jurisdiction of the Bankruptcy Court."⁹³

56. Natural's tariff does not contain any language addressing the interaction of its creditworthiness provisions and the Bankruptcy Code. Therefore, we will require Natural to include tariff language clarifying that Natural's creditworthiness provisions cannot conflict with the U.S. Bankruptcy Court.

2. Timelines Applicable to Additional Information for Credit Determination

Compliance Filing

57. Natural proposes language in section 5.12(a)(2) that states; "If Natural does not have sufficient information to determine whether Shipper is creditworthy, it may request additional information in writing from the Shipper consistent with section 16(a) of these GT&C, and Shipper must provide such information within 3 business days."⁹⁴ If a shipper fails to provide the requested information or if Natural determines that the shipper is not creditworthy based on such information, Natural may suspend or terminate service.

⁹² Section 4 of Tennessee's tariff contains Tennessee's credit evaluation procedures including provisions requiring shipper's losing creditworthiness to provide credit assurances.

⁹³ Tennessee, 103 FERC ¶ 61,275 at P 93 (2003)

⁹⁴ Substitute First Revised Sheet No. 241B.

Protest

58. Shippers argue that Natural's proposal that a shipper must provide credit data to Natural within 3 days or face suspension or termination of service is unreasonable.⁹⁵ The Industrial take exception with section 5.12(a)(2) of Natural's tariff, claiming that Natural is proposing an unreasonably short period of 3 business days for a shipper to provide additional information to aid in credit determination. The Industrials note that some of information required under section 16(b) may be readily available, but other information may not, or may not be readily releasable without special company action, such as that required of non-public companies. The Industrials request that in order to assure that the shipper can provide the requested information; the Commission should change the response period from 3 business days to 5 business days. Alternatively, the shipper should at least be able to respond within 3 business days that it is gathering the information and will provide it within a reasonable set period without adverse impact.

Commission Ruling

59. The Commission agrees with the shippers that providing additional credit information on 3 day's notice is unreasonable. In analogous situations, the Commission has provided that 5 days is an appropriate period for actions by the pipeline or its customers.⁹⁶ Accordingly, Natural is required to revise this provision of its tariff to allow a response time of 5 business days.

3. Timelines Applicable to Re-Evaluation of Credit

March 31 Order

60. The Commission required Natural to include tariff language allowing a shipper the right to request that its credit status be reevaluated at any time.⁹⁷ Further, if Natural determines a shipper is creditworthy, Natural was required to terminate the security requirement that the non-creditworthy shipper had been required to provide Natural to assure its future performance. If the form of security had been a prepayment, Natural was required to refund the prepayment amount and any interest on the prepayment amount owed the shipper.

⁹⁵ Industrials Protest at 3.

⁹⁶ See, e.g., Koch Gateway Pipeline Co., 75 FERC ¶ 61,313 (1996) (posting); Southern California Edison Co., 67 FERC ¶ 61,034 (1994) (refunds); Transoak, Inc., 52 FERC ¶ 61,083 (1990) (workpapers).

⁹⁷ March 31 Order at P 57.

Compliance Filing

61. Natural revised section 5.12(c) of its tariff to provide that a shipper which Natural has determined to be non-creditworthy may at any time request that its credit status be reevaluated by providing Natural with additional or updated information.⁹⁸ Further, such reevaluation shall be performed consistent with section 16(a) of the GT&C. If a shipper has provided Natural with all the information required under said section 16(a), Natural shall complete such a reevaluation within 20 business days. If Natural determines that a shipper is creditworthy, any security requirement shall be terminated and any prepayment amounts (including any applicable interest) will be released to the shipper from escrow within 10 business days after such determination.

Protest

62. Calpine, the Industrials and Peoples all contend that the section 5.12(c) provision allowing Natural 20 business days to re-evaluate a shipper's creditworthiness is excessive.⁹⁹ Calpine contends that a reevaluation implies Natural has already taken the necessary steps in performing an initial credit status. Calpine states that a shipper requesting a reevaluation would identify any changed circumstance, and as a result a new analysis could be performed within 5 business days rather than 20 days. The Industrials contend the reevaluation and release of escrow should not exceed 15 business days total, and Peoples proposes that the timing in section 5.12(c) be halved.

Commission Ruling

63. We agree with the protestants' concern that 20 business days to re-evaluate a shipper's creditworthiness is excessive. In a NOPR that is being addressed concurrently with the instant order, the Commission is proposing to adopt 10 creditworthiness standards approved by the Wholesale Gas Quadrant (WGQ) of the North American Energy Standards Board (NAESB). One of the standards adopted by NAESB deals with the timelines applicable to re-evaluation of a shipper's credit status. Specifically, the standard provides:

After a Transportation Service Provider's (TSP) receipt of a Service Requester's (SR) request for re-evaluation, including all required information pursuant to NAESB WGQ Standard [0.3.zK] ("SR's Request"), within five [(5)] Business Days, the TSP should provide a written response to the SR's Request. Such written response should include either a determination of creditworthiness status, clearly

⁹⁸ Substitute First Revised Sheet No. 241B.

⁹⁹ Calpine Protest at 6-7; Peoples Protest at 3; Industrials Protest at 3.

stating the reason(s) for the TSP's decision, or an explanation supporting a future date by which a re-evaluation determination will be made. In no event should such re-evaluation determination exceed twenty [(20)] Business Days from the date of the receipt of the SR's Request unless specified in the TSP's tariff or if the parties mutually agree to some later date.

64. We believe that the above NAESB standard provides a reasonable timeline applicable to re-evaluation of a shipper's credit status. As a result, we will require Natural to revise section 5.12(c) to incorporate the timeframes in the above NASEB standard.¹⁰⁰

4. Return of Collateral

March 31 Order

65. The Commission required Natural to include language providing that if Natural determines a shipper is creditworthy, Natural must terminate the security requirement that the non-creditworthy shipper had been required to provide to assure its future performance.¹⁰¹ If the form of security had been a prepayment, Natural must refund the prepayment amount and any interest on the prepayment amount owed the shipper.

Compliance Filing

66. Natural revised section 5.12(c) of its tariff to provide that if Natural has determined a shipper is creditworthy, any security requirement shall be terminated and any prepayment amounts (including any applicable interest) will be released to the shipper from escrow within 10 business days after such determination.¹⁰²

Protest

67. Calpine claims that once a shipper has been reestablished as creditworthy, Natural's section 5.12(c) proposal to hold on to security for an additional 10 days is unreasonable.¹⁰³ Calpine requests that the Commission reject Natural's 10 business day

¹⁰⁰ In the event the final rule issued in that proceeding changes the NOPR proposal, Natural will be required to file a revised provision.

¹⁰¹ March 31 Order at P 57.

¹⁰² Substitute First Revised Sheet No. 241B.

¹⁰³ Calpine Protest at 7.

proposal and require that the release of collateral be simultaneous with notification to a shipper that it has been found creditworthy. Calpine claims that in order to cancel a letter of credit or guarantee, Natural must simply mark the document as cancelled and return the documents to the issuing bank or guarantor. Calpine states a similar concurrent notification could be made to an escrow company holding any funds. Both the Industrials and Peoples contend that the 10-day timeframe is too generous.¹⁰⁴ Peoples recommends the timeframe be halved and the Industrials assert that the re-evaluation of creditworthiness and return of collateral should not exceed 15 days total.

Commission Ruling

68. We find the protestants' concerns regarding Natural's timeframe for the return of collateral to have merit. We agree that Natural has failed to show the 10 day period is reasonable or that collateral cannot be returned more quickly. In several recent orders, e.g., Trailblazer and PG&E,¹⁰⁵ the Commission accepted provisions requiring the pipeline to return collateral within 5 business days of determining a shipper is creditworthy, and we will require Natural to adopt a similar period. This 5-day period, however, is subject to change based on the Creditworthiness NOPR in which the Commission has proposed in capacity release situations to require pipelines to return collateral by the next nomination cycle so that a losing bidder will have the opportunity to use the collateral to obtain capacity from another releaser or another pipeline.

5. Criteria for Determining Creditworthiness

March 31 Order

69. The Commission found that Natural's proposed credit criteria language was unjust and unreasonable in that it allowed Natural too much discretion in determining when a shipper becomes non-creditworthy and allows for possible undue discrimination.¹⁰⁶ Natural was instructed to set forth in its tariff the financial analysis and criteria that it will employ in evaluating the creditworthiness of a shipper in order to ensure that Natural is treating all shippers in a non-discriminatory manner.

¹⁰⁴ Peoples Protest at 3; Industrials Protest at 3.

¹⁰⁵ Trailblazer, 103 FERC ¶ 61,225 at P 59; PG&E, 103 FERC ¶ 61,137 at P 75.

¹⁰⁶ March 31 Order at P 69.

Compliance Filing

70. Natural revised its credit criteria language contained in section 16 of its tariff.¹⁰⁷ Natural is proposing a 2-stage credit criteria process. In the first stage, a shipper will be deemed creditworthy if: (1) its long-term unsecured debt securities are rated at an investment grade rating of at least BBB- by Standard and Poor's Corporation (S&P) and at least Baa3 by Moody's Investor Service (Moody's); and (2) if the sum of the reservation fees, commodity fees and any other associated fees and charges for the contract term is less than 15% of a shipper's tangible net worth. In the second stage, shippers not meeting the criteria outlined in (1) and (2), above, may request that Natural evaluate their creditworthiness based upon the level of service requested relative to the shippers' current and future ability to meet its obligations. The tariff provides that such credit appraisal will be based upon the evaluation of information and credit criteria that Natural has set out in section 16(a)(1) through section 16(a)(8) of its tariff. In sections (16)(a)(8)(i) through (xvi), Natural lists 16 types of information it may request the shipper provide, in connection with such credit evaluation.

a. Tangible Net Worth Credit Criteria

Protest

71. Calpine submits Natural's credit criteria proposed in section 16(a) is unjust, unreasonable, and unduly discriminatory.¹⁰⁸ Calpine claims Natural's use of a tangible net worth metric or standard to meet credit rating criteria could allow Natural to deem a shipper non-creditworthy even if a shipper is rated above investment grade by the rating agencies.¹⁰⁹ Calpine contends the term tangible net worth is vague and could lead to undue discrimination and abuse. Calpine asserts that without knowing what Natural means by tangible net worth it is impossible to tell whether Natural's proposal is just and reasonable. Calpine states that if Natural defines tangible net worth in relatively conservative terms, then Natural would create a wide band in which shippers would be deemed non-creditworthy and, consequently, subject to expensive collateral requirements. Further, Calpine claims there is no evidence that the tangible net worth condition is needed to protect Natural's interests. Calpine states Natural has failed to

¹⁰⁷ Substitute First Revised Sheet No. 279.

¹⁰⁸ Calpine Protest at 8-12

¹⁰⁹ Proposed section 16(a) states that Natural may determine a creditworthiness factor as "the sum of reservations fees, commodity fees and any other associated fees and charges for the contract term is less than 15% of Shipper's tangible net worth." Substitute First Revised Sheet No. 279.

provide any record evidence that links the ratio of a contract's overall gross value to tangible net worth to payment defaults and their associated bad debt write-offs. Calpine contends that without such evidence, it is impossible to tell whether there is any, let alone sufficient, justification for Natural's proposal.

72. Calpine argues creditworthiness criteria must be reasonably related to the risk of default actually borne by the pipeline, giving consideration to: (i) the pipeline's duty to mitigate the harm associated with the default; (ii) the likelihood or probability of a default considering the critical and often non-substitutable service that a pipeline provides to the shipper; and, (iii) the Commission's policy to promote competition in the nation's energy markets by limiting barriers to entry. Calpine claims Natural's tangible net worth proposal does none of these things and thus should be rejected. Alternatively, Calpine states that if the Commission determines such a standard is appropriate, the Commission should require that Natural limit any determination of whether a shipper needs to provide collateral to a calculation of tangible net worth that includes a determination of the net present value of payments owed under the contract considering (i) the time value of money through the contract term, and, (ii) any offsets that would be reasonably available to the pipeline as the result of its damages mitigation obligation. In addition, particularly in the context of project-financed entities, Calpine contends that Natural should not be permitted to fashion a tangible net worth standard to require collateral as a result of lower levels of equity due to the fact that the project is deemed to be a lower risk and able to finance its self on a higher leveraged basis. Furthermore, to the extent that such a tangible net worth standard is developed and adopted, Calpine argues it should be available to all shippers on a non-discriminatory basis as an alternative manner of credit assessment rather than strict reliance on the credit rating agencies' determinations.

Commission Ruling

73. The Commission addressed a similar net worth provision that was proposed by Tennessee. That proposal was protested by Calpine, and another party, for many of the same reasons discussed above. Tennessee filed an answer to the protests providing a definition of "tangible net worth"¹¹⁰ and explained that net present value of a long-term contract is used to determine the overall value of the contract for use in a shipper's credit determination.¹¹¹ The Commission in a June 4, 2003, Order¹¹² noted that although

¹¹⁰Tennessee at page 7 of its April 3, 2003 answer defines tangible net worth for a corporation as the sum of the capital stock, paid-in capital in excess of par or stated value, and other free and clear equity reserve accounts less goodwill, patents, unamortized loan costs or restructuring costs, and other intangible assets. Tennessee clarifies that only actual tangible assets are included in its assessment of creditworthiness.

¹¹¹See Tennessee's April 3, 2003 answer to protest, note 18 at 7.

¹¹²Tennessee, 103 FERC ¶ 61,275 at P 45 (2003).

Tennessee's April 3, 2003 answer to protests provided a useful definition of "tangible net worth," and explains that net present value of a long-term contract is used to determine the overall value of the contract, Tennessee's proposed tariff provisions fail to provide such information. Tennessee was required to revise its tariff to provide a definition of tangible net worth and explain that net present value is a factor in the credit determination process; so that shippers could better understand what factors are parts of the credit evaluation process.¹¹³

74. Natural, like Tennessee, failed to provide a definition of "tangible net worth" in its tariff. However, unlike Tennessee, Natural did not answer Calpine's protest and, as a result, we have no definition of tangible net worth in this proceeding. Without any definition of tangible net worth, we agree with Calpine's contention that Natural's term tangible net worth is vague. Therefore, Natural is required to revise its tariff to provide a definition of tangible net worth so that shippers can better understand what factors are part of the credit evaluation basis. Without such a definition, we cannot address Calpine's protest that Natural's "tangible net worth" criterion is unjust, unreasonable, and unduly discriminatory. Further, Natural must explain how it intends to determine the overall value of a shipper's contract for use in a shipper's credit determination.

b. Evaluation of Information and Credit Criteria

75. Natural's proposed section 16(a)(4) states that a shipper may not be operating under the bankruptcy laws or have a pending petition of involuntary bankruptcy, except for a debtor in possession operating under Chapter XI of the Federal Bankruptcy Act if Natural is assured of prompt payment of bills as a cost of administration under the federal court's jurisdiction, and the shipper continues to make its payments.¹¹⁴

76. Pursuant to section 16(a)(5), the credit appraisal will be based on "[w]hether Shipper is subject to any lawsuits or judgments outstanding which could materially impact its ability to remain solvent." Pursuant to section 16(a)(7), the credit appraisal will be based on "[t]he nature of the Shipper's business and the effect on that business of general economic conditions and economic conditions specific to it, including Shipper's ability to recover the costs of Natural's services through filings with regulatory agencies or otherwise to pass on such costs to its customers."

¹¹³ Ibid.

¹¹⁴ Substitute First Revised Sheet No. 279.

Protest

77. Shippers object to Natural's proposal which finds a bankrupt shipper non-creditworthy and then refuses service to a shipper during bankruptcy.¹¹⁵ The Industrials state that Natural's proposed section 16(a)(4) would allow Natural to refuse service or refuse to continue service to a shipper in bankruptcy proceedings, except under Chapter 11 where Natural can be assured that it will have service billings paid promptly. The Industrials argue that Natural should not be able to refuse service where a Bankruptcy Court has ordered that service continue, and the Commission should so clarify.

78. Shippers also object to Natural's proposed credit evaluation procedure in sections 16(a)(5) and (7). The shippers claim these provisions are vague and unreasonable and should be removed from the tariff.¹¹⁶ The Industrials state that Natural's sections 16(a)(5) and (7) should not be used for credit evaluation, consistent with the Commissions evolving policies. The Industrials contend that the Commission, in a recent order, rejected language similar to section 16(a)(5), finding that such language is vague and would require a shipper to make assumptions about future changes in its business conditions subject to interpretation. The Industrials claim Natural's section 16(a)(7) language is overbroad and would unreasonably permit Natural to reject shippers based on guesses about the economy or their industries. The Industrials contend that Natural should not be permitted to reject a shipper as non-creditworthy based on its view of the "nature of the Shippers business and the effect of that business on general economic conditions and economic conditions specific to it."

Commission Ruling

79. We agree Natural has not justified why its provision would not conflict with the bankruptcy court's jurisdiction. As we stated in P 56 of this order, Natural's tariff does not contain any language addressing the interaction of its creditworthiness provisions and the Bankruptcy Code. As a result, we are requiring Natural to include tariff language in its tariff clarifying that Natural's creditworthiness provisions cannot conflict with the U.S. Bankruptcy Court. This should satisfy the Industrial's concern that Natural could refuse service where a Bankruptcy Court has ordered that service continue.

80. Section 16(a)(5) and (a)(7) do not require shippers to provide information to Natural, but only sets forth the information Natural may consider in its credit evaluations. Therefore, unlike sections 16(a)(8)(i) through 16(a)(8)(xvi), which deal with the information a shipper must provide to Natural, under section 16(a)(5) and (7), a shipper does not have to make assumptions about what information qualifies for disclosure to

¹¹⁵ Industrials Protest at 4.

¹¹⁶ Industrials Protest at 4.

Natural. The types of information that Natural proposes to consider, information on lawsuits or judgments, and general economic conditions and economic conditions specific to the shipper, are sufficiently relevant and objective indications of financial health that Natural should be permitted to consider, as long as it ensures the shipper has the ability to challenge such a determination.¹¹⁷ As discussed in P 89 of this order, we are requiring Natural to revise its tariff to provide an opportunity for a shipper to challenge Natural's determinations of non-creditworthiness. The shippers are therefore protected from Natural's abuse of its discretion, while Natural has the flexibility to determine a shipper's creditworthiness based on relevant financial information on a case-by-case basis.

c. Information Natural May Request Shipper Provide

81. Sections 16(a)(8)(i) through 16(a)(8)(xvi) lists the 16 types of information which Natural may request a shipper provide in connection with a shipper's credit evaluation. Pursuant to section 16(a)(8)(viii), Natural may request a "list of its affiliates, parent companies, and subsidiaries in connection with a credit evaluation."¹¹⁸ Pursuant to section 16(a)(8)(xv), Natural may request "any information reasonably required so that Natural can make any determination under this section 16(a)."¹¹⁹

Protest

82. Calpine and the Industrials each object to Natural's section 16(a)(8)(viii) provision. Each contends that this provision is unreasonable and has been rejected by the Commission in other proceedings.¹²⁰ Both Calpine and the Industrials state that Natural should be prohibited from using the adverse credit status of a shipper's affiliates, parent and/or subsidiaries to determine that the shipper is not creditworthy.

83. Calpine contends that the proposed section 16(a)(8)(xv) language is vague and ambiguous.¹²¹ Calpine states that the Commission has repeatedly rejected proposed tariff provisions from pipelines based on the fact they were too vague and ambiguous. Calpine suggests this language could lead to unduly burdensome and excessive information requests. In addition, Calpine claims any such obligation must be limited so as not to

¹¹⁷ See, Tennessee, 105 FERC ¶ 61,120 at P. 31 (2003).

¹¹⁸ Substitute First Revised Sheet No. 280.

¹¹⁹ Substitute First Revised Sheet No. 279.

¹²⁰ Calpine Protest at 12-13; Industrials Protest at 5.

¹²¹ Calpine Protest at 13.

conflict with securities disclosure obligations. Calpine states that Natural's proposed language should be rejected, but contends that to the extent that the Commission permits some expansion on the pipelines existing right to obtain information, the Commission should also require that any such right to request information be provided by the pipeline to the shipper as well in order for shippers to assess the performance risks that the pipeline may present from time to time. In its current form, Calpine urges that Natural's proposed tariff language should be rejected.

Commission Ruling

84. The orders cited by Calpine and the Industrials found that a shipper should not be deemed non-creditworthy because of the default or other loss of creditworthiness by an affiliate.¹²² Natural, however, has not made such a proposal. Natural proposes, in section 16(a)(8)(viii), to require a shipper provide a list of its affiliates, parent companies, and subsidiaries in connection with a credit evaluation of a shipper. We find that it is reasonable to require a shipper provide such information, since it may be relevant to the determination of a shipper's financial health. In fact, the information may support the basis for a shipper being deemed creditworthy. Further, as discussed in P 89, a shipper is protected because it will have the opportunity to be informed of the reasons Natural has determined it to non-creditworthy, and to challenge Natural's determination.

85. We agree with Calpine that Natural's section 16(a)(8)(xv) proposal which allows Natural to request any information that it believes reasonable to make a credit determination is vague and ambiguous, and it does not meet the requirement that credit criteria be objective. Further, section 16(a)(8)(xvi) which states, "[S]uch other information as may be mutually agreed by the parties," provides Natural the opportunity to request information that is not listed in its tariff.

6. Communication of Credit Analysis

March 31 Order

86. Natural was required to set forth objective financial analysis and criteria to determine a shipper's creditworthiness in its tariff.¹²³

¹²² Tennessee, 102 FERC ¶ 61,075 at P 29 (2003); Gulf South, 103 FERC ¶ 61,129 at P 14 (2003).

¹²³ March 31 Order at P 69.

Compliance Filing

87. Natural revised its credit criteria language contained in section 16 of its tariff by setting out the specific criteria and information it will utilize to determine a shipper's creditworthiness in its tariff. As part of its revision, Natural removed language from section 16(a)(1) that required Natural to identify or to provide to a shipper any information used by Natural in the determination that the shipper is non-creditworthy.

Protest

88. Calpine, the Industrials and Peoples each contend the Commission should require Natural to include tariff language that would require Natural to explain the basis for Natural's determination that a shipper is not creditworthy.¹²⁴ Calpine states that Natural's October 1, 2002 filing provided that "Natural shall provide its analysis to Shipper and identify or provide to Shipper any information used in its analysis prior to taking action on such information." Calpine contends Natural's compliance filing removes such language, even though the Commission did not order the tariff language removed. Calpine states that the Commission should require Natural to reinstate this language. Calpine and the Industrials note that the Commission has ruled in other creditworthiness proceedings that a pipelines tariff should provide a written explanation to a shipper outlining the reasons why it has been deemed non-creditworthy.

Commission Ruling

89. Our March 31 Order did not require that Natural remove the language proposed in its October 1, 2002 filing that it would provide its analysis and identify or provide to the shipper any information used in its analysis prior to taking action on such information. In both Tennessee and PG&E, the Commission found that all shippers are entitled to a written explanation when they are found to fail the pipeline's creditworthiness screen.¹²⁵ Therefore, we direct Natural to revise its tariff to include language requiring that Natural will inform the shipper in writing as to the reasons why the shipper was deemed non-creditworthy. Consistent with our order in Tennessee, we will require the revision provide that the written notification be made within 10 days of deeming a shipper non-creditworthy, as well as providing a recourse for a shipper to challenge such a determination.¹²⁶ However, consistent with our order on rehearing in Tennessee,

¹²⁴ Calpine Protest at 14-15; Peoples Protest at 2; Industrials Protest at 2.

¹²⁵ Tennessee, 103 FERC ¶ 61,075 at P 46 (2003); PG&E, 105 FERC ¶ 61,382 at P 81 (2003).

¹²⁶ Tennessee, 103 FERC ¶ 61,275 at P 45 (2003).

we will permit Natural to include language that it will provide such a written explanation only when a shipper requests such written notification.¹²⁷ A shipper's interests remain protected if it is given the choice whether to receive such written notification.

7. Natural's Approval of Escrow Accounts

March 31 Order

90. The Commission found that Natural must provide a shipper with an opportunity to earn interest on prepayments. Natural was required to revise its tariff to either pay the interest itself or give a shipper the option to deposit prepayment funds into an interest-bearing escrow account (established by the shipper) to which Natural may gain access, if necessary.

Compliance Filing

91. Natural added section 16(c) which requires that prepayment amounts will be deposited in an interest-bearing escrow account, if such an account has been established by a shipper, and "Natural reasonably determines that such account is satisfactory." section 16(c) provides that the costs of establishing and maintaining the escrow account will be borne by the shipper. In addition, Natural has added language in section 16(c) specifying criteria that an escrow bank must meet. The escrow bank must be rated at least AA or better and shall not be affiliated with the shipper. The escrow arrangement must provide for the prepayment amounts to be applied against the shipper's obligation under its service agreement(s) with Natural and must grant Natural a security interest in such amounts as an assurance of future performance. The escrow agreement must also specify the permitted investments of escrowed funds so as to protect principal, and must include only such investment options as corporations typically use for short-term deposit of their funds.

Protest

92. Peoples argues that Natural should not be allowed to decide if an escrow account is satisfactory, as long as it meets the tariff's criteria in proposed section 16(c) of the GT&C.¹²⁸

¹²⁷ Tennessee, 105 FERC ¶ 61,120 at P 28 (2003).

¹²⁸ Peoples Protest at 3-4.

Commission Ruling

93. Natural's section 16(c) states that the shipper may choose to place its prepayment in an escrow account, if Natural reasonably determines that such account is satisfactory, and specifies the method of operation of the account, the credit rating of the escrow bank, and other provisions designed to protect the principal and its payment to Natural in the event of default. Peoples do not object to Natural's detailed specification of the credit standing of the escrow bank and the means of operation of the account. The Commission sees no need for an additional layer of approval by Natural to the execution of escrow accounts. Accordingly, we will require Natural to revise this provision to remove the approval feature of section 16(c).

The Commission orders:

(A) Natural's tariff sheets listed in footnote No. 1 are accepted, to become effective June 27, 2003, subject to further modification, as more fully described in the body of this order.

(B) Natural is directed to file, within 30 days of the date of issuance of this order, revised actual tariff sheets consistent with the discussion of the body of this order.

(C) Calpine's request for clarification is granted. The requests for rehearing are denied.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.