103 FERC ¶ 61,275

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Tennessee Gas Pipeline Company — Docket Nos. GT02-35-003 and GT02-35-004

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued June 4, 2003)

1. On February 28, 2003, Tennessee Gas Pipeline Company (Tennessee) filed tariff sheets[1] in compliance with the Commission's January 29, 2003 order in this proceeding. The January 29, 2003 order (January 29 Order)[2] conditionally accepted Tennessee's modified filing to revise the creditworthiness provisions in its tariff. Tennessee and others also filed requests for rehearing of the January 29 Order. As discussed below, the Commission partially grants and partially denies rehearing, finds that Tennessee has generally complied with the January 29 Order, and conditionally accepts the proposed tariff sheets listed in footnote 1, effective February 16, 2003. Our action here will reduce the financial risks to Tennessee and its creditworthy customers due to Tennessee's non-creditworthy customers, while protecting Tennessee's shippers from unduly burdensome creditworthiness standards.

## I. Background

[1]Second Revised Sheet No. 326, Third Revised Sheet No. 330, Sub Third Revised Sheet No. 338, Eighth Revised Sheet No. 343, Third Revised Sheet No. 344, Fourth Revised Sheet No. 348, 1st Rev First Revised Sheet No. 366B, Original Sheet No. 366C, Sub Fifth Revised Sheet No. 404, Sub Eighth Revised Sheet No. 405, Original Sheet No. 405.01, Original Sheet No. 405.02, 2nd Sub Ninth Revised Sheet No. 405A, Seventh Revised Sheet No. 512, and First Revised Sheet No. 513D to FERC Gas Tariff, Fifth Revised Volume No. 1.

[2]Tennessee, 102 FERC ¶ 61,075 (2003).

2. On August 16, 2002, Tennessee filed tariff sheets to revise the credit evaluation provisions in its tariff. The filing proposed more stringent creditworthiness safeguards in Article XXXVIII of Tennessee's General Terms and Conditions (GT&C). A number of parties protested Tennessee's filing. On September 13, 2002, the Commission issued an order accepting and suspending the tariff sheets, subject to refund, conditions and a technical conference. The order accepted the tariff sheets effective the earlier of February 16, 2003, or the date the Commission specifies in an order issued after the technical conference. The September 13, 2002 order, also directed Tennessee to revise its tariff language to clarify, as Tennessee agreed, that a good faith dispute over amounts owed will not cause Tennessee to find a shipper to be un-creditworthy. On September 30, 2002, Tennessee filed to comply with this requirement. The compliance filing was protested.

3. Rehearing of the September 13, 2002 order was requested. On rehearing, parties asserted that Tennessee's proceeding should be expanded into a generic proceeding and no Commission policy existed. On December 19, 2002, the Commission issued an order denying the requests for rehearing and stay.[3] In the rehearing order, the Commission found that the best approach was to continue to process each pipeline's creditworthiness filing on an individual basis.[4]

4. On November 5, 2002, staff convened a technical conference. Initial comments were due December 3, 2002 and reply comments were due December 13, 2002. On November 8, 2002, staff submitted data requests to Tennessee. On November 19, 2002, Tennessee filed pro forma revised tariff sheets to reflect changes in response to comments at the technical conference and staff's November 8, 2002 data requests.

5. On January 29, 2003, the Commission issued an Order Following Technical Conference, Accepting Tariff Sheets, Subject to Conditions. The January 29 Order accepted Tennessee's November 19, 2002 proposal and September 30, 2002 compliance filing, subject to conditions. Pertinent details of the order are described below. Calpine Energy Services, L.P. (Calpine), East Ohio Gas Company d/b/a Dominion East Ohio and

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[3]Tennessee, 101 FERC ¶ 61,311 (2002).

[4]See Northern Natural Gas Company (Northern Natural), 102 FERC ¶ 61,076 (2003); Natural Gas Pipeline Company of America (Natural), 102 FERC ¶ 61,335 (2003); Gulf South Pipeline Company (Gulf South), 103 FERC ¶ 61,129 (2003); PG&E Gas Transmission-Northwest (PG&E Transmission), 103 FERC ¶ 61,137 (2003); and Trailblazer Pipeline Co., 103 FERC ¶ 61,225 (2003).

Peoples Natural Gas Company d/b/a Dominion Peoples (Dominion), Indicated Shippers,[5] Industrials,[6] NiSource Distribution Companies (NiSource), the Interstate Natural Gas Association of America (INGAA), Columbia Gas Transmission Corporation (Columbia), and Tennessee request rehearing of the January 29 Order. The requests for rehearing in Docket No. GT02-35-003 are addressed below.

## II. Notice, Interventions and Protests

6. Notice of Tennessee's compliance filing in Docket No. GT02-35-004 was issued on March 6, 2003. Interventions and protests were due as provided in Section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2003). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2003), all timely filed motions to intervene and any motions to intervene out of time filed before the issuance of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

7. Calpine; the Cities of Clarksville, Springfield, Portland, and Waynesboro, Tennessee, the Corinth Public Utilities Commission, Mississippi, the West Tennessee Public Utility District, the Greater Dickson Gas Authority, and the Humphreys County Utility District (Municipals); Process Gas Consumers Group (PGC); Proliance Energy, L.C.C.; and Rhode Island State Energy Statutory Trust 2000 (Trust 2000) protested the compliance filing. Dominion, Tennessee Small General Service Customer Group (SGS), and Virginia Power Energy Marketing, Inc. (VPEM) filed comments. KeySpan Delivery Company (KeySpan) filed late comments. Tennessee filed an answer to the requests for rehearing of certain parties, protests, and comments. The Municipals filed an answer opposing Tennessee's answer.[7] The protests, comments and answers are addressed below.

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[5]Herein Indicated Shippers are: Amerada Hess Corporation; ChevronTexaco Exploration & Production Co.; ConocoPhillips Gas and Power Marketing; ExxonMobil Gas & Power Marketing Co., A Division of Exxon Mobil Corporation; Occidental Energy marketing, Inc.; and Shell Offshore Inc.

[6]Herein Industrials are: Process Gas Consumers Group; American Iron and Steel Institute; Alcoa Inc.; EVTAC Mining; United States Gypsum Company; and USG Interior, Inc.

[7]While the Commission's Rules of Practice and Procedure generally prohibit answers to protests or answers, the Commission will accept the answers to allow a better understanding of the issues. <u>See</u> 18 C.F.R. § 385.213(a)(2) (2003).

## III. Discussion

8. We accept Tennessee's compliance filing as generally in compliance with the January 29 Order, subject to Tennessee filing revised tariff sheets within 20 days of the issuance of this order as discussed below. The rehearing requests, protests, and comments are addressed in the sections below.

### A. Generic Nature of Proceeding

#### January 29 Order

9. The January 29 Order found that the issue of the appropriate type of proceeding to address creditworthiness policies had already been addressed in an order on rehearing in this proceeding.[8] The January 29 Order reiterated that the best approach was to process each creditworthiness filing on an individual case-by-case basis. The order did not address the issue on the merits. The order also encouraged the North American Energy Standards Board (NAESB) to see whether consensus standards could be developed for certain creditworthiness issues, with a report due by June 1, 2003.

#### Requests for Rehearing

10. On rehearing, Columbia requests that the Commission clarify or grant rehearing that the Commission is not seeking to create generic policy in this proceeding. Although the Industrials' rehearing request expresses appreciation for the well-reasoned decisions set forth in the January 29 Order and the Northern Natural order,[9] they state that they reserve the right to request the Commission to initiate a generic proceeding, led by the Commission, to tackle any remaining creditworthiness issues after NAESB addresses the creditworthiness issues. NiSource requests that the Commission either clarify its commitment to case-by-case review or, if it intends to create generic policy, establish a true rulemaking proceeding. It is unclear what INGAA is requesting on this issue. In its rehearing request INGAA states, "A generic approach to creditworthiness is not desirable. Risk profiles can be very different from shipper to shipper. Similarly, risk tolerance can be very different from pipeline to pipeline."[10] However, later in its rehearing request INGAA argues, "The Commission should reconsider the wisdom of taking a case-by-case approach to determine its new policy on creditworthiness. It is unfair, and perhaps even

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[8]Tennessee, 101 FERC ¶ 61,311 (2002).

[9]Northern Natural, 102 FERC ¶ 61,076 (2003).

[10]INGAA rehearing request at 27.

unlawful, for the Commission to impose major changes on pipeline tariffs and to disrupt settled expectations without the input of the broadest spectrum of parties interested in the Commission's decision. . . . Rulemaking proceedings insure that affected parties will be heard by requiring the agency to publish notice of the proposed change in policy in the Federal Register and allowing interested parties to comment on the policy in question."[11]

11. The Industrials are concerned that NAESB will not do its job of "making industry standards out of Commission policy." The Industrials contend that, now the Commission has answered important policy questions and standardization can begin, many NAESB participants claim that the Commission's decisions in the January 29 Order and Northern Natural are not Commission policy and certain segments of the industry are reluctant to standardize. Therefore, the Industrials request the Commission clarify that the decisions in the January 29 Order and Northern Natural are Commission policy, and the June 1, 2003 reporting deadline is not a cut off date for further discussion.

**Commission Ruling**

12. Rehearing is denied. The Commission is not attempting to use a one-size-fits-all approach on creditworthiness issues as suggested by Columbia. However, the Commission can set policy in individual cases as well as through generic proceedings. The Commission applies prior precedent only where applicable. Furthermore, parties in the individual pipeline proceedings, such as in North Baja,[12] have the opportunity to demonstrate that the pipeline's specific circumstances are distinguishable from the circumstances in prior cases. Additionally, the Commission will not revisit the issue of a the appropriateness of a generic rulemaking here. The issue has already been addressed in an order on rehearing in this proceeding and the Commission determined to proceed on a case-by-case basis.[13] The parties have not presented any new arguments on rehearing that persuade the Commission to reconsider the issue and are making an impermissible collateral attack on the prior rehearing order.

13. The Commission agrees with the Industrials that the June 1, 2003 date is a reporting date, not a date to end standardization discussions. The Commission will take time to consider NAESB's report on standardization before considering how to proceed with any unresolved creditworthiness issues.

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[11]INGAA rehearing request at 37-38.

[12]North Baja Pipeline, LLC (North Baja), 102 FERC ¶ 61,239 (2003).

[13]Tennessee, 101 FERC ¶ 61,311 (2002).

**B. Tennessee's Proposed Creditworthiness Provisions**

**Interest on Prepayments**

**January 29 Order**

14. The Commission found that Tennessee must provide shippers with an opportunity to earn interest on prepayments, requiring Tennessee to either pay the interest itself or provide the shipper with the option to designate an escrow account to which Tennessee may gain access to payments for services provided.[14]

**Rehearing Request**

15. Tennessee contends in its rehearing request that the Commission erred in finding that Tennessee must allow a shipper the opportunity to earn interest on prepayments. Tennessee asserts that the Commission failed to provide support that Tennessee's tariff is unjust or unreasonable and questions whether the Florida Gas orders cited by the Commission to justify permitting customers the opportunity to earn interest on prepayments is applicable to Tennessee.[15] Tennessee asserts that if it allows a shipper the opportunity to earn interest on prepayments, then it may not be protected if the shipper files for bankruptcy. Tennessee asserts that if it pays the shipper interest on the prepayment, then a bankruptcy court could conclude that the prepayment is a security deposit, and as such, property of the bankrupt estate. Tennessee contends that payments of one's service charges are funds that rightfully belong to Tennessee and Tennessee should not be required to pay interest to another party on its own revenue. Alternatively, if the Commission requires Tennessee to provide shippers with an opportunity to earn interest on prepayments, then the Commission should clarify that this directive does not apply to prepayments that are made for the shipper's purposes of paying its transportation charges in advance.

16. Tennessee proposes to clarify any ambiguity regarding acceptance of prepayments as an adequate assurance, contending that it will no longer hold those types of prepayments, which are required from a shipper for lack of creditworthiness, as a security deposit to make Tennessee whole in the event the shipper is unable to pay its monthly

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[14]January 29 Order at P 38, citing at note 13 Florida Gas Transmission Co. (Florida Gas), 66 FERC ¶ 61,140 at 61,261 (1994) and Florida Gas, 66 FERC ¶ 61,376 at 62,528 (1994).

[15]Id.

invoice. Instead, Tennessee claims it will credit these prepayments to the shipper's monthly invoice as Tennessee would with a prepayment that is voluntarily made by the shipper for the purpose of paying its transportation charges in advance. Therefore, Tennessee concludes the prepayments to cure lack of creditworthiness will no longer be a deposit but rather a prepaid expense by the shipper.[16]

**Commission Ruling**

17. Tennessee's request for rehearing is denied. Tennessee is proposing new creditworthiness provisions under Section 4 of the NGA. Therefore, Tennessee has the burden to show that the proposed provisions are just and reasonable. The Florida Gas decision questioned by Tennessee was based on what the Commission had approved for other pipelines and is still Commission policy. Tennessee's argument regarding the treatment of prepayments by the Bankruptcy Court is not persuasive. The Commission is imposing this requirement to protect shipper rights regarding the time value of the collateral the shipper provides Tennessee because of lack of creditworthiness. A shipper may be current in its payments to Tennessee for service and still be required to provide collateral to Tennessee. We are not attempting to protect Tennessee against any application of the Bankruptcy Code. However, Tennessee is not prevented from pursuing any remedies it may have for contract breach in the event of non-payment. Finally, prepayments to cure lack of creditworthiness are not Tennessee's revenues, since Tennessee has not yet provided service to the shipper related to the prepayments. The prepayments are collateral or security for payment for future service. A shipper should be compensated for the time value of money that Tennessee holds.

18. As for Tennessee's alternative proposal, we find that it is not appropriate in a rehearing request.[17] Tennessee did not make the alternative proposal in its August 16, 2002 Section 4 filing and it is not required by the January 29 Order. Accordingly, we reject the proposal, without prejudice to Tennessee making a similar proposal in a

[16] However, Tennessee explains that, as set forth in the February 28 compliance filing, where Tennessee and the shipper agree to a cash deposit instead of a prepayment, then it is appropriate that the shipper has an opportunity to earn interest.

[17] In Trailblazer, 103 FERC ¶ 61,225 at P 20 (2003), the Commission indicated that a pipeline may be able to justify requiring a non-creditworthy shipper to pre-pay the reservation charge for firm service in advance, rather than after service is provided. But that does not appear to be the equivalent of having the pipeline pre-pay for service 3-months in advance and then continuing to bill the shipper each month. Such a proposal appears more like the provision of collateral or security, as opposed to pre-payment for services.

separate Section 4 filing along with substantial support to show the justness and reasonableness of its proposal.

**Appropriate Interest Rate**

**January 29, 2003 Order**

19. The January 29 Order required Tennessee to provide shippers with the opportunity to earn interest on prepayments, by either paying the interest itself, or giving the shipper the option to designate the escrow account to which Tennessee may gas access to payments for services provided if needed.[18] The Commission found that this determination was consistent with our approval of a similar option on paying shippers' interest on prepayments in Northern Natural.[19]

**Rehearing Request**

20. The Industrials request that the Commission clarify that the interest rate that Tennessee is required to pay on cash collateral or prepayment held by Tennessee is the FERC interest rate.

**Commission Ruling**

21. The Commission grants in part and denies in part the Industrials' request for rehearing on this issue. We have required Tennessee to provide its shippers with the opportunity to earn interest on prepayments. Tennessee may either pay the interest itself, or give the shipper the option to designate an escrow account to which Tennessee may gain access to payments for services provided if needed. The interest paid by the escrow account designated by the shipper is the appropriate interest rate when an escrow account is used. Such a finding is consistent with our rulings in Gulf South, North Baja, Natural, and Trailblazer.[20] However, if Tennessee pays the interest itself, we clarify that the FERC interest rate is the appropriate interest rate.

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[18] January 29 Order at P 38.

[19] Northern Natural, 102 FERC ¶ 61,076 at P 39 (2003).

[20] North Baja, 102 FERC ¶ 61,239 at P 16 (2003); Gulf South, 103 FERC ¶ 61,129 at P 40 (2003); Natural, 102 FERC ¶ 61,355 at P 72 (2003); Trailblazer, 103 FERC ¶ 61,225 (2003) at P 64.

**Amount of Collateral for Service and when Should Collateral be Released**

**Compliance Filing**

22. Section 4.9 in Article XXVIII of Tennessee's tariff provides that if Tennessee constructs a new facility for an uncreditworthy shipper, Tennessee may require an irrevocable letter of credit in an amount up to the cost of the facilities until Tennessee has been reimbursed for the cost of the facilities. Further, if the facilities are constructed to serve more than one shipper, the letter of credit is limited to the cost of facilities allocable to the shipper.

**Rehearing Request and Protest**

23. Calpine on rehearing contends that if the Commission intended the January 29 Order to include mainline extensions and major system expansions in Section 4.9, then the collateral requirement should be capped at twelve months of demand charges. Calpine argues that a collateral requirement up to the cost of new mainline facilities is excessive and that the Commission has only allowed collateral requirements up to twelve months' service charges for project-financed pipelines.[21] Calpine also cites our decision in North Baja, contending that Commission Policy only permits pipelines to "require up to twelve months of security from its initial firm shippers at the time the project is certificated."[22]

24. Calpine also protests Tennessee's proposal in Section 4.9 to allow collateral demands up to the cost of facilities and the ability to maintain that level of collateral until Tennessee has been reimbursed for the cost of the facilities, contending that such provisions should be rejected. Calpine further contends that Tennessee's proposal to hold more than three months of service charges as credit assurance once service commences represents a de facto negotiated term and condition, which is prohibited by the Commission's regulations.[23]

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[21] North Baja, 100 FERC ¶ 61,183 (2002); Gulfstream Natural Gas System, 91 FERC ¶ 61,119 (2000); Alliance Pipeline, L.P., 84 FERC ¶ 61,239 (1998).

[22] North Baja, 102 FERC ¶ 61,239 at P 14 (2003).

[23] Calpine cites, Regulation of Short-term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Service, FERC Stats. & Regs.
(continued...)

25. VPEM contends in its comments that Tennessee should clarify Section 4.9 to provide that when facilities are being constructed to serve multiple customers, an individual customer's obligation to provide security should be capped at its proportionate share of the cost of the facilities measured by its share of the related capacity.

**Commission Ruling**

26. Tennessee's tariff proposes that in the event it constructs new facilities to accommodate a shipper, it may require security in an amount up to the cost of the facilities. However, it is unclear as to whether this provision is intended to apply to lateral or mainline expansion facilities.[24] The Commission's policy has been that pipelines are not required to construct lateral facilities and that the shipper must be willing to pay the full cost of such construction.[25] 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.[26] Collateral requirements for mainline system expansions should not be in a pipeline's tariff.[27] Specific risk sharing arrangements are more appropriately negotiated and agreed to in the context of precedent

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[23](...continued)
Regulation Preambles (July 1996 - December 2000) ¶ 31,094 (Feb. 9, 2000) (Order No. 637-A).

[24]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").

[25]Panhandle Eastern Pipe Line Co., 91 FERC ¶ 61,037 at 61,141-42 (2000).

[26]See Natural Gas Pipeline Co. of America, 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).

[27]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) (Docket No. RP03-312-000).

agreements that may be reviewed in a certificate proceeding. Tennessee is therefore directed to revise its tariff language to clarify that its collateral requirement applies only to lateral facilities.[28]

27. Calpine and the Industrials have misinterpreted our decisions in North Baja with regard to the issue of how much security a pipeline can require from non-creditworthy shippers that request the construction of new facilities. In North Baja, the pipeline requested 12 months of collateral, and the Commission found that "requiring twelve months of security may be acceptable in the precedent agreements leading up to the issuance of a certificate."[29] While our language may have been unclear; we did not intend to establish a policy that security for pipeline expansions cannot exceed 12 months of service charges.

28. Commission policy provides that the amount of collateral a particular shipper is required to provide will depend on whether the shipper is an initial subscriber or a new shipper that takes service after the facilities are placed in service. These differences reflect the relative risks faced by a company proposing to construct new facilities versus an existing pipeline. Once pipeline facilities are constructed, the major risk to the pipeline is the potential loss of reservation charges associated with the contract termination process. The Commission's established three-month collateral requirement provides the pipeline with sufficient protection against this risk. Accordingly, initial subscribers will not have their collateral automatically reduced to three months worth of charges once the facilities enter service. Such a limited amount of collateral would not generally serve to secure the financial commitment made by the pipeline on behalf of the initial subscribers that requested construction of new mainline facilities.

29. Tennessee's tariff currently provides the clarity sought by VPEM concerning a shipper's obligation to provide security proportionate to its share of the cost of the facilities. Tennessee's tariff provides at Section 4.9 that a shipper's credit is limited to the cost of facilities allocable to that shipper,[30] therefore, Tennessee is not required to clarify its tariff on this issue. Further, the Commission finds that pipelines should be required to mitigate the consequences of a shipper's default. In the event of default and termination,

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[28]A lateral would include facilities as defined in 18 C.F.R. § 154.109(b) and 18 C.F.R. § 157.202 (2003).

[29]North Baja at P 15.

[30]See 2nd Sub Ninth Revised Sheet No. 405A to Tennessee's FERC Gas Tariff, Fifth Revised Volume No. 1.

the pipeline will be required to reduce the collateral it retains by mitigating damages.[31] Tennessee is directed to revise its tariff to include such language.

**Credit Assurances for Construction Projects Prior to the In-Service Date**

**Compliance Filing**

30. Tennessee proposes in Section 4.9 at Article XXVIII to comply with the January 29 Order, establishing the credit assurance required for shippers who are deemed uncreditworthy and making conforming changes with Article XVII, Section 7, because the two sections operate in concert.

**Protest**

31. Trust 2000 protests Tennessee's proposed tariff language and argues that Tennessee should require credit assurances only prior to the in-service date. Trust 2000 contends that Tennessee's proposal provides it with wide discretion to impose excess credit assurance requirements, even after the in-service date, on shippers that require interconnecting facilities and have no other option but to agree to Tennessee's proposed credit assurances. Trust 2000 contends that the proposed tariff language in Section 4.9 and the similar language in Article XVII, Section 7 should be rejected since they were not contemplated by the January 29 Order and have not been justified.

**Commission Ruling**

32. Tennessee in its April 3 answer to the protests, clarifies that it can only unilaterally require credit assurances prior to the in-service date of the facilities and further that only if mutually agreed to prior to the in-service date, may such credit assurances be triggered after the facilities are placed in-service. Tennessee further contends in its April 3 answer that this proposal is reasonable because Tennessee should have the right, if mutually agreed to by both parties, to invoke the adequate assurances associated with construction

[31]Pipelines are required to post capacity for sale after a termination. One method of mitigation would be for the pipeline to determine its damages by taking the difference between the highest net present value bid for the capacity and the net present value of the remaining terms of the shipper's contract. The pipeline could then retain as much of the collateral as necessary to cover the damages. Pipelines could also develop alternative measures for determining mitigation.

at any time prior to full reimbursement by the shipper.[32] The Commission finds that Tennessee's proposal is reasonable because it provides Tennessee with the right, if mutually agreed to by both parties, to invoke the request for adequate assurances associated with construction at any time prior to full reimbursement by the shipper. Such measures are necessary to protect Tennessee against a potentially uncreditworthy shipper. However, the Commission finds that Tennessee's proposed clarifications are necessary to resolve any misunderstanding concerning the requirements of Section 4.9, therefore Tennessee is required to revise its tariff in accordance with the clarification provided in its April 3 answer. Trust 2000's protest on this issue is denied subject to Tennessee clarifying its tariff.

**Collateral Limited to Three Months of Service Charges**

**Compliance Filing**

33. Tennessee in Article XXVIII at Section 4.5 of its tariff provided five types of credit assurances that an uncreditworthy shipper can provide to continue service: (a) an irrevocable letter of credit satisfactory to Tennessee; (b) 3 months of prepayments; (c) security interest or collateral; (d) a guarantee by another person; or (e) mutually agreeable credit assurance.

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[32] See Tennessee's April 3 Answer to the Protests at 16.

**Protest**

34. PGC protests several provisions and specific tariff language included in revised Section 4.5. PGC objects to the following: (1) it is unclear whether the credit assurances are limited to the highest three months; (2) Tennessee has failed to eliminate language that would ease shipper liability for service charges in the event Tennessee suspended a non-creditworthy or defaulting shipper; and (3) the word payment in the phrase "the next three (3) months of payments, to be provided within thirty (30) days" found at Section 4.5 is inappropriate. PGC further contends: (1) that the three month requirement applies to pre-payment or some other form of alternative credit assurance with a three-month value, recommending that the phrase be replaced with "the next three (3) months of pre-payment or equivalent collateral, to be provided . . . "; (2) objects to the phrase "satisfactory to the Transporter" in Section 4.5(a) contending that it gives Tennessee too much discretion and could lead to undue discrimination; and (3) objects to the phrase "value [of collateral] which is mutually agreed upon by Transporter and Shipper" in Section 4.5(c) as providing too much discretion to Tennessee, contending that Tennessee could refuse a shipper's offer of security interest.

**Commission Ruling**

35. The changes proposed by PGC are unnecessary and we will not require Tennessee to revise its tariff. Tennessee's tariff at Section 4.5 clearly states that the five forms of credit assurances are considered prepayments to continue service for a shipper who is insolvent or loses their creditworthiness status. Tennessee is providing uncreditworthy shippers with several options to provide credit assurance to continue receiving service. Tennessee as the transporter, is assuming liability if the shipper fails to pay for services rendered, and correctly reserves the right to determine whether the security interest is equivalent in value to three months of payments. Further, Tennessee has provided an opportunity for the shipper to participate in the assessment of the security interest by including the phrase at Section 4.5 (c) using a security interest as collateral, "the value of which is mutually agreed upon by Transporter and Shipper."[33]

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[33]See Original Sheet No. 405.02 to Tennessee's Gas Tariff, Fifth Revised Volume No. 1.

**Objective Creditworthiness Criteria**

**January 29 Order**

36. The Commission in the January 29 Order made a finding under Section 5 of the Natural Gas Act that Tennessee's tariff is unjust and unreasonable because it allows Tennessee too much discretion in determining when a shipper becomes non-creditworthy, allowing for possible undue discrimination, therefore, Tennessee was required to include objective criteria in its tariff to determine whether a shipper is creditworthy.[34] The Commission determined that with the increased importance of the creditworthiness evaluation process, it is important for the process to be open and objective, requiring Tennessee to set forth objective financial analysis and criteria to determine a shipper's creditworthiness in its tariff. Further, the Commission recognized the need for Tennessee to consider the individual circumstances of its shippers and did not require Tennessee to use financial credit ratings as the sole determinant of creditworthiness.[35]

**Requests for Rehearing**

37. Tennessee requests rehearing of the determination that it must set forth in its tariff the financial analysis and criteria that it will employ in evaluating the creditworthiness of a shipper, contending that the Commission has not met its Section 5 obligation to demonstrate that the current tariff language is unjust or unreasonable.[36] Tennessee argues that the Commission has offered no proof or evidence that its tariff is unjust or unreasonable or that Tennessee has unduly discriminated against a shipper. Tennessee contends that the Commission acknowledged in the January 29 Order that no party has filed a complaint claiming that they have been discriminated against or been unfairly treated by Tennessee in determining their creditworthiness,[37] which according to Tennessee illustrates that its tariff is just and reasonable. Tennessee further contends that the Commission has not proven that its proposed creditworthiness requirements are unreasonable and failed to provide any proposed tariff language but merely stated that

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[34]January 29 Order at P 41.

[35]Id.

[36]Tennessee cites to Mississippi Canyon Gas Pipeline, L.L.C., 91 FERC ¶ 61,245 (2000); Nautilus Pipeline Co. L.L.C., 91 FERC ¶ 61,246 (2000); see also Western Resources Inc. v. FERC, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993).

[37]January 29 Order at P 44.

"Tennessee is required to set forth objective financial analysis and criteria."[38] Tennessee asserts that it should be permitted to continue to exercise its business judgement in evaluating the creditworthiness of its shippers and should not be required to perform its credit evaluations pursuant to a set of tariff-defined objective criteria. Tennessee argues that the evaluation process is a complex and individualized process that cannot be reduced to a limited set of tariff criteria. Tennessee contends that the Commission should grant rehearing of the directive that it set forth in its tariff the financial analysis and criteria that it will employ in evaluating the creditworthiness of a shipper.

38. NiSource argues on rehearing that creditworthiness determinations require reasonable flexibility; therefore, the process should not rely on objective formula without provision for business judgement. NiSource contends that the Commission did not present any evidence that Tennessee was unduly discriminating in its creditworthiness determinations that would support a change in the existing tariff language, nor does the January 29 Order indicate any basis for finding existing approved tariff language no longer to be just and reasonable. NiSource asserts that an important balance must be achieved between "objective criteria" that would leave no room for risk management and criteria that would permit a showing of creditworthiness in a variety of ways subject to appropriate analysis. NiSource believes it would be impracticably to require that Tennessee's tariff set forth entirely objective formula for determining creditworthiness in all circumstances and requests that the Commission modify the order.

39. INGAA argues in its rehearing request that rigid creditworthiness standards are contrary to Commission policy and precedent and that the Commission should permit pipelines flexibility with respect to their creditworthiness standards. INGAA points to Order Nos. 888 and 889, contending that the Commission gave transmission providers significant leeway to establish suitable business practices and make judgements regarding shipper creditworthiness and the Commission should apply such flexible provisions to Tennessee.

**Commission Ruling**

40. The Commission in the January 29 Order, made a Section 5 finding that Tennessee's tariff was unjust and unreasonable because it did not contain objective criteria for evaluating creditworthiness. Objective criteria are necessary to ensure that shippers know the basic standards that Tennessee will apply in determining their creditworthiness status, so they can have the ability to predict whether additional collateral or other requirements may be imposed. Therefore, the Commission required

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[38] January 29 Order at P 41.

Tennessee to set forth in its tariff the financial analysis and criteria that it will employ in evaluating the creditworthiness of a shipper to ensure that Tennessee would be treating all shippers in a non-discriminatory manner.[39]

41. The Commission did not impose restrictions on Tennessee's flexibility in evaluating a shipper's creditworthiness, but merely required the minimum standards that Tennessee uses to evaluate a shipper's creditworthiness be set forth in its tariff. While providing minimum objective criteria in its tariff, Tennessee still retains the discretion to determine a shipper's creditworthiness on a case-by-case basis and to consider the uniqueness of each shipper's circumstances, which Tennessee and NiSource seek in their respective rehearing requests.[40] The Commission's requirement for objective standards does not interfere with Tennessee's right to exercise its business judgement in evaluating a shipper's creditworthiness. Several pipelines provide objective creditworthiness standards in their tariff's, which are similar to the standards that the Commission required Tennessee to provide to its shippers.[41] As the Commission pointed out in the January 29 Order, with the increased importance of the creditworthiness evaluation process, it is important that the process be open and objective.[42] The Commission therefore denies Tennessee's, NiSource's and INGAA's requests for rehearing on this issue.

**Are the Proposed Creditworthiness Criteria, Unjust and Unreasonable?**

**Compliance Filing**

42. In compliance with the January 29 Order, Tennessee established the criteria it will use to determine a shipper's creditworthiness in Article XXVIII at Section 4.3 of its tariff. A shipper is deemed creditworthy if: (i) its long-term unsecured debt securities are rated at least BBB by Standard & Poor's Corporation (S&P) or Baa2 by Moody's Investor

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[39] Id.

[40] Tennessee's Rehearing Request at 13 and NiSource's Rehearing Request at 4.

[41] See Credit Worthiness provisions in: Northern Natural Gas Company's FERC Gas Tariff, Fifth Revised Volumes No. 1 at First Revised Sheet No. 284 and Second Revised Sheet No. 295; North Baja Pipeline, LLC's FERC Gas Tariff, Original Volume No. 1 at Original Sheet Nos. 128 to 132; and PG&E Gas Transmission, Northwest Co.'s FERC Gas Tariff, First Revised Volume No. 1-A at Second Revised Sheet No. 70A and Fourth Revised Sheet No. 72.

[42] January 29 Order at P 41.

Service (Moody's); (ii) shipper's short term and long term outlook opinion is Stable or Positive from S&P or Moody's; and (iii) the sum of reservation fees, utilization fee and any other associated fees for the contract term is less than 15% of the shipper's tangible net worth. If the shipper is rated by multiple agencies, the lower rating applies. If the shipper does not meet these criteria, then a credit appraisal will be based on the following: (a) S&P and Moody's opinions; (b) consistent financial statement analysis; (c) shipper paying its obligations in a timely manner; (d) shipper is not operating under any chapter of the bankruptcy laws; (e) whether a shipper is subject to any lawsuits or judgements outstanding which would seriously reflect upon the business entity's ability to remain solvent; (f) whether a shipper has any delinquent balances with Tennessee; and (g) any other information that is relevant to shippers' current and future financial strength.

**Protest**

43. VPEM in its comments expressed two concerns with the objective criteria for establishing credit. First, Tennessee's second objective criteria, that the short term and long term opinion of the shipper is Stable or Positive from S&P or Moody's[43] should only apply if the credit rating is BBB by S&P or Baa2 by Moody's or higher. VPEM contends that if a shipper's debt is rated several levels higher than the minimum benchmark, a Negative outlook should not be determinative. VPEM asserts that absent this correction, the tariff would result in finding creditworthy, a company rated BBB with a Stable outlook, but not a company with an AAA rating and a Negative outlook. VPEM in its comments urges the Commission to require Tennessee to explain to a shipper in detail, with references to specific facts, the basis for any determination that a shipper is not creditworthy and further that the tariff should provide an avenue for a shipper to challenge such a determination.

44. PGC and Calpine both object to Section 4.3, which requires that a shipper will be deemed creditworthy only "if the sum of reservation fees, utilization fees and any other associated fees, for the contract term is less than 15% of the shipper's tangible net worth,"[44] and argues it should be rejected. Calpine argues that although a shipper may be rated above investment grade by the rating agencies, Tennessee could deem that shipper non-creditworthy if the sum of all fees for the entire term of the contract, is greater than 15% of the shipper's "tangible net worth." Calpine asserts that this is untenable and the

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[43] See Section 4.3(ii) at Sub Eighth Revised Sheet No. 405 to Tennessee's FERC Gas Tariff, Fifth Revised Volume No.1.

[44] See Sub. Eighth Revised Sheet No. 405 to Tennessee's FERC Gas Tariff, Fifth Revised Volume No.1.

provision should be rejected as unjust and unreasonable. Calpine contends that Tennessee failed to provide any 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 and that without such evidence it is impossible to tell whether there is any justification for Tennessee's proposal. PGC submits that there is no basis for why Tennessee would want to limit the length of possible contract terms available to creditworthy shippers and that, at a minimum, Tennessee must provide more detailed information. PGC also objects to the proposed tariff language in Section 4.3 that "[a]cceptance of a Shipper's request for service and the continuation of service are contingent upon the Shipper satisfying on an ongoing basis, a credit appraisal by Transporter."[45] PGC contends that "on an ongoing basis" is overly vague and objects to the implication that a shipper might be required to provide credit information to Tennessee continuously for an indefinite period of time. PGC argues that this requirement places enormous, unjustified burdens on the shipper and must be rejected or at a minimum, more narrowly defined. Both Calpine and VPEM indicate that the meaning of "tangible net worth" found in Section 4.3(iii) of the tariff requires definition and explanation, with Calpine contending that the term could lead to undue discrimination and abuse.

**Commission Ruling**

45. The Commission in the January 29 Order, required Tennessee to revise its tariff, to inform a shipper in writing as to the reasons why it was deemed non-creditworthy.[46] Tennessee failed to revise its tariff providing the required written explanation to non-creditworthy shippers, as prescribed by the January 29 Order. Tennessee is therefore required to revise its tariff, in accordance with the January 29 Order, providing a detailed written notification within 10 days of deeming a shipper non-creditworthy, explaining with specific facts why a shipper was deemed non-creditworthy and providing a recourse for a shipper to challenge such a determination. Such a revision to Tennessee's tariff addresses VPEM's concerns on this issue.

46. Concerning PGC and Calpine's objections to Tennessee's criteria for creditworthiness in Section 4.3 that the sum of reservation fees, utilization fees and other associated fees for the contract term be less than 15% of a Shipper's "tangible net worth," Tennessee has failed to adequately define the term "tangible net worth." While Tennessee in its April 3, 2003 answer to the protests provides a useful definition of

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[45] Id.

[46] January 29 Order at P 46.

"tangible net worth," such an explanation is absent in Tennessee's tariff.[47] In addition, Tennessee also explains in its answer to the protest, 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.[48] Although Tennessee explains in its April 3 answer to the protests that net present value of long term contracts is a factor in its credit determination process, the proposed tariff provisions fail to provide such information. Tennessee is therefore required to revise its tariff providing a definition of tangible net worth and explain that net present value is a factor in credit determination process, so that shippers can better understand what factors are part of the credit evaluation process.

47. Tennessee's uses "tangible net worth" as one of three factors in evaluating a shipper's creditworthiness and this is certainly not the only factor. Further, if a shipper fails the three part test for creditworthiness, which includes "tangible net worth," then Tennessee provides six different criteria a shipper can use to meet Tennessee's creditworthiness determination. A shipper's "tangible new worth" is a reasonable indication of the risk that Tennessee will incur with regard to a particular shipper, that the shipper's transportation service contract will be suspended or terminated, and the associated impact to Tennessee if the shipper does not have sufficient retained earnings and capital to maintain its creditworthiness and perform its duties under the contract. If the shipper fails to meet the three factors, of which "tangible net worth" is only one factor, Tennessee will evaluate all other information and criteria based upon the level of service requested, and the shipper will still have other options to ensure it receives transportation service if the shipper is found not creditworthy. PGC and Calpine have failed to explain why the "tangible net worth" factor is discriminatory, harmful, or too stringent a factor in determining a shipper's creditworthiness. PGC and Calpine's protests on this issue are denied.

48. The Commission will deny VPEM's request for correction of Tennessee's second objective criteria concerning the short term and long term opinion of the shipper being Stable or Positive from S&P or Moody's. We find that Tennessee's criteria is just and reasonable and consistent with our requirement that Tennessee provide objective criteria

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[47]Tennessee 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.

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

in its tariff, providing shippers with specific information on the criteria that will be used to evaluate their creditworthiness applications.

### Credit Evaluation Requiring SEC Report

#### Compliance Filing

49. Tennessee proposed in Article XXVIII, Section 4.2 that either during the request for service, execution of the service agreement or during a future time Tennessee may conduct a credit evaluation. If Tennessee requests a credit evaluation, the shipper is required to provide any or all of four pieces of information: (a) bank reference and at least two trade references; (b) confirmation in writing that it is not operating under any chapter of the bankruptcy laws; (c) notification within two days of a material event or corporate change affecting its financial condition that requires a report with the Security and Exchange Commission (SEC); and (d) a list of owners and/or shareholders.

#### Protest

50. Calpine contends in its protest that the newly proposed Section 4.2(c) which requires that a shipper notify Tennessee of any filing with the SEC, or an equivalent foreign body, within two days and further that shippers who are not subject to SEC reporting requirements must report events that would have been reported to the SEC if subject to SEC reporting requirements is overly burdensome. Calpine contends that such a provision would obligate shippers who are not subject to SEC reporting requirements to review current regulations, monitor changes in regulations and create reports according to those regulations without the requisite economic benefits of such regulation. Calpine asserts that having to provide publicly available documents within two days of making an SEC filing unduly burdens shippers and further that, since the documents are publicly available, Tennessee could track filings by its shippers at a minimal cost. Calpine contends that revised Section 4.2(c) should be rejected.

51. PGC argues that the proposed new Section 4.2(c) raises two concerns. First, Tennessee's proposal to require non-SEC reporting shippers to provide information to Tennessee about an event that would trigger a SEC filing is onerous to these shippers and would require that non-SEC reporting shippers spend significant resources to learn the SEC reporting requirements. Second, the requirement that the shipper notify Tennessee of a material event or corporate change that require an SEC reporting would require substantial financial and administrative costs and does not address many of the Commission's concerns with the original Sections 4.2(c) and (d) proposal.

**Commission Ruling**

52. The Commission finds that Section 4.2(c), requiring shippers to notify Tennessee within two days of a material event that requires a report to the SEC, is unduly burdensome as currently written and must be revised. First, this provision is too burdensome and onerous for shippers who are not subject to SEC reporting requirements. Such shippers should not have to understand, evaluate, and monitor changes in regulations with which they are not required to comply, and we therefore will not require those shippers to have to monitor changes in regulations which they are not required to comply with. Second, Tennessee has failed to explain or justify why a shipper filing with the SEC must provide Tennessee with advance notification of a material change that requires a report with the SEC. As written this provision could require the shipper to provide notice to Tennessee even before it has made a filing with the SEC. Tennessee has not demonstrated that it is entitled to get access to potentially confidential, and sensitive information in advance of the public.

53. However, we find that it is not unreasonable to require shippers, who are subject to SEC reporting requirements, to notify Tennessee when they file a report with the SEC. Since documents that are filed with the SEC are publicly available, a shipper can reasonably be required to notify Tennessee that it has made such a filing, providing a general description of the filing. But it would not be necessary to provide Tennessee with the actual report, if the report is available from the SEC electronically. Tennessee is therefore required to revise its tariff, specifying that the SEC reports are only required of companies which are subject to SEC reporting requirements and that the shipper is required to notify Tennessee when it files a report and provide a general description. If the report is not available from the SEC electronically, then the shipper can be required to provide Tennessee with a copy of the report.

**Credit Evaluation Language**

**January 29 Order and Compliance Filing**

54. The January 29 Order found that the wording of the proposed credit evaluation tariff language of the then numbered Sections 4.2(c) and (d) in Article XXVIII,[49] were

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[49]Section 4.2 included a list of five items that Tennessee may require to evaluate a shipper's creditworthiness. Specifically, Section 4.2(c) required a shipper "confirmation that the shipper is not aware of business conditions that would cause a deterioration in its financial conditions, insolvency, or inability to exist as an ongoing business," while (continued...)

unnecessarily vague and required the shipper to make assumptions about lawsuits or judgements and guess the effect of the shippers and required Tennessee to remove these provisions from its tariff.[50]

55. Tennessee proposes to comply with the January 29 Order incorporating in the Criteria for Creditworthiness section in Article XXVIII of Section 4.3 the following two provisions: 4.3(e) whether the shipper is subject to any lawsuits or judgments outstanding which would seriously reflect upon the business entity's ability to remain solvent and 4.3(g) any other information obtained that is relevant to Shipper's current and future financial strength.[51]

**Rehearing Request and Protests**

**Rehearing Request**

56. Tennessee requests that the Commission grant rehearing of its rejection of proposed Sections 4.2(c) and 4.2(d) in the August 16, 2002 filing as amended on November 19, 2002. Tennessee contends that there is no difference between its proposed Sections 4.2(c) and 4.2(d) and other pipelines' approved tariff language. Tennessee recites its proposed tariff language and then followed with language that the Commission approved for other pipelines.[52] Tennessee argues that the Commission fails to demonstrate why virtually identical provisions in other tariffs are not "unnecessarily vague" and do not require the "shipper to make assumptions about future changes in its

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[49](...continued)
Section 4(d) required that the shipper indicate, "no significant or material collection lawsuits or judgements affecting solvency."

[50]January 29 Order at P 35.

[51]See Original Sheet No. 405.01 to Tennessee's FERC Gas Tariff, Fifth Revised Volume No. 1.

[52]See Tennessee's rehearing request at 17 and note 17, citing Texas Eastern Transmission, L.P., FERC Gas Tariff, Seventh Revised Volume No. 1 at Original Sheet No. 516, Section 3.3; Algonquin Gas Transmission Co., FERC Gas Tariff, Fourth Revised Volume No. 1 at Second Substitute Original Sheet No. 622, Section No. 622, Section 3; and Williston Basin Interstate Pipeline Co., FERC Gas Tariff at Fourth Revised Sheet No. 197, Section 7, continued on Third Revised Sheet No. 198.

business condition which are subject to interpretation."[53] Tennessee further asserts that the Commission's rejection of Sections 4.2(c) and 4.2(d) creates hardships for shippers and its proposal is similar to other common reporting requirements. Tennessee points to the SEC which requires public companies to provide an investor with similar information to allow an understanding of the company's financial status to support its position that Tennessee should be able to require a shipper to confirm that it is not aware of any financial conditions that would cause financial exposure for Tennessee.

**Protests**

57. Calpine, PGC, ProLiance, and Municipals contend in their respective protests that Tennessee failed to comply with the January 29 Order which directed Tennessee to remove Sections 4.2(c) and 4.2 (d) from its tariff, therefore the Commission should either reject this provision or reject Tennessee's filing entirely.

**Commission Ruling**

58. The Commission will deny Tennessee's request for rehearing on this issue. The Commission recognizes that it previously accepted similar provisions to Tennessee's in other pipelines' tariffs; however, Tennessee did not cite to any orders where the Commission specifically addressed this issue. The fact that such provisions have been approved in earlier tariffs in differing circumstances does not prevent the Commission from reconsidering the implications of such a provision in a particular filing in light of current conditions, such as the recent credit downgrades in the industry. The Commission continues to find that Tennessee's proposed tariff language in Section 4.2(c), as discussed above, is unnecessarily vague and subject to interpretation, requiring the shipper to make assumptions without the benefit of the necessary objective criteria. The Commission in its recent creditworthiness orders, has consistently denied tariff language that it has found unnecessarily vague and subject to interpretation and will not grant rehearing on this issue.[54]

59. Further we find that consistent with the January 29 Order Tennessee's proposed tariff language in Sections 4.3(e) and (g) which requires information on lawsuits or judgements outstanding and any other information on a shipper's financial strength, respectively is also unnecessarily vague language that requires the shipper to make

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[53] January 29 Order at P 35.

[54] Northern Natural, 102 FERC ¶ 61,076 at P 33 (2003); Gulf South, 103 FERC ¶ 61,129 at Ps 22 and 32 (2003).

assumptions about what information qualifies for disclosure to Tennessee. Accordingly, Tennessee is required to remove Sections 4.3(e) and 4.3(g) from its tariff.

**Use of Third Rating Service and Lower Credit Rating as Standard**

**Compliance Filing**

60. Tennessee at Section 4.3, proposes the criteria it will use to determine a shipper's creditworthiness. Tennessee proposes to use the ratings of two credit rating agencies, Moody's Investor Service (Moody's) and Standard & Poor's Corporation (S&P) and in the event that a shipper is rated by multiple agencies, the lower rating applies.

**Protests**

61. Calpine contends in its protest that Tennessee should use three rating agencies instead of two in its analysis of a shipper's creditworthiness. Tennessee currently uses S&P and Moody's, with Calpine arguing that Fitch Ratings (Fitch) should be included. Calpine points to Northern Natural and Gulf South as two companies that have recently submitted creditworthiness filings proposing three credit rating agencies.[55] Calpine also contends that to the extent that a shipper is rated by more than two rating agencies, an initial creditworthiness determination should rely on the "majority view" found in those ratings, not the single lowest rating. Calpine contends that such an approach would eliminate the potentially distorting effect of relying solely on the lowest rating.

**Commission Ruling**

62. Tennessee's inclusion of a third credit rating agency such as Fitch is unnecessary since Moody's and S&P are widely recognized credit rating agencies and provide adequate assurance that a shipper's credit is rated fairly. Tennessee's use of two credit rating agencies, Moody's and S&P, is sufficient to satisfy the Commission's requirement to specify objective criteria for evaluating creditworthiness and is in compliance with the Commission's January 29 Order. Consistent with our findings in Gulf South and Northern Natural, the Commission finds Tennessee's proposal to use the lower of the

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[55] See Gulf South's filing in Docket No. RP02-64-000 at Third Revised Sheet No. 284 and Northern Natural's filing in Docket No. GT02-38-004 at Second Revised Sheet No. 284.

credit rating by either Moody's or S&P in determining a shipper's creditworthiness to be reasonable.[56]

**Creditworthiness Criteria for Small Customers**

**January 29 Order**

63. The January 29 Order required Tennessee to include objective criteria for determining whether a shipper is creditworthy in its tariff. The order also stated that Tennessee must set forth in its tariff the financial analysis and criteria that it will employ in evaluating the creditworthiness of a shipper, that for example, does not meet a credit rating standard to ensure that Tennessee is treating all shippers in a non-discriminatory manner. The order did not specifically mention separate creditworthiness criteria for small customers.

**Compliance Filing**

64. In its compliance filing, Tennessee did not propose objective creditworthiness standards specifically tailored to small customers. As discussed above, Tennessee's proposed revised Article XXVIII, Section 4.3 states, in part, that a shipper will be deemed creditworthy if: (1) its long-term unsecured debt securities are rated at a stated minimum level either by the Moody's or S&P's rating service; (2) its short-term and long-term outlook opinion is stable or positive by either rating service; and (3) the amounts to be paid to Tennessee over the contract term constitute less that 15 percent of the shipper's net worth.

**Comments and Protests**

65. The Municipals request that the Commission require Tennessee to revise its tariff to set forth objective creditworthiness criteria which may be applied to small customers. The Municipals argue that, since small shippers cannot meet the first two standards set forth above as they have no unsecured debt securities and they are not subject to an outlook opinion by Moody's or S&P's services, Tennessee's proposed objective criteria may realistically be applied only to large shippers. Therefore, the Municipals object that there are no proposed objective criteria for small customers. The Municipals state that Section 4.3 provides alternative information that Tennessee will evaluate for shippers that do not meet the above standards, but nothing is set forth that is binding on Tennessee in

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[56] See Gulf South, 103 FERC ¶ 61,129 at P 25 (2003) and Northern Natural, 102 FERC ¶ 61,076 at P 30 (2003).

its evaluation. The Municipals state that in Northern Natural the Commission allowed the pipeline to rely on a small customer's past payment history to the pipeline over the prior 12 months to determine whether a small customer is creditworthy, since historically small customers posed not significant credit risk to the pipeline. Since Tennessee has not suggested that small customers pose any significant credit risk, the Municipals and SGS request that the Northern Natural credit test be applied to Tennessee's small customers. If the Northern Natural test is not applied, the Municipals request that Tennessee be required to set forth other objective criteria applicable to small customers.

66. Calpine in its protest contends that a shipper's past payment history is an important testament to the priority a shipper places on pipeline capacity and should be given heavy weight when assessing a customer's creditworthiness. Calpine argues that the Commission should require Tennessee to include a shipper's past payment history among the criteria reviewed during a creditworthiness evaluation.

67. In its answer, Tennesse claims that it has complied with the directive in the January 29 Order. Tennessee asserts that Section 4.3 states that it shall apply consistent evaluation practice to all similarly situated shippers and all the factors and criteria will be applied in a nondiscriminatory manner to every shipper. Thus, Tennessee asserts the criteria are objective and nondiscriminatory and a party claiming discriminatory treatment may file a complaint. The Municipals filed a motion opposing the acceptance of Tennessee's answer and contends that Tennessee's answer only seeks to obfuscate and states the obvious. In the motion, the Municipals reiterate their claims that Tennesse has not set forth objective criteria that apply to all shippers, since none of the objective criteria apply to small shippers. They insist that the January 29 Order did not state that Tennessee need not state any objective criteria at all that apply to small customers.

**Commission Ruling**

68. Calpine's, the Municipals', and SGS' concerns regarding the use of a shipper's past payment history for credit evaluation are unjustified. The proposed criteria for creditworthiness determination of Tennessee's tariff, at Section 4.3(f) in Article XXVIII provides that whether a shipper has paid its account balance to Tennessee, will be one of the factors in determining a shippers creditworthiness. Furthermore, Tennessee's revised standards provide a further basis to evaluate the creditworthiness of customers that do not have ratings by S&P or Moody's or have not been subject to an outlook opinion by S&P or Moody's. As set forth more fully above, Tennessee's revised standards in Section 4.3 provides that, if a shipper is not rated by S&P or Moody's, it may use its parent's rating. Otherwise, the shipper's creditworthiness may be evaluated by Tennessee based on certain relevant financial documents submitted by the shipper. This will provide Tennessee with a basis for evaluating shipper creditworthiness in an objective and non-discriminatory

manner, while also enabling it to recognize legitimate difference between shippers. Accordingly, the protests on this issue are denied.

**Confiscation of Gas**

**January 29 Order**

69. The January 29 Order rejected Tennessee's proposal to confiscate gas left on Tennessee's system by a non-creditworthy shipper after its contract has terminated, without prejudice to Tennessee filing in its tariff a lien or interest that is consistent with applicable state law or the Uniform Commercial Code (UCC).

**Rehearing Request**

70. Indicated Shippers request that the Commission reverse its holding that Tennessee may assert any carrier liens or other interest on defaulting shipper's gas under state law or the UCC. Indicated Shippers argue that the Commission fails to reconcile this holding with its previous rejection of carriers' liens under the UCC and fails to explain how permitting such liens is consistent with the Commission's concerns regarding the pipeline's lack of legal authority to confiscate gas and adequate protection of the rights of other parties. Indicated Shippers state that the Commission has previously held that interstate natural gas pipelines are not common carriers and are not subject to the UCC or carrier liens.[57]

71. Tennessee contends in its rehearing request that the Commission erred in rejecting Tennessee's proposal to take title to a shipper's gas that is left on Tennessee's system after the shipper's service is terminated and compounded the error by suggesting that Tennessee could seek to include a lien or security interest provision in its tariff. First, Tennessee asserts that Commission precedent does not permit a pipeline to assess a lien on gas accepted for transportation. Tennessee cites a Williams case and contends that in that case the Commission rejected the pipeline company's proposal to attach liens to a

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[57] See Williams Natural Gas Company (Williams), 71 FERC ¶ 61,412 at 62,625-26 (1995), order on reh'g and clarification, 73 FERC ¶ 61,285 at 61,778 (1995). See also, Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf, FERC Stats. and Regs., Regulation Preambles July 1996-December 2000 ¶ 31,097 at p. 31,534 n. 60 (2000), reversed on other grounds, Chevron U.S.A. Inc. v. FERC, 193 F. Supp 54 (2002).

shipper's gas in connection with past and current charges.[58] Tennessee also asserts that in denying William's request for rehearing, the Commission stated that the carrier's lien provision of the U.C.C., Section 7-307, does not apply to natural gas pipelines because natural gas pipelines are not common carriers as referred to in the U.C.C.[59]

72. Second, Tennessee argues that it is sensible for a pipeline to take title to a shipper's gas that is left on its system after service is terminated, because the gas left on Tennessee's system occupies limited space. Tennessee contends that if it is forced to allow unclaimed gas to occupy limited space in its storage fields, at no charge for an indeterminate period of time, then other shippers that are willing to pay for this valuable storage service will be unable to do so. Tennessee contends that for this reason, the Commission has previously approved, under Rate Schedule PAL, Tennessee's right to take title to gas parked on Tennessee's system if the shipper does not comply with a request to remove the gas within a certain time frame.[60]

73. Third, Tennessee contends that it is impractical for it to assert a lien on gas that is left on its system under provisions of the U.C.C. Tennessee argues that a carrier lien only applies to goods covered by a bill of lading and, since it does not use a bill of lading, it is unclear that Tennessee uses any document that could legally be construed as a bill of lading.[61] Tennessee further contends that, since a carrier lien under the UCC applies to charges subsequent to the date of the receipt of the good for storage or transportation and does not apply to charges associated with gas transported prior to receipt of the gas on which the lien might be imposed, the carrier lien provision would provide limited benefit.[62] Tennessee asserts that the shipper would likely move the gas subject to a lien off Tennessee's system before Tennessee could terminate service and impose a lien. Tennessee also contends that the lien applies only to charges associated with the gas on which the lien is asserted and not to charges associated with other gas.

**Commission Ruling**

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[58]Williams, 71 FERC ¶ 61,412 (1995).

[59]Williams, 73 FERC ¶ 61,285 at 61,778 (1995).

[60]See First Revised Sheet No. 240 to Tennessee's FERC Gas Tariff, Fifth Revised Volume No.1.

[61]UCC § 7-307(1) (2002).

[62]UCC § 7-307(1) (2002).

74. The Commission affirms its rejection of Tennessee's proposal to confiscate gas left on its system after the shipper's contract is terminated. As the Commission explained in the January 29 Order, Tennessee has not provided sufficient legal justification for the Commission to provide it with a priority to gas left on the system over others with potential claims to that gas. Arguments similar to Tennessee's arguments concerning the impracticality of asserting a lien on gas that is left on its system were recently rejected by the Commission in Gulf South.[63] Even if Tennessee is unable to establish a lien pursuant to applicable law (as discussed below), it has not justified having the Commission provide it with more extensive rights to confiscate gas given the other parties which may have interest in the gas.

75. In regards to Tennessee's concerns regarding the necessity for Tennessee to store the gas on its system, the Commission is not precluding Tennessee from exercising any remedies Tennessee may have to sell the gas or charge storage fees to the holder of the gas or the party that ultimately takes title to the gas. We are deciding only that Tennessee has not justified its contention that the Commission should provide it with a priority right to gas left on its system or the proceeds of the sale of that gas as an offset to the amount a shipper owes Tennessee.

76. The Commission denies the requests for rehearing regarding liens. While the Commission is not providing Tennessee with a priority to gas left on its system, the Commission also sees no reason that the Commission should prevent Tennessee from obtaining a carrier or other lien as permitted under applicable state law.[64] Tennessee should have the ability to avail itself of any protections afforded to non-regulated companies under applicable state law. The Williams and Tennessee orders do not provide persuasive reasons for denying a pipeline the right to assert a lien authorized by state law, and the Commission will not follow those precedents.[65]

77. In Williams, the Commission rejected the pipelines' proposal that gas accepted for transportation would be subject to a lien for all applicable current and antecedent lawful charges. Williams pointed out that oil pipeline tariffs permit similar liens. The Commission provided two justifications for rejecting this provision: that "bad debts must be compensated through the rate of return"; and that "natural gas pipelines are not

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[63]Gulf South, 103 FERC ¶ 61,129 at P 60 (2003).

[64]See Honeoye Storage Corporation, 102 FERC ¶ 61, 340 at P 4 (2003) where the Commission directed Honeoye to revise its tariff to provide that the carrier liens imposed must be consistent with the applicable law.

[65]Tennessee Gas Pipeline Company, 56 FERC ¶ 61,342 at 62,333 (1991).

common carriers as are oil pipelines and the other carriers referred to in the UCC, so that the provisions of the Interstate Commerce Act and the U.C.C. are not applicable here."[66] The Commission finds neither of these justifications persuasive. First, the fact that the pipeline's rate of return includes some element of bad debt risk does not suggest that pipelines should be unable to assert generally accepted legal principles that reduce that risk.[67] Second, while natural gas pipelines are contract carriers, rather than common carriers, the Williams decision did not explain why that difference in status should result in different treatment. To the extent state law permits a pipeline to assert a carrier or other lien, the Commission cannot see any reason to establish a federal policy against asserting that right.[68]

78. In Tennessee, Tennessee proposed a tariff provision that would establish a lien on all customer-owned natural gas received by Tennessee for transportation or storage, to secure payment of any and all charges due Tennessee from customers using Tennessee's system. The Commission rejected this provision because it was overly broad and vague and because Tennessee had other avenues available to it to assure payment. In contrast, here, the Commission is not permitting Tennessee to establish a lien in its tariff, which was the issue addressed in Tennessee; we are only allowing Tennessee to establish a lien acceptable under applicable state law. Also, as stated above, the Commission does not find sufficient justification to deny Tennessee (and its creditworthy customers) additional protection against a shipper default to the extent permitted by applicable state contract law.

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[66] Williams, 73 FERC ¶ 61,285 at 61,778 (1995).

[67] Oil pipelines too have regulated rates of return, which reflect risk.

[68] The Commission is not determining whether the applicable state law would permit such liens, only that it sees no reason to stand in the way of a pipeline that can assert such a lien.

**Shipper Liability for Transportation Charges After Suspension of Services**

**January 29 Order**

79. The January 29 Order required Tennessee to revise its tariff to provide that shippers are not responsible for charges after service is suspended. The Commission also stated that Tennessee's tariff does not give Tennessee the right to collect charges for service after a contract is terminated.

**Requests for Rehearing and Clarification**

80. INGAA asks the Commission to clarify that it did not intend to alter any contractual rights, other remedies or obligations that Tennessee and its shippers might have in court litigation, bankruptcy proceedings or other forums outside of the Commission's proceedings. INGAA insists that the Commission should not provide defaulting shippers with an easy and unjustified defense against a pipeline's lawsuit to recover an appropriate remedy from a defaulting shipper and must consider the large transfer of risk to Tennessee. INGAA asserts that Tennessee's existing tariff allows Tennessee to pursue any other remedy for damages, including litigation, for shipper non-payment in addition to termination or suspension of the shipper's contract.

81. Tennessee, NiSource, and INGAA ask the Commission to grant rehearing of the Commission's determination that a pipeline may not collect demand charges during any suspension of service permitted under its agreements. Tennessee and INGAA argue that the Commission can only modify Tennessee's approved tariff under Section 5 and accordingly must determine that Tennessee's existing tariff is unjust and unreasonable and show that the required modifications are just and reasonable. INGAA contends that a shipper which has failed to maintain creditworthiness or defaulted should not be allowed to walk away from its contractual obligations or years of payment obligations by forfeiting its three-month security deposit. INGAA claims this determination would have far-reaching ramifications for the pipeline industry and contradicts Commission policy to promote industry stability, balance risks between pipelines and shipper, encourage construction of pipeline infrastructure, and to match cost-responsibility with cost incurrence. INGAA submits it would be inequitable for pipelines and their creditworthy customers to bear the cost of unpaid reservation charges during any period in which service is suspended.

82. Tennessee, NiSource, and INGAA argue that during suspension the shipper retains rights to the reserved capacity and the pipeline is not free to enter into a firm transportation agreement with another shipper to mitigate damages. NiSource contends

that relieving shippers of the responsibility to pay for reserved capacity effectively abrogates contracts and creates an incentive for shippers in financial difficulties to refuse to pay outstanding balances or provide security. Tennessee makes similar arguments and states that the Commission's finding will encourage a shipper to benefit from its defaults and allow the shipper to voluntarily or maliciously default and force Tennessee to suspend or terminate the contract with no consequences to the shipper. Tennessee maintains this would permit the shipper to use a suspension period to wait for changes in the market or a termination by Tennessee to abrogate its contract. Tennessee argues that the Commission's ruling leaves termination of shipper contracts as Tennessee's sole viable recourse. Tennessee concludes that the Commission should at least make clear that the limitation does not apply to contracts linked to the construction of new facilities, or Tennessee would have to seriously consider its willingness to proceed with new projects.

**Commission Ruling**

83. The rehearing requests raise three issues: (1) whether the Commission is precluding Tennessee from bringing action for breach of contract; (2) whether shippers can suspend service to avoid demand charges; and (3) whether Tennessee should be permitted to impose reservation charges during a shipper's suspension.

84. The Commission clarifies that its decision will not affect Tennessee's ability to sue for consequential damages caused by a shipper's contractual breach. The Commission found only that if Tennesse elects to suspend a shipper's service, the Commission would not authorize Tennessee to bill that shipper as if the shipper is still receiving service. However, this will not prevent Tennessee for bringing an action for consequential, and unmitigated damages occasioned by a shipper's contractual breach. That is a contractual action that must be brought in the appropriate jurisdiction.[69]

85. Tennessee and INGAA seem to suggest that a shipper may be able to suspend service in order to limit its obligation to pay demand charges. But the Commission provided only that the pipeline cannot charge if it suspends service. So long as the

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[69] See, e.g., 5 Williston On Contracts, § 683 (3d ed. 1961) (where a contract is breached, the injured party has the choice of continuing the contract or refusing to go on); Lucente v. IBM, 310 F.3d 243, 258 (2d Cir. 2002) (non-breaching party has two mutually exclusive options: it may elect to terminate the contract and collect damages for breach or may continue to treat the contract as valid and await the designated time for performance to bring suit); Government Guarantee Fund v. Hyatt Corp., 960 F. Supp. 931, 946 (DVI 1997) (non-breaching party cannot reap the benefits of the contract while at the same time failing to perform its obligations under the contract).

pipeline has not suspended service, the pipeline can continue to bill the shipper for its reservation charges.

86. The Commission affirms its determination that Tennessee's shippers should not be billed for demand charges after service is suspended.[70] Tennessee retains full control of the shipper's obligation to pay. Upon the shipper's failure to maintain creditworthiness, the pipeline can elect its remedy: whether to suspend service or to continue to provide service. [71] If the pipeline elects to suspend service, it cannot bill for service that it does not offer to provide, but the pipeline would be able to sue the shipper for the consequential, unmitigated damages caused by its contractual breach. On the other hand, if the pipeline chooses not to suspend, it can continue to bill the shipper under the contract.

87. Tennessee suggests that a shipper might choose to withhold its provision of collateral to induce Tennessee to suspend service so that the shipper can wait for favorable changes in the market to re-start its service, with no adverse consequences. In the first place, Tennessee has provided no evidence that shippers have engaged in such behavior. Moreover, if Tennessee believes such behavior is occurring, it is under no obligation to suspend service. It may continue to provide service, insist on the payment of demand charges, and then seek to terminate service. Tennessee has failed to demonstrate that it should be afforded the extraordinary remedy of refusing to provide service to a shipper while at the same time billing the shipper as if the service was in effect.

88. We disagree that the Commission must act under Section 5 of the NGA to require Tennessee to modify its August 16, 2002 Section 4 filing. The Commission is not finding that Article X, Section 4 of Tennessee's GT&C is unjust and unreasonable. Article X, Section 4 pertains to termination of service and provides that Tennessee cannot bill shippers after termination of service. Tennessee points to no current tariff provision that

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[70]The Commission has affirmed its policy in two recent order. <u>See</u> PG&E Gas Transmission, 103 FERC ¶ 61,137 at Ps 57-58 (2003) and Gulf South, 103 FERC ¶ 61,129 at P 56 (2003).

[71]The Commission has allowed pipelines the added remedy of suspending service for failure to maintain creditworthiness on shorter notice than termination of service. But the provision of this additional right does not carry with it the consequent ability to charge for service that the pipeline has chosen not to provide. The pipeline should not be entitled to repudiate its obligation under the contract while still insisting that it benefit as if the contract was still fully in effect.

permits it to bill during service suspension, which is consistent with Commission policy. In order to ensure that tariff silence would not be misunderstood, the Commission required Tennessee' to specifically reflect the status quo: that Tennessee has no authority to bill shippers for service during suspension. In any event, the Commission finds for the reasons discussed above that billing shippers during suspension is unjust and unreasonable under § 5 of the NGA.

89. Tennessee has also failed to justify why a different rule should apply for contracts related to new construction. Tennessee has the same ability to elect its remedies with respect to these shippers. It can either suspend service, and sue for consequential damages, or continue to bill the shippers for service. Further, Tennessee has the ability to require adequate assurances for new construction. As discussed above in this section, Tennessee may pursue any other contract rights and remedies it may have under state contract law for breach of contracts related to new construction.

90. In its compliance filing, Tennessee did not file to comply with the requirement of the January 29 Order that it revise its tariff to provide that shippers are not responsible for charges after service is suspended. Thus, Tennessee's filing does not comply with the January 29 Order. Accordingly, within 20 days of the issuance of the order, Tennessee is required to file revised tariff sheets to comply with the January 29 Order on this issue.

### Interaction with Bankruptcy Code

#### January 29 Order

91. The January 29, 2003 order accepted Tennessee's proposed Article XXVIII, Section 4.10 which states, "[t]ransporter intends that this Section 4 shall be read in harmony, and not in conflict, with the Bankruptcy Code." The Commission found that the provision only reflects the fact that Tennessee's tariff cannot conflict with the U.S. Bankruptcy Code.

#### Request for Rehearing

92. The Industrials request the Commission to clarify that Article XXVIII, Section 4.5, which allows Tennessee to require a shipper to pay past-due amounts within five business 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. The Industrials assert that a shipper's failure to pay pre-petition debts would not result in suspension of service. Tennessee contends that, in light of Section 4.10 quoted above, the clarification is unnecessary. Tennesse asserts that the Industrials' request asks the Commission to prematurely determine that funds are property of a

currently non-existing bankruptcy estate and the determination of whether past-due amounts qualify as a pre-petition debt exempt from Section 4.5 is the jurisdiction of the Bankruptcy Court.

**Commission Ruling**

93. The Commission agrees that the clarification is unnecessary and denies rehearing. 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.

**C. Capacity Release Provisions**

**Impositions of Creditworthiness Standards by Releasing Shippers**

**January 29 Order**

94. The January 29 Order clarified that releasing shippers do not have the right to impose creditworthiness conditions on a replacement shipper independent of the creditworthiness conditions imposed by the pipeline. It stated that the Commission has determined that the releasing shipper cannot establish separate creditworthiness standards, because they might conflict with the pipeline's standards, or specify more stringent standards than the pipeline's standards.[72]

**Request for Rehearing**

95. NiSource submits that the Commission should confirm that the prohibition against a releasing shipper imposing more stringent creditworthiness standards than the pipeline does not impact on the creditworthiness evaluation and support requirements an LDC may use on its distribution system or a supplier of gas in a retail unbundling program. NiSource argues that state and individual LDC creditworthiness criteria are beyond the jurisdiction of the Commission. NiSource notes that an LDC may be required by state regulations or company procedure to apply its own criteria to evaluate the creditworthiness of a marketer or consumer for purposes of distribution services or obligation to serve retail customers. NiSource asserts that, while the Commission may

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[72]See, El Paso Natural Gas Company, 61 FERC ¶ 61,333 at 62,299 (1992); Panhandle Eastern Pipe Line Company, 61 FERC ¶ 61,357 at 62,417 (1992); Texas Eastern Transmission Corporation, 62 FERC ¶ 61,015 at 61,098 (1993); and CNG Transmission Corp., 64 FERC ¶ 61,303 at 63,225 (1993).

not permit the LDC to add prepayment obligations to a release agreement for capacity, the LDC may have additional prepayment or other support required of a marketer using released capacity to serve retail customers.

**Commission Ruling**

96. The Commission clarifies that the January 29 Order was addressing capacity releases in the interstate market and release agreements which require Commission approval. The Commission was not attempting to extend its jurisdiction. LDC's are not prohibited from following state law regarding creditworthiness standards for distribution services and retail sales.

**Recall Rights**

**January 29 Order**

97. The January 29 Order found that it was unnecessary for Tennessee to add language to its tariff providing that a releasing shipper may recall capacity or terminate its agreement with the replacement shipper when the replacement shipper loses its creditworthy status or is in default on payments, since releasing shippers are permitted under the Commission's regulations to include a provision in their releases which allow the releasing shipper to recall capacity at the releasing shipper's discretion.

**Request for Rehearing**

98. On rehearing, Dominion urges the Commission to clarify that if Tennessee suspends a replacement shipper's contract, the capacity will automatically revert back to the applicable releasing shipper. Among other things, Dominion argues that the capacity should revert back to the releasing shipper to prevent Tennessee from collecting twice for the same capacity. In its answer, Tennessee claims that Dominion's argument is based on the faulty assumption that Tennessee can track sales of interruptible service to capacity freed up by the suspension of a replacement shipper's contract. Tennessee states it does not have this ability.

**Commission Ruling**

99. We grant clarification that if Tennessee suspends a replacement shipper's contract, the capacity reverts back to the applicable releasing shipper during the suspension period. The releasing shipper remains liable for reservation charges under its contract with Tennessee even if the replacement shipper's service is suspended. When the replacement shipper's contract is suspended, it cannot use its service and will not be obligated to pay the pipeline under its contract. In that event, the releasing shipper will not obtain the capacity release credits. Since the releasing shipper will be paying reservation charges and will not be receiving any revenue from the release, the firm rights to use the capacity should revert to the releasing shipper during the suspension period.[73]

100. The Commission does not understand Tennessee' argument concerning tracking of interruptible sales. There is no need for Tennessee to track its interruptible sales if a replacement shipper has its service suspended. As is always the case, the releasing firm shipper will have priority in using the capacity, but if any capacity is not used Tennessee can sell that capacity as interruptible service. There is no need for Tennessee to track or otherwise credit the releasing shipper for such interruptible sales.

**Notice Provided to Releasing Shipper**

**January 29 Order**

101. Since the releasing shipper is ultimately responsible for any default by the replacement shipper, the January 29 Order required Tennessee to revise its tariff to simultaneously notify the releasing shipper of the uncreditworthiness, past due notice, or default of the replacement shipper.

**Compliance Filing**

102. Tennessee states that it has revised Sections 11.11(j) and 12.ll(d) of Article III of its GT&C and, and Section 4.5 of Article XXVIII to provide that Tennessee shall simultaneously notify the releasing shipper of the loss of creditworthiness, past due notice, or default of the replacement shipper. However, Tennessee has not provided for simultaneous notification to the releasing shipper in all pertinent portions of Sections 11.11(j) and 12.11(d).

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[73]Any reput rights (the right of the replacement shipper to use the capacity if the suspension period ends) depends upon the terms of the release agreement.

**Comments**

103. Dominion requests that Tennessee add the word simultaneously to the revised notification language Tennessee is proposing in revised Article III, Sections 11.11(j) and 12.11(d). Dominion asks that the requirement that Tennessee provide simultaneous notice via e-mail and facsimile to the releasing and replacement shipper when Tennessee suspends or terminates the replacement shipper's agreement for non-payment be added to relevant sections of Article III. Dominion states that the phrase "via e-mail and facsimile" should be added to the provision in Article XXVIII, Section 4.5 stating that Tennessee will simultaneously notify the releasing shipper when a replacement shipper has lost creditworthiness. Dominion submits that the reference to notice pursuant to Article III, Sections 11.11(j) and 12.11(d) in Article XXVIII, Section 4.5 is inappropriate, since the sections deal with a shipper's default for non-payment, not a shipper's failure to meet creditworthiness standards. Dominion also contends that the requirement that Tennessee provide simultaneous notice via e-mail and facsimile to the replacement and releasing shipper when Tennessee suspends or terminates the replacement shipper's service agreement for failing to provide the necessary credit assurances should be added to Section 4.5.

104. In it answer, Tennessee states that it is willing to add language to its tariff, to clarify that the releasing shipper will be given notice "reasonably proximate in time" to the notice provided to the replacement shipper.

105. KeySpan comments that Tennessee should provide notice to a releasing shipper when Tennessee requests creditworthiness information from a replacement shipper to reevaluate the replacement shipper's creditworthiness status, or when Tennessee suspends service to a replacement shipper. KeySpan submits that the additional notices will enable releasing shippers to take action to minimize the amount of unpaid reservation charges that could accrue as a result of a replacement shipper's default and is not unduly burdensome on Tennessee. In its answer, Tennessee argues that notices of requests to a replacement shipper for financial information are not required by the January 29 Order and the information requested from the replacement shipper may be considered confidential and proprietary information.

**Commission Ruling**

106. The changes requested by Dominion will help clarify Tennessee's proposed notice provisions as well as bring them more into compliance with the January 29 Order. It should not be too burdensome for Tennessee to provide simultaneous notice to the releasing shipper and replacement shipper rather than notice reasonablely proximate in time. We agree with Dominion and KeySpan that Tennessee should provide

simultaneous notice to the replacement and releasing shipper when Tennessee suspends or terminates the replacement shipper's service agreement. Since the releasing shipper is ultimately responsible for charges related to the reserved capacity, the replacement shipper should simultaneously be notified that Tennesse has terminated or suspended the replacement shipper's service agreement. Accordingly, Tennessee is required to revise its tariff consistent with Dominion's comments and to provide that Tennessee will provide simultaneous notice to the replacement and releasing shipper when Tennessee suspends or terminates the replacement shipper's service agreement within 20 days of the issuance of this order.

107. We reject KeySpan's suggestion that Tennessee should notify releasing shippers when it requests financial information from replacement shippers. As modified above, Tennessee's proposed provisions will give adequate notification to releasing shippers of steps being taken by Tennessee to protect itself from non-creditworthy replacement shippers. A request to a replacement shipper for additional information to evaluate creditworthiness does not indicate that Tennessee believes the replacement shipper is non-creditworthy. Such a request simply means that Tennessee would like additional information and notification to the releasing shipper at such a time would be premature.

## D. Miscellaneous Issues

### Incorrect References to Section 4.4 Instead of 4.5

#### Compliance Filing

108. Tennessee in filing revised tariff sheets on February 28, inserted a new provision in Section 4 of its tariff, renumbering the previous Section 4.4, to Section 4.5 in Article XXVIII.

#### Protest

109. Dominion contends that Tennessee should be required to correct the incorrect references to Section 4.4 (which should read Section 4.5). In particular, Dominion contends that Sheet Nos. 326, 330, 343, and 344 refer to Section 4.4 which has now been changed to Section 4.5 in the February 28 filing.

**Commission Ruling**

110. Since Tennessee inserted a new provision in Section 4 of its tariff, renumbering this section, Tennessee is required to change the reference on Sheet Nos. 326, 330, 343, and 344 from Section 4.4 to Section 4.5 to correctly refer to the proper section in its tariff.

**Performance Guarantees to Shippers**

**Request for Rehearing**

111. Calpine argues on rehearing that because Tennessee's parent company, El Paso Corporation, has been subject to significant crediting rating downgrades and shippers may be impacted by imprudent financial activities of the pipeline, the Commission should require Tennessee to revise its tariff to state that a shipper may demand reasonable performance guarantees. Calpine contends that shippers should be able to require the pipeline to provide assurances that financial uncertainty will not increase (1) the risk of non-performance by the pipeline or (2) the cost of service. Calpine contends that the Commission should revise its January 29 Order and require Tennessee to amend its tariff so that its shippers have a clear right to demand reasonable performance assurances when either (1) the pipeline's credit rating drops below the credit rating criteria that the pipeline itself relies on in connection with shipper collateral obligation or (2) other events occur that may adversely affect pipelines' service or rate obligations.

**Commission Ruling**

112. Calpine offers no evidence that Tennessee or any other pipeline is breaching its duty to perform because the pipeline company or its parent has lost its creditworthiness. Calpine is speculating about what could happen in the future and has failed to offer any precedent establishing the right for shippers to require a pipeline company to provide a performance guarantee. If the shipper is concerned about performance guarantees, particularly for a construction project, then that shipper can protect itself by inserting clauses into the precedent agreement that provide remedies if the pipeline fails to fulfill its obligations. Calpine's rehearing request on this issue is denied.

<u>The Commission orders</u>:

(A) The requests for rehearing are granted in part and denied in part as discussed in the body of this order.

(B) Tennessee's compliance filing in Docket No. GT02-35-004 is accepted as in compliance with the January 29 Order, effective February 16, 2003, subject to Tennessee filing, within 20 days of the date of this order, the modifications directed above.

By the Commission.

( S E A L )

Magalie R. Salas,
Secretary.