

105 FERC ¶ 61,120
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. GT02-35-005
GT02-35-006

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 24, 2003)

1. On June 24, 2003, Tennessee Gas Pipeline Company (Tennessee) filed tariff sheets¹ in compliance with the Commission's June 4, 2003 order in this proceeding. The June 4, 2003 order (June 4 Order)² conditionally accepted Tennessee's modified filing to revise the creditworthiness provisions in its tariff. Tennessee also filed a request for rehearing of the June 4 Order. Other parties filed protests or adverse comments to Tennessee's June 24, 2003 compliance filing. As discussed below, the Commission partially grants and partially denies rehearing, finds that Tennessee has generally complied with the June 4 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.

¹Sub Second Revised Sheet No. 326, Sub Third Revised Sheet No. 330, 2nd Sub Third Revised Sheet No. 338, Sub Eighth Revised Sheet No. 343, Sub Third Revised Sheet No. 344, Sub Fourth Revised Sheet No. 348, 2nd Sub Eighth Revised Sheet No. 405, Sub Original Sheet No. 405.01, Sub Original Sheet No. 405.02, 3rd Sub Ninth Revised Sheet No. 405A, and Sub Original Sheet No. 405A.02 to FERC Gas Tariff, Fifth Revised Volume No. 1.

²Tennessee, 103 FERC ¶ 61,275 (2003).

Background

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.³ The order accepted the tariff sheets effective the earlier of February 16, 2003, or the date the Commission specified in an order issued after the technical conference.

3. After the technical conference, the Commission issued an order January 29, 2003 (January 29 Order),⁴ which addressed the technical conference and accepted Tennessee's November 19, 2002 pro forma tariff filing and September 30, 2002 compliance filing, subject to conditions. Pertinent details of the January 29 Order are described below.

4. On February 28, 2003, Tennessee submitted its filing in compliance with the January 29 Order. A number of parties filed protests and adverse comments to the February 28, 2003 compliance filing and several parties requested rehearing of the January 29 Order. The June 4 Order accepted Tennessee's February 28, 2003 compliance filing, subject to Tennessee filing further revisions to its creditworthiness provisions and granted rehearing in part and denied rehearing in part. Tennessee has requested rehearing of the June 4 Order. Pertinent details of the June 4 Order are described below.

Notice, Interventions and Protests

5. Notice of Tennessee's June 24, 2003 compliance filing in Docket No. GT02-35-005 was issued providing for an intervention due date of July 7, 2003. Interventions and protests were due as provided in Section 154.210 of the Commission regulations, 18 C.F.R. § 154.210 (2003). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2003), all timely filed motions and motions to intervene out of time filed before the issuance of this order are granted. Granting late interventions at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

6. Process Gas Consumers Group (Process Gas) and Rhode Island State Energy Statutory Trust 2000 (Rhode Island) filed protests. Calpine Energy Services, L.P.

³Tennessee, 100 FERC ¶ 61,268 (2002).

⁴Tennessee, 102 FERC ¶ 61,075 (2003).

(Calpine), The East Ohio Gas Company d/b/a Dominion East Ohio, and The Peoples Natural Gas Company d/b/a Dominion Peoples (Dominion LDCs) filed comments. Tennessee filed an answer to the protests and comments.⁵ The protests, comments and answer are addressed below.

Discussion

7. Tennessee's request for rehearing is accepted, in part, and denied, in part, as discussed below. Tennessee's compliance filing as generally in compliance with the June 4 Order, subject to Tennessee filing revised tariff sheets within 20 days of the issuance of this order as discussed below. The rehearing request, protests, and comments are addressed in the sections below.

I. Tennessee's Rehearing Requests

A. Shipper Liability for Transportation Charges After Suspension of Services

1. Prior Orders

8. The January 29 Order required Tennessee to revise its tariff to provide that shippers are not responsible for charges for suspended service.⁶ The June 4 Order rejected Tennessee's rehearing argument that the Commission must act under Section 5 of the NGA to require Tennessee to modify its August 16, 2002 Section 4 filing, since the Commission did not find that Article X, Section 4 of Tennessee's tariff pertaining to termination of service was unjust and unreasonable. The Commission found that Tennessee's tariff was silent on the billing of shippers for suspended service and wanted to ensure that the tariff's silence could not be interpreted in a manner inconsistent with Commission policy. Nevertheless, the Commission did find that charging shippers for suspended service is unjust and unreasonable under Section 5 of the NGA.

2. Rehearing Request

9. On rehearing, Tennessee again argues that the Commission must act under Section 5 of the NGA to reject Tennessee's right to hold shippers responsible for transportation

⁵While 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. See 18 C.F.R. § 385.213(a)(2) (2003).

⁶June 4 Order at P 32.

charges after Tennessee suspends service. Tennessee contends that its tariff provides that a shipper shall pay for its reservation charges unless the service agreement is terminated.⁷ Tennessee argues that the June 4 Order fails to justify why a shipper should not be responsible for transportation charges if it breaches its agreement and Tennessee suspends service. Tennessee asserts that the Commission failed to explain or cite precedent for its policy that shippers are not liable for charges for suspended service. Again Tennessee claims that the Commission has interfered with Tennessee's private contracts and limits Tennessee's options to work with a defaulting shipper. Tennessee maintains it is limited to the sole option of terminating the service agreement, since it is at risk for under-recovery of its costs during a suspension of service. Tennessee objects that it is deprived of its compensation for reserved capacity during a suspension.

3. Commission Ruling

10. Rehearing is denied. The Commission adequately addressed Tennessee's arguments in the June 4 Order. The Commission does not agree that Tennessee's current tariff and service agreement permits it to charge for service during suspension. Section 6.1 of the service agreement indicates the rates a shipper will pay commencing upon the effective date of the agreement for "service provided." When Tennessee suspends service, it provides no service. Thus, Tennessee was proposing a change to its current tariff in this proceeding, and the Commission determined that change was not justified.

11. In any event, in the June 4 Order, the Commission did find pursuant to Section 5 of the NGA that Tennessee charging shippers for suspended service is unjust and unreasonable.⁸ As the Commission explained, the non-breaching party to a contract must elect whether to continue the contract or suspend the contract, but it cannot suspend its performance while requiring performance by the other party. Tennessee retains full control of the shipper's obligation to pay. Tennessee can elect to suspend service or continue to provide service and sue the shipper for consequential, unmitigated damages caused by its contractual breach. It is unjust and unreasonable for the pipeline to continue to charge for services when it refuses to perform its obligation to provide service under the contract.

12. Tennessee maintains that it is still continuing its obligation to reserve capacity for the shipper during suspension, and should therefore be paid for reserving the capacity. But the shipper is not paying simply to reserve capacity; it is paying to reserve capacity

⁷See Third Revised Sheet Nos. 531-537 (Article VI of pro forma FT-A Service Agreement).

⁸June 4 Order at P 88.

and, more importantly, to have Tennessee transport gas using that capacity. By refusing to transport gas during suspension, Tennessee is failing to perform its obligation under the contract. Tennessee, therefore, should not be permitted to continue to charge the shipper as if it were receiving service.⁹

13. Tennessee maintains the Commission does not have a consistent policy prohibiting the pipeline from charging shippers during suspension. As pointed out in the June 4 Order, in its recent creditworthiness cases the Commission has applied the same policy to other pipelines.¹⁰ Tennessee has not cited any instance where the Commission permitted a pipeline to continue to charge a shipper for transportation service when the pipeline has suspended service. But even if the Commission's policy has been inconsistent, as Tennessee alleges, the Commission finds that permitting such charges, for the reasons discussed here, is not just and unreasonable.

14. Tennessee complains that it is at risk for under-recovery of its costs if it cannot charge for service during suspensions. But again, this is an election of remedies the pipeline must make. If the pipeline is concerned that its liability may increase, it may choose to suspend (and ultimately terminate service), in which case it can sue the breaching party for damages. Or, it can elect to continue to provide the service with the shipper being responsible for demand charges. Indeed, Tennessee concedes that when a pipeline terminates service, it can no longer charge the shipper under its contract. The Commission has permitted pipelines the added remedy of suspension of service on shorter notice than termination of service. But the provision of such added protection does not warrant providing the pipeline with the right to charge for service during suspension when it would not have that right if service is terminated. For instance, under Tennessee's tariff, the shipper's contractual breach may consist only of failing to post required collateral due to a change in its creditworthiness evaluation. In this situation, Tennessee may deem the loss of creditworthiness sufficient to suspend service on short notice in order to protect against the incurrence of additional obligations. But Tennessee should not be given added incentive to suspend service by being protected against financial loss in the meantime. It must decide which remedy to elect: suspension of service or continuation of the contract and the shipper's obligation to pay.

⁹With apologies to Cervantes, "You cannot eat your cake and have your cake". Don Quixote. Part ii. Chap. xliii.

¹⁰PG&E Gas Transmission, 103 FERC ¶ 61,137 at PP 57-58 (2003) and Gulf South, 103 FERC ¶ 61,129 at P 56 (2003).

B. Interest on Collateral

1. Prior Orders

15. The June 4 Order affirmed the finding in the January 29 Order¹¹ 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 if needed.¹² The June 4 Order stated that Tennessee had the burden to show that its proposed creditworthiness provisions are just and reasonable and its argument regarding the treatment of prepayments by the Bankruptcy court was not persuasive. The order also explained that the prepayments are security for payment for future service and the shipper should be compensated for the time value of money that Tennessee holds. Finally, the Commission found that Tennessee's alternate proposal, to prospectively credit all prepayment required for a shipper's lack of creditworthiness to the shipper's monthly invoice, was not appropriate in a rehearing request and was not required to comply with the January 29 Order. Accordingly, the alternative proposal was rejected.

2. Rehearing Request

16. On rehearing, Tennessee claims its alternative proposal to prospectively credit all prepayments, required for a shipper's lack of creditworthiness, to the shipper's monthly invoice does not require a separate NGA Section 4 filing. Tennessee contends that it did not propose new tariff language, but simply attempted to clarify its prospective practice in treating the prepayments. Tennessee also claims that the Commission did not address Tennessee's concerns that if it provides shippers with the opportunity to earn interest on prepayments, Tennessee may be harmed if the shipper files for bankruptcy. Tennessee claims that the Commission's decision may jeopardize Tennessee's ability to assure it is paid for services provided. Tennessee claims that a corollary to the Commission's findings in the Florida Gas orders is that if a shipper's prepayment is used to pay for service it is the pipeline's and should not accrue interest.¹³ Finally, citing Williston

¹¹See January 29 Order at P 38 and n. 13.

¹²June 4 Order at PP 17-18.

¹³Florida Gas Transmission Co. (Florida Gas), 66 FERC ¶ 61,140 at 61,261 (1994) and 66 FERC ¶ 61,376 at 62,528 (1994).

Basin, Tennessee argues that if it must pay interest on prepayments its shareholders must bear the costs.¹⁴

3. Commission Ruling

17. We deny rehearing, finding that pipelines must offer non-creditworthy shippers an opportunity to collect interest on amounts held as security to protect the pipeline in the event of default. Under Tennessee's tariff, it is holding the three-months of demand charges, while continuing to charge the shippers their monthly transportation charge. The shipper is also entitled to a return of the withheld payments if it satisfies Tennessee's creditworthiness requirements. In these circumstances, the amounts provided by non-creditworthy shippers to Tennessee are therefore designed to provide collateral or security against potential default, not prepayments of future demand charges, and the pipeline should be responsible for paying the shipper interest to cover the time value of the money it is holding as security.¹⁵ Moreover, the Commission generally requires pipelines to pay interest on amounts held for shippers to ensure that the shippers are not unduly harmed by having the pipeline hold monies due.¹⁶ The Commission finds no basis for treating collateral put up by non-creditworthy shippers differently from other amounts held by the pipeline. Indeed, the pipeline may well hold such collateral for long periods of time (depending on the shipper's contract duration and whether they can satisfy the pipeline's creditworthiness requirements), and it would be inequitable for the pipeline to hold monies for such an indeterminate time without affording the shipper the opportunity to earn interest on the amounts held.¹⁷

18. Tennessee maintains that the Commission failed to respond to its argument that requiring the payment of interest may harm Tennessee. Tennessee maintains that the payment of interest could result in a bankruptcy court determining that the amount held by Tennessee is a security deposit, rather than a prepayment, and could result in the

¹⁴Williston Basin Interstate Pipeline Co., 67 FERC ¶ 61,137 at 61,360 (1994), reh'g, 71 FERC ¶ 61,019 (1995).

¹⁵See Commissioner of Internal Revenue v. Indianapolis Power & Light Co., 493 U.S. 203, 209 (1990) (amounts held by utility were not considered prepayments when the timing and method of refund are within the control of the customer).

¹⁶See Anadarko Petroleum Co. v. FERC, 196 F.3d 1264, 1267-68 (D.C. Cir. 1999) ("interest is merely a way of ensuring full compensation").

¹⁷See, e.g., Trailblazer Pipeline Company, 103 FERC ¶ 61,074, at P 69 (2003) (requiring pipeline to pay interest on penalty revenues retained for only one year).

bankruptcy court determining that the funds belong to the bankrupt's estate rather than Tennessee.

19. First, as discussed above, the Commission finds that requiring collateral for non-creditworthy shippers is properly considered as collateral or security, rather than as a prepayment of demand charges. This amount is put up by the shipper only because the shipper cannot meet the creditworthiness provisions of Tennessee's tariff, and Tennessee holds this amount for an indeterminate term (so long as the shipper fails to meet the creditworthiness provisions of the tariff), while continuing to bill the shipper the same monthly reservation charge as it bills other shippers. The amounts held, therefore, are in the nature of collateral or security against default, not prepayments for service.¹⁸ Tennessee cites no support for the proposition that the amounts it holds are properly considered prepayments, and not security, or that it should not be required to pay interest on such funds. Further, Tennessee provides no citation for its contention that a bankruptcy court may consider the payment of interest alone sufficient to make the difference between whether property is considered a part of the bankrupt's estate. In any event, the Commission's determination of how properly to treat collateral held by the pipeline cannot be governed by how a bankruptcy court may possibly treat the transaction, but on the Commission's determination of whether the pipeline's holding of such funds without the payment of interest is just and reasonable. And, as discussed above, the Commission finds that interest must be paid to ensure that the pipeline's rates are just and reasonable and not unduly discriminatory. The Commission, however, has permitted pipelines to structure their collateral provisions in whatever way is most beneficial, as long as the shipper is given the ability to earn interest on the transaction.¹⁹

20. Tennessee further contends that the Commission erred in finding that it would have to make a section 4 filing in order to propose that the amounts it holds for the shippers are prepayments. It claims that its long-standing practice is to hold prepayments while continuing to bill shippers for service charges and to refund the payments if the shippers cures its lack of creditworthiness. Tennessee argues that all it attempted to do in its rehearing petition was to clarify this practice in line with a previous tariff provision, and was not proposing new tariff language in its rehearing request.

¹⁸In fact, if Tennessee does not pay interest on the amounts it holds, it would, in effect, be charging the shipper more than other shippers (and more than the maximum rate) by an amount equal to the time value of the money.

¹⁹See *Northern Natural Gas Company*, 102 FERC 61,076 at PP 38-39 (2003) (shipper can deposit funds in an interest bearing escrow account where the principal is maintained by the pipeline and the interest is paid to the shipper).

21. Tennessee's argument that it did not propose new tariff language in its rehearing request is disingenuous. In this proceeding Tennessee proposed changes to its creditworthiness provisions, including a new Section 4.5 which provides, in part, that if a non-creditworthy shipper desires to continue service, it may make a prepayment to Tennessee. The tariff filing contained no provision regarding crediting to a monthly invoice. The Commission found in the January 29 Order that Tennessee's proposal was deficient because it failed to provide for the payment of interest on the collateral Tennessee held.

22. In its request for rehearing of the January 29 Order, Tennessee argued that the Commission should not require Tennessee to allow a shipper the opportunity to earn interest on prepayments. Tennessee did not propose to credit all prepayments to a shipper's monthly invoice until its request for rehearing of the January 29 Order, and that proposal was not a part of its original tariff filing.²⁰ It is inappropriate to make such a new proposal on rehearing. If Tennessee wishes to file a new proposal, it must do so in a section 4 proceeding where shippers have the right to intervene and protest, and the Commission can judge whether that new proposal is just and reasonable.

23. Moreover, Tennessee appears to be proposing only that it will deem the three months collateral to be credited to the shipper's invoice, while, at the same time, Tennessee continues to bill the shipper for succeeding months' reservation charges. If this is the nature of Tennessee's proposal, then it is no different in substance from Tennessee's holding of collateral, without paying interest, and, as described above, such a proposal is unjust and unreasonable.²¹ If Tennessee believes that its proposal is substantively different, it must make a full proposal under section 4 so that the parties and the Commission can judge whether its proposal is just and reasonable.

²⁰Tennessee also has failed to point to any provision in its current tariff that establishes its right to treat collateral payments by non-creditworthy shippers as prepayments not subject to the payment of interest. It cites only to a tariff sheet accepted in 1987, which is no longer in effect.

²¹As the Commission stated in the June 4 Order, a pipeline may be able to justify requiring a non-creditworthy shipper to prepay the reservation charge for firm service one month in advance, without the payment of interest. See Trailblazer, 103 FERC ¶ 61,225 at P 14, 20 (2003). But this approach is far different from Tennessee's contention that it be permitted to hold 3-months of demand charges while continuing to bill the shipper each month. Such a proposal is more like the provision of collateral or security, as opposed to pre-payment for services.

24. Tennessee seeks to distinguish Florida Gas (in which the Commission ruled that pipelines must pay interest on prepayments provided as collateral), by arguing that if the prepayment is not used to pay for service then interest should be charged, but that if the prepayment is used to pay for service, then no interest should be charged. But this argument supports the conclusion that Tennessee must pay interest on the collateral it holds as security. In this case, the collateral held by Tennessee is not being used to pay for service; rather, it is being held by the pipeline, while, as Tennessee concedes, it is “continuing to bill the shipper for its service charges.” (Tennessee Rehearing at 9).

25. The Commission cannot discern the claimed inconsistency between its holding here that Tennessee must pay interest on security, and its decision in Williston Basin.²² In Williston Basin, the Commission found that a pipeline could not include in its cost-of-service amounts representing uncollectible revenues from customers that failed to pay transportation charges, which Williston chose to write-off, rather than seek to collect. The Commission ruled that the pipeline’s bad debts are a risk of doing business that are compensated through the rate of return and that its ratepayers, therefore, should not be responsible for paying costs already reflected in the pipeline’s rate of return. The Commission cannot see any relationship between the issue of whether the pipeline pays interest on security it holds and whether the pipeline’s rate of return adequately covers its bad debt exposure. But, in any event, this would be an issue for Tennessee to raise in a rate case, and has no bearing on whether it should be permitted to hold security deposits without charging interest.

C. Written Explanation of Non-Creditworthiness Finding

1. June 4 Order

26. The June 4 Order required Tennessee to revise its tariff at Section 4.5 to state that Tennessee will provide a shipper deemed non-creditworthy a detailed written notification explaining with specific facts why the shipper was deemed non-creditworthy and provide a recourse for the shipper to challenge such a determination.²³

2. Rehearing Request

27. On rehearing, Tennessee requests that the Commission permit Tennessee to provide such written notification only when requested by the shipper. Tennessee

²²Williston Basin Interstate Pipeline Company, 67 FERC ¶ 61,137, at 61,360 (1994).

²³June 4 Order at P 45.

contends that the June 4 Order ignores the fact that a shipper may not want such detailed information put in writing.

3. Commission Ruling

28. We agree that it is just and reasonable for Tennessee to send the written notification required by the June 4 Order only when a shipper requests such written notification. Shippers' interests are protected if they are given the choice whether to receive such written notifications. Since Tennessee is directed to file a revised Article XXVIII, Section 4.5 above, in its compliance filing Tennessee may provide that Tennessee will provide a written explanation of its credit evaluation upon request.

D. Sections 4.3(e) and 4.3(g)

1. June 4 Order

29. Article XXVIII, Section 4.3, as proposed in Tennessee's February 28, 2003 compliance filing, provides that, if a shipper does not meet certain listed criteria to be deemed creditworthy, the shipper may have Tennessee evaluate its creditworthiness based on information and credit criteria set forth in Sections 4.3(a) - 4.3(g). Sections 4.3(e) and 4.3(g) state information on lawsuits or judgments seriously reflecting on a shipper's solvency and other information on a shipper's financial strength will be used by Tennessee in its credit evaluations. The June 4 Order rejected Sections 4.3(e) and 4.3(g) as too vague.²⁴

2. Rehearing Request

30. Tennessee seeks rehearing of the June 4 Order's rejection of proposed Sections 4.3(e) and 4.3(g). Tennessee explains that it is not requiring the shipper to provide the information reflected in rejected Sections 4.3(e) and 4.3(g) but may consider the information in its credit evaluation. Tennessee also contends that if a shipper disagrees with Tennessee's evaluation, Article XXVIII, Section 4.5, as proposed in Tennessee's June 24, 2003 compliance filing, provides the shipper an opportunity to challenge Tennessee's evaluation. Tennessee believes that the rejection of Sections 4.3(e) and 4.3(g) is inconsistent with the Commission's statement in the June 4 Order that it recognizes Tennessee's need to consider the individual circumstances of its shippers. Finally, Tennessee argues that its approach is commercially reasonable, since it is less demanding than that utilized by most banks when approving loans and is consistent with that of other businesses extending credit.

²⁴June 4 Order at P 59.

3. Commission Ruling

31. We grant Tennessee's request for rehearing with respect to sections 4.3(c) and 4.3(g). Section 4.3 does not require shippers to provide information to Tennessee, but only sets forth the information Tennessee may consider in its credit evaluations. Therefore, unlike Section 4.2, which deals with the information a shipper must provide to Tennessee, under Section 4.3, a shipper does not have to make assumptions about what information qualifies for disclosure to Tennessee. The types of information that Tennessee proposes to consider, information on lawsuits or judgments and other information bearing on a shipper's financial health, are sufficiently relevant and objective indications of financial health that Tennessee should be permitted to consider, as long as it ensures the shipper has the ability to challenge such a determination. Proposed Section 4.5 states that Tennessee will provide an opportunity for shippers to challenge Tennessee's determinations of non-creditworthiness as the June 4 Order required.²⁵ The shippers are therefore protected from Tennessee's abuse of its discretion while Tennessee has the flexibility to determine a shipper's creditworthiness based on relevant financial information on a case-by-case basis. Since Tennessee has filed a revised Article XXVIII, Section 4.3 in the June 24, 2003 compliance filing addressed above, Tennessee may file a revised Section 4.3 in its filing in compliance with this order to include the previously rejected Sections 4.3(e) and 4.3(g) as proposed.

E. Sections 4.2(c) and 4.2(d)

1. Prior Orders

32. Article XXVIII Section 4.2 of Tennessee's tariff, as proposed in Tennessee's August 16, 2002 filing and amended on November 19, 2002, included a list of five items that Tennessee may require a shipper to provide Tennessee to evaluate a shipper's creditworthiness. Sections 4.2(c) and 4.2(d) required a shipper to confirm in writing that it is not aware of any change in business conditions substantial affecting its financial condition, solvency, or existence as a business or material lawsuits or judgments affecting its solvency. The January 29 Order rejected Sections 4.2(c) and 4.2(d) as too vague.²⁶ The June 4 Order denied Tennessee's request for rehearing of the January 29 Order stating that the proposed language was unnecessarily vague, subject to interpretation, and required the shipper to make assumptions without the benefit of the necessary objective criteria.²⁷

²⁵June 4 Order at P 45.

²⁶January 29 Order at P 35.

²⁷June 4 Order at P 58.

2. Rehearing Request

33. Tennessee seeks rehearing of the June 4 Order's denial of its request for rehearing of the January 29 Order's rejection of Section 4.2(c) and 4.2(d). Tennessee reiterates that similar provisions have been accepted for other pipelines in the past. Tennessee argues that the fact that conditions have changed in the industry does not explain why such provisions are just and reasonable for some pipelines but not for Tennessee. Tennessee contends that the fact the industry has changed reflects the need for more – not less – financial disclosure from credit-seeking participants in the industry. It asserts that the Commission's contention that since prior approval of such tariff provisions was not in the context of specific discussion there was not real approval is contrary to legal precedent.

3. Commission Ruling

34. The Commission affirms the June 4 Order's denial of rehearing on this issue. Again Tennessee ignores the main issue that the provisions are unnecessarily vague and require a shipper to make assumptions without the benefit of the necessary objective criteria. In the January 29 Order, the Commission required Tennessee to include objective criteria in its tariff to determine whether a shipper is creditworthy. The Commission determined that, with the increased importance of the creditworthiness evaluation process, it is important for the process to be open and objective.²⁸ In the June 4 Order the Commission explained it was reconsidering the implications of such provisions in light of the circumstances in a particular case and current conditions in the industry. Recent downgrades in the industry have increased the importance of the creditworthiness evaluation process which increases the need to make sure the evaluation process is open and objective.

35. Tennessee maintains that the Commission has failed to explain why Tennessee differs from other pipelines, which had similar tariff provisions approved in the past. As stated in the June 4 Order, in its recent creditworthiness orders, the Commission has consistently denied tariff language that it has found unnecessarily vague and subject to interpretation.²⁹ While the Commission recognizes that it has accepted proposals similar to Tennessee's in the past, the Commission has not established a consistent policy on such questions and its prior acceptance of such tariff provisions does not preclude the Commission from reconsidering its policies so long as it provides a sufficient explanation for changing policy.³⁰ Here, the Commission has reevaluated Tennessee's proposed

²⁸January 29 Order at P 41.

²⁹June 4 Order at P 58 and n. 54.

³⁰Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970).

provisions in the light of the greater scrutiny that recent events have focused on creditworthiness determinations. Based on this review, the Commission finds that shippers are entitled to know with a reasonable degree of certainty what information they should have to provide to the pipeline, and Tennessee's proposed revisions fail to provide sufficient guidance.³¹ Tennessee has not shown that these provisions are sufficiently clear that shippers will understand their obligations.

E. Confiscation of Gas

1. June 4 Order

36. In its February 28, 2003 request for rehearing of the Commission's January 29 Order, Tennessee stated that the Commission had not explained how any other party could have an interest in the confiscated gas or be harmed given that the shipper whose contracts have been terminated must have free and clear title to the gas. The June 4 Order rejected Tennessee's rehearing arguments in support of its proposal to confiscate gas left on its system after the shipper's contract is terminated and affirmed the Commission's previous rejection of Tennessee's proposal to confiscate the gas.³²

2. Rehearing Request

37. On rehearing, Tennessee complains that the June 4 Order did not address its argument that a third party's interest would not be affected by Tennessee's proposal to confiscate gas left on its system. Tennessee argues that Article IX specifically prohibits other parties from having an interest in the gas, since it provides that the shipper must warrant that it has good title or the good right to deliver the gas onto Tennessee's system. Tennessee contends the Commission should grant rehearing because Tennessee's tariff requires a shipper's gas to be free of encumbrances, so no other party should have claims to the gas, and the Commission's regulations require the shipper to have title to the gas it delivers to Tennessee.

³¹In the June 4 Order, the Commission was not suggesting, as Tennessee alleges, that it had not accepted similar provisions to those proposed by Tennessee in earlier cases. However, the Commission did not specifically address the policy question presented by those tariff provisions in those cases, and, therefore, never specifically made a finding as to whether such provisions are just and reasonable. In this case, the Commission has considered the implications of such provisions, based on shipper protests, and found them unjust and unreasonable.

³²June 4 Order at PP 74-78.

3. Commission Ruling

38. We deny Tennessee's request for rehearing on the confiscation issue. The June 4 Order adequately explained the Commission's reasons for affirming its decision to reject Tennessee's proposal to confiscate gas left on its system after the shipper's contracts have terminated. We will not repeat that discussion here. Tennessee's argument that shippers must have title to gas delivered to Tennessee is not a reason for the Commission to change its determination. There is no necessary connection between having title to the gas and having a potential interest in the gas. For example, the shipper may have a contractual obligation to deliver the gas to a third party, who would have an interest in the gas, or a party providing financing to the shipper may have a claim to the gas.³³ Tennessee has not shown that its interest in confiscating the gas is superior to the potential interests of other parties. The Commission has permitted Tennessee to establish whatever carrier or other liens over the gas are appropriate under the applicable state law.

II. June 24, 2003 Compliance Filing

A. Shippers Cannot be Charged for During Suspension Periods

1. Compliance Filing

39. The Commission in the June 4 Order affirmed its determination that Tennessee's shippers should not be billed for demand charges after service is suspended.³⁴ Tennessee in compliance with the June 4 Order revised Section 4.5 of Article XXVIII of its tariff to state that Tennessee will not bill a shipper for service during the period of suspension of service. Also, Tennessee clarified that the shipper shall still be liable to Tennessee for all damages caused by the shipper's contractual breach.

2. Protest

40. Process Gas and Calpine protest Tennessee's revisions to Section 4.5, contending that this section should state that "Tennessee will not charge the shipper for service during the suspension of service," instead of the proposed language that "Tennessee will not bill shipper for service during the period of suspension of service."³⁵ Calpine and

³³Indeed, under Tennessee's reasoning, it too would have no interest in the gas sufficient to support confiscation, since it also does not have title to the gas.

³⁴The Commission affirmed this policy in PG&E Gas Transmission, 103 FERC ¶ 61,137 at PP 57-58 (2003) and Gulf South, 103 FERC ¶ 61,129 at P 56 (2003).

³⁵See Sub Original Sheet No. 405.02 to Tennessee's FERC Gas Tariff, Fifth
(continued...)

Process Gas both argue that the proposed wording is too vague to convey Tennessee's actual intentions and that if Tennessee does not intend to bill shippers for service not received, then they request that Tennessee clarify its intent by deleting the statement "will not bill Shipper for service during the period of suspension of service" and replacing it with "Transporter will not charge Shipper for suspended service."³⁶

3. Commission Ruling

41. The Commission will grant Calpine's and Process Gas' objection to Tennessee's proposed tariff provision in Section 4.5 and require Tennessee to revise this provision. Both Calpine and Process Gas are correct that this provision as currently written is unnecessarily vague. The Commission stated in both the January 29 and June 4 Orders that Tennessee cannot charge a shipper for service after such service was suspended.³⁷ The proposed tariff language could permit Tennessee to assess a charge during the period service is suspended, which conflicts with the Commission's orders. Tennessee is therefore required to revise Section 4.5 to fully comply with the January 29 and June 4 Orders to provide that a shipper is not responsible for charges during the period service is suspended.

B. Definition of Tangible Net Worth

1. Compliance Filing

42. The June 4 Order required Tennessee to revise its tariff to provide a definition of tangible net worth and explain that net present value is a factor in the credit determination process, to ensure that shippers can better understand what factors are part of the credit determination process. Tennessee, in compliance with the June 4 Order, defined tangible net worth 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.³⁸

(...continued)

Revised Volume No. 1.

³⁶Calpine's Comments at 4.

³⁷See January 29 Order at P 32 and June 4 Order at P 90.

³⁸See 2nd Sub Eighth Revised Sheet No. 405 to Tennessee's FERC Gas Tariff, Fifth Revised Volume No. 1.

2. Protest

43. Calpine argues that Tennessee's definition of "tangible net worth," which provides the criteria for determining a shipper's creditworthiness, may be unduly vague because the phrase in the definition "other free and clear equity reserve accounts" is unnecessarily vague and "increases the potential for abuse in the determination of a shipper's creditworthiness."³⁹ Calpine suggests that Tennessee used "other free and clear equity reserve accounts" as a substitute for the more commonly known term "retained earnings," and that if Tennessee cannot explain the phrase "other free and clear reserve accounts" then the phrase should be rejected as unnecessarily vague.⁴⁰

44. Tennessee explains in its answer that it is attempting to include in its definition of "tangible net worth" accounting treatments for the variety of entities⁴¹ it serves which have varying accounting standards. Further, Tennessee explains that, though "retained earnings" is universally understood, in the case of government agencies such as cities, towns, and counties which use their own set of Government Accounting Standards, retained earnings may not be the only component of their net worth. Accordingly, Tennessee contends that it must define tangible net worth in a manner that is broad enough to accommodate the various accounting treatments used by Tennessee's shippers. Tennessee elaborates that, since Tennessee serves a variety of entities, it has chosen a financial term, "tangible net worth" which provides a broad financial definition to encompass the various entities it services and thus it has not chosen an unnecessarily vague term as alleged by Calpine.

3. Commission Ruling

45. The Commission in the June 4 Order dismissed Calpine's protest that the term "tangible net worth" was discriminatory, harmful, or too stringent a factor in determining a shipper's creditworthiness and does so again here.⁴² Tennessee has adequately supported its definition of "tangible net worth" and explained its terminology, therefore, Calpine's request to redefine the term is dismissed.

³⁹Calpine's Comments at 2.

⁴⁰Id. at 2-3.

⁴¹Tennessee provides service to corporations, partnerships, sole proprietorships, government entities and other types of legal entities.

⁴²June 4 Order at P 47.

C. Parent Company's Financial Statement

1. Compliance Filing

46. Tennessee, in compliance with the June 4 Order, clarified that a shipper subject to Securities and Exchange Commission (SEC) requirements shall provide Tennessee written notice and a general description of any report filed with the SEC within two days of such filing.⁴³ If the report is not available from the SEC electronically, then the shipper shall otherwise provide Tennessee with a paper copy of the report.

2. Protest

47. Rhode Island objects to Tennessee's proposed Section 4.2(c) of Article XXVIII of Tennessee's tariff, which requires shippers not subject to SEC reporting requirements, but has a parent that is subject to SEC reporting requirements, to comply with the SEC reporting requirement. Rhode Island contends that this language is "overly broad in that it places an unnecessary reporting burden on shippers regarding their parents' activities regardless of whether there is any nexus between the credit standing of the parent and the creditworthiness of the shipper, especially when the credit standing of the shipper with Tennessee is not dependent upon a parental guarantee."⁴⁴

3. Commission Ruling

48. The Commission in the June 4 Order found that it is not unreasonable to require shippers, who are subject to SEC reporting requirements, to notify Tennessee and provide a general description of the filing when they file a report with the SEC, since the reports are publicly available. Further, the Commission found that 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.⁴⁵ Tennessee's proposal to require a shipper, whose parent is subject to SEC reporting requirements, to submit the parent's publicly available SEC document is not unreasonable; the shipper should have reasonably access to such a report. The parent's SEC filings may provide Tennessee with relevant information on the subsidiary's financial well being that may be the only publicly available document containing this information. Tennessee should be provided with this public information,

⁴³See 2nd Sub Eighth Revised Sheet No. 405 to Tennessee's FERC Gas Tariff, Fifth Revised Volume No. 1.

⁴⁴Rhode Island's Protest at 3.

⁴⁵June 4 Order at P 53.

to insure that it can protect itself from the subsidiary shipper's financial hardship. Accordingly, Rhode Island's protest on this issue is dismissed.

D. Collateral Retained from a Defaulting Shipper

1. Compliance Filing

49. The June 4 Order found that when new facilities are constructed to serve a shipper, pipelines should be required to mitigate the consequences of a shipper's default. Therefore, the Commission directed Tennessee to revise its tariff to require that in the event of default and termination Tennessee will be required to reduce the collateral it retains by mitigating damages.⁴⁶ Tennessee revised Section 4.9 of Article XXVII to provide if a shipper defaults and Tennessee terminates service to that shipper, Tennessee can draw upon and retain the collateral necessary to reimburse Tennessee for the cost of the facilities constructed to serve the shipper.

2. Protest

50. Rhode Island protested Section 4.9 of Article XXVII contending that Tennessee's proposal to be able to "draw upon and retain such collateral as necessary to reimburse Transporter for the cost of the facilities constructed for shipper"⁴⁷ is vague and provides Tennessee excessive discretion to determine the amount of "such collateral" that Tennessee may choose to "draw upon and retain." Rhode Island asserts that the Commission should direct Tennessee to clarify its tariff to provide that the pipeline may retain at most only the unamortized portion of original facilities costs and further that specific schedules setting forth the unamortized portion of new facilities' costs are more appropriately negotiated and agreed to in the context of a precedent agreement, which may then be reviewed by the Commission.

51. Tennessee, in its answer to the protests, agreed to clarify its tariff to state that it may retain only the unamortized portion of the original facilities cost. In addition, Tennessee stated in the answer that its proposed tariff language in Section 4.9 may be ambiguous and could be read to state that if there is no difference between the original shipper's and the new shipper's future reservation charges, then Tennessee would retain the original shipper's collateral without any mitigation. Tennessee contends that it did not intend this interpretation and proposed revised tariff language stating, "collateral

⁴⁶June 4 Order at P 29 and n. 31.

⁴⁷3rd Sub Ninth Revised Sheet No. 405A, to Tennessee's FERC Gas Tariff, Fifth Revised Volume No. 1.

retained by Transporter from the original Shipper shall be reduced to an amount equal to the net present value of that portion of the future reservation charge revenues of the original Shipper that would have been attributed to the cost of such facility less the net present value of that portion of the future reservation charge revenues of the newly awarded shipper that may be attributed to the cost of such facility.” Tennessee maintains this revised language should clarify any ambiguity regarding the amount of collateral that may be retained to reimburse Tennessee for the cost of facilities constructed for a shipper in the event of the shipper’s default.

3. Commission Ruling

52. Tennessee’s revised language in its answer satisfactorily addresses Rhode Island’s concerns. Tennessee’s further proposed changes clarify its tariff. Tennessee is, therefore, required to file revised tariff sheets, modifying Section 4.9 in accordance with its answer.

E. Providing Non-Creditworthy Shipper with Written Explanation of Loss of Creditworthiness

1. Compliance Filing

53. The June 4 Order, citing the January 29 Order, required Tennessee to revise its tariff to provide that it will inform a shipper in writing as to the reason why it was deemed non-creditworthy.⁴⁸ Further, the Commission required Tennessee to provide a non-creditworthy shipper with detailed written explanation within ten days of deeming the 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.⁴⁹ Tennessee revised Section 4.5 of Article XXVII to provide a detailed written explanation to a shipper of the reasons for the loss of creditworthiness and provide a recourse for the shipper to challenge the determination.

2. Protest

54. Process Gas and Calpine, respectively, contend that Tennessee should provide a non-creditworthy shipper with a detailed written explanation of the reasons for such loss of creditworthiness within five days, instead of ten days. Calpine argues that ten days is

⁴⁸June 4 Order at P 45 and January 29 Order at P 46.

⁴⁹Id.

an unreasonably long period of time between Tennessee's notification to the shipper of a lack of creditworthiness and the shipper's receipt of the written explanation.

3. Commission Ruling

55. Tennessee in revising its tariff to provide a written explanation of the reasons for loss of creditworthiness within ten days fully complies with the June 4 Order. If Process Gas or Calpine objected to the reasonableness of the time frame, which was directed by the Commission, then they should have requested rehearing of the June 4 Order and not raised this issue in a protest or comment on Tennessee's compliance with that order. The Commission rejects Process Gas' and Calpine's protest as an impermissible attack on the Commission's June 4 Order.⁵⁰

The Commission orders:

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

(B) Tennessee's compliance filing in Docket No. GT02-35-005 is accepted as in compliance with the June 4 Order, effective February 16, 2003, subject to Tennessee filing, within 20 days of this order, the modifications directed above.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

⁵⁰Process Gas' and Calpine's objections on this issue are a collateral attack on the June 4 Order. Process Gas and Calpine should have sought rehearing of the June 4 Order if they believed the compliance obligation was incorrect, rather than raising their objections in a protest or comment to the compliance filing.