

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Reliant Energy Services, Inc., and CenterPoint Energy      Docket No. RP06-408-000  
Resources Corp.

v.

Kern River Gas Transmission Company

ORDER ON COMPLAINT

(Issued July 19, 2007)

1. On June 30, 2006, Reliant Energy Services, Inc. (Reliant) and CenterPoint Energy Resources Corp. (Centerpoint) (collectively Complainants) filed a joint complaint (Complaint) pursuant to section 5 of the Natural Gas Act (NGA) against Kern River Gas Transmission Company (Kern River) requesting that the Commission order Kern River to accept certain credit support from Reliant as a substitute for a payment guaranty that Centerpoint issued in favor of Kern River in 2001. For the reasons discussed below, the Commission grants the Complaint in part and denies the Complaint in part.

**Background**

2. According to the Complaint, Reliant has four transportation service agreements (TSAs) with Kern River. Reliant acquired one of those agreements in relation to Kern River's 2003 Expansion project, two through permanent assignments, and the last one through capacity release.<sup>1</sup> Because Reliant was not creditworthy when it signed the

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<sup>1</sup> Contract No. 1716 is an agreement between Kern River and Reliant for 2003 Expansion capacity pursuant to Rate Schedule KRF-1. Contract No. 1504 is the result of a permanent assignment of capacity in 2000 from Petro-Canada Hydrocarbons to Reliant. Contract 1506 is the result of a permanent assignment of seasonal capacity from Southwest Gas Corporation (Southwest Gas) to Reliant. Contract No. 8035 is a Released Transportation Service Agreement between Kern River and Noram Energy Services, Inc. (Noram)(presumably the predecessor to Reliant) pursuant to which Reliant acquired additional seasonal capacity on Kern River from Southwest Gas.

agreements, its affiliate, CenterPoint,<sup>2</sup> executed a guarantee in favor of Kern River for all of Reliant's payment obligations under the TSAs (CenterPoint Guaranty or Guaranty).<sup>3</sup> CenterPoint subsequently disaffiliated from Reliant, and, according to Complainants, is exposed to significant potential liability as a result of having made the Guaranty without any offsetting benefit. As such, CenterPoint wants Kern River to release it from the Guaranty.

3. Although the parties disagree somewhat as to the sequence of events, there is no dispute that Reliant asked Kern River to substitute alternative credit for the CenterPoint Guaranty. Reliant asserts that in February 2006, Reliant contacted Kern River to determine whether Kern River would be willing to allow Reliant, an admittedly non-investment grade shipper, to post an alternative form of credit support for the TSAs because CenterPoint is no longer affiliated with Reliant. The Complainants allege that Reliant offered to post a letter of credit in favor of Kern River for one year of reservation charges for the TSAs and to provide a parent guarantee from Reliant's parent, Reliant Energy Inc. (REI). Kern River declined to accept such alternative credit support as a substitute for the CenterPoint Guaranty. Instead, according to Complainants, Kern River insisted that the CenterPoint Guaranty remain in place for ten more years or that Reliant provide support equal to all the reservation charges for the TSAs through 2016.

4. On August 29, 2006, the Commission issued an Order Requiring Submission of Further Information.<sup>4</sup> In that order the Commission stated that it agreed with Complainants that "the excerpts of the contracts that Kern River provided do not provide us with enough information to thoroughly analyze its arguments and reach a reasoned decision."<sup>5</sup> The Commission accordingly directed Kern River to file complete copies of certain of its financing documents, to indicate whether those agreements and the pledge of collateral apply to all Kern River's lenders, and to provide any other documents that

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<sup>2</sup> At the time the agreements were signed, CenterPoint was known as Reliant Energy Resources Corporation and was an affiliate of Reliant. It has since been spun off and has become a subsidiary of CenterPoint Energy, Inc.

<sup>3</sup> Centerpoint guaranteed "the full payment and performance, when due, of all [of RES's] present and future indebtedness and obligations under the Agreement, and all amendments, modifications, replacements, renewals and extensions thereof." Complaint P 16.

<sup>4</sup> 116 FERC ¶ 61,188 (2006)(August 29 Order).

<sup>5</sup>*Id.*, P 9.

bear on Kern River's obligations to pledge the Guaranty or the TSAs to its lenders. Kern River filed the required documents on September 13, 2006.

### **Complaint**

5. The Complainants assert that Kern River's refusal to accept alternative forms of credit support from Reliant in substitution for the CenterPoint Guaranty substantially harms CenterPoint and: (a) is contrary to the Commission's *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines*<sup>6</sup> and Commission precedent; (b) violates the express terms of Kern River's tariff; and (c) unduly discriminates against Reliant in violation of the Natural Gas Act (NGA).

6. Complainants argue that Kern River is requesting credit support at a level that exceeds Commission policy and the requirements of Kern River's tariff. Complainants contend that Commission policy is that "a pipeline cannot demand from non-investment grade shippers, as credit support for service, amounts in excess of three months reservation charges for existing capacity."<sup>7</sup> They also acknowledge, however, that the Commission allows pipelines, particularly project-financed pipelines, to seek greater amounts of collateral from potential shippers on new construction projects. According to the Complainants, the circumstances under which a pipeline may require such additional collateral are narrow and must be set forth in the precedent agreements between the potential shipper and the pipeline. If not, Complainants argue, the pipeline's tariff creditworthiness provisions apply once the facilities go into service.

7. Complainants contend that because the precedent agreements executed by Reliant, as an initial shipper on the Kern River 2003 Expansion, did not require any form of credit support, and because those agreements terminated upon execution of the TSAs, that the allowable level of credit support that Kern River can require is governed by its tariff. According to Complainants, Kern River's tariff allows a non-creditworthy shipper to elect the form of security that it chooses to provide, namely either "(a) furnish and maintain for the term of the Transportation Service Agreement, a written guarantee from a third party; or (b) furnish other security acceptable to Transporter's lenders."<sup>8</sup> Thus,

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<sup>6</sup> Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines, 70 FR 37717 (June 30, 2005), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,191 (June 16, 2005); 111 FERC ¶ 61,412 (2005)(Policy Statement).

<sup>7</sup> Complaint at P 24, (*citing* Policy Statement at P 14).

<sup>8</sup> Complaint at P 15.

Complainants argue, “[a]lthough a guarantee was previously provided as collateral, it was never agreed that the guarantee would survive the precedent agreement, and in accordance with Kern River’s Tariff, [Reliant] is now seeking to exercise its option to ‘furnish other security’ consistent with Section 7.1 of Rate Schedule KRF-1.”<sup>9</sup>

8. Complainants further contend that Kern River’s insistence that the CenterPoint Guaranty remain in place as support for the agreements Reliant acquired through assignment or capacity release violates the Policy Statement because that capacity was not related to the construction of any new facilities nor was it awarded as part of a competitive bidding process for available capacity. Therefore, Complainants contend, Kern River is not entitled to credit support in excess of the value of three months of reservation charges.<sup>10</sup>

9. Complainants assert that by not accepting the substitute credit support Kern River is unduly discriminating against Reliant because Kern River has accepted similar types of credit support from similarly situated shippers. Specifically, Complainants contend that based on documents from Kern River’s rate proceeding in Docket No. RP04-274, Kern River has allowed shippers that do not meet Kern River’s creditworthiness standards to continue to receive service by posting a security interest equal to one year’s reservation charges. Complainants argue that by not accepting their offer to post security equal to one year’s reservations charges Kern River is unduly discriminating against the Complainants.

### **Notice of Filings and Responsive Pleadings**

10. Notice of Reliant’s and Centerpoint’s Complaint was issued on July 3, 2006, with interventions and protests due on or before July 20, 2006. Pursuant to Rule 214, 18 C.F.R. § 395.214, all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On July 20, 2006, Kern River filed an answer to the complaint.<sup>11</sup> On August 14, 2006, Complainants filed a Motion for Leave to Answer

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<sup>9</sup> *Id.*, P 29.

<sup>10</sup> Complaint at P 33.

<sup>11</sup> Answer of Kern River Gas Transmission Company to Joint Complaint of Reliant Energy Services, Inc. and Centerpoint Energy Resources Corp., dated July 20, 2006 (Answer).

and Answer to Kern River's Answer.<sup>12</sup> On August 18, 2006, Kern River filed an answer to Complainants' answer.<sup>13</sup>

11. Rule 213 (a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2)(2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Complainants' Answer and Kern River's Reply because they have provided information that assisted us in our decision making process.

### **Kern River's Answer**

12. Kern River states that its refusal to forfeit or surrender the CenterPoint Guaranty is entirely justified and appropriate. According to Kern River, beginning in 2001, the Commission authorized a series of expansion projects that were meant to add significant new energy infrastructure in reaction to severe energy shortages that caused price spikes in California and elsewhere in the western United States. Two of these projects were the 2002 Expansion Project, which added 10,500 dekatherms per day and the 2003 Expansion Project, discussed above. According to Kern River, one of the TSAs relates to the 2003 Expansion capacity, and the other three relate to the Original System and 2002 Expansion capacity.<sup>14</sup>

13. Kern River also explains that it is a "project financed pipeline," meaning that its lenders secure their loans to Kern River by collateral assignment of the service agreements negotiated with contract shippers, and by related credit support in the form of parent or third party guarantees, proceeds of letters of credit and contract rights under cash escrow arrangements. Kern River states that it has assigned all four of the TSAs to its lenders as security for its project financing arrangements. Kern River further asserts that those financing arrangements prevent Kern River from allowing Reliant to substitute a letter of credit for the CenterPoint Guaranty.

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<sup>12</sup> Motion for Leave to Answer and Answer of Reliant Energy Services, Inc., and Centerpoint Energy Resources Corp., dated August 14, 2006 (Complainants' Answer).

<sup>13</sup> Kern River Gas Transmission Company's Answer to Motion for Leave to Answer and Answer of Reliant Energy Services, Inc., and Centerpoint Energy Resources Corp., and Alternative Reply to Answer, dated August 18, 2006 (Kern River Reply or Reply).

<sup>14</sup> Answer at P 6.

14. Kern River answers that the complaint that Centerpoint must “guarantee the obligations of an entity with whom it is no longer affiliated and for which it no longer receives any benefit” rings hollow in light of the fact that Centerpoint’s impending disaffiliation was public knowledge at the time Centerpoint signed the CenterPoint Guaranty. Kern River explains that nearly three months before Centerpoint executed the Guaranty, Reliant ceased to be a wholly owned subsidiary of Centerpoint. So at a time when Centerpoint knew it no longer owned an interest in Reliant and knew that it would soon no longer be affiliated with Reliant, it still executed the CenterPoint Guaranty supporting Reliant’s TSAs. Accordingly, argues Kern River, Centerpoint should not now be permitted to shift to Kern River the risk that Centerpoint willingly and knowingly took when it signed the Guaranty.

15. Kern River further states that its actions in this situation are not inconsistent with Commission Policy. It asserts that the Policy Statement specifically excludes project financed pipelines from the Commission’s general collateral policy that a pipeline may require only three months of reservation charges, recognizing that lenders providing project financing require greater credit support because the debt is non-recourse and the amount of money is substantial. According to Kern River, these greater credit requirements benefit shippers as well as the lenders because they allow the lenders to provide a lower rate on project-financed debt, which gets passed on in the form of lower rates. Kern River contends that having obtained the long-term benefit of lower rates through a lower cost of capital, Centerpoint should not now be allowed to renege on Centerpoint’s part of the bargain.

16. Kern River states that Complainants are mistaken in their assertion that the capacity assigned and obtained through capacity release is not expansion capacity and thus should be subject to the three month limit. Kern River asserts that “all long term firm transportation agreements and corresponding shipper credit support on Kern River’s system are subject to its lenders’ security requirements and must be assigned to the lenders in support of their project financing, regardless of how or when they were obtained.”<sup>15</sup> Moreover, for the assigned agreements, Kern River claims that Reliant stepped into the shoes of, and assumed the obligations of, the initial shipper for whom the new construction was required. Kern River also argues that if the Commission required it to reduce the credit support for all the Original System and Expansion 2003 shippers to three months of reservation charges, then the credit impairment to its lenders would be substantial. Kern River states that it seems unlikely that this was the intent of the Policy Statement.

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<sup>15</sup> Answer at P 30.

17. In response to Reliant's arguments concerning the precedent agreements and Reliant's claim that credit support related to the TSAs must be governed exclusively by the tariff, Kern River states that the credit support required by Reliant was, and is, being applied pursuant to and consistent with the credit provisions of its tariff.<sup>16</sup> Kern River avers that it imposed the same credit requirements on the 2003 Expansion Shippers as all other long term shippers. Kern River also argues that Reliant's argument that the Centerpoint Guaranty was given only as collateral for the precedent agreements and not the TSAs is mistaken, given that the precedent agreements made clear that service would be provided in accordance with the terms and conditions of Kern River's tariff, and that pursuant to the tariff, Kern River would not have had to execute a transportation service agreement or initiate service for any shipper who did not meet its creditworthiness standards. Kern River states that the Centerpoint Guaranty, which was executed approximately three months after the precedent agreements for the 2003 Expansion were signed, expressly states that Centerpoint provided the guaranty "to induce Kern River to enter into gas transportation agreements ... for [Reliant],"<sup>17</sup> and that Reliant acknowledges in the Complaint that Kern River required Reliant to provide credit support for its payment obligations under the TSAs. Thus, claims Kern River, contrary to Complainants' arguments, the credit support issues relating to the TSAs were administered under the tariff and Kern River would not have entered into the TSAs without the provision of the appropriate support.

18. As to Complainants' argument that Kern River's tariff allows Reliant to elect to substitute the CenterPoint Guaranty at any time with alternative forms of credit, Kern River claims that the language referenced by Complainants in fact is to the contrary and provides a non-creditworthy shipper an initial election of collateral prior to the execution of a transportation agreement or receiving service. The express tariff language stating that the shipper must maintain the guarantee for the term of the agreement supports its position that the Guaranty cannot be replaced at will. According to Kern River, because Complainants chose initially to provide the Guaranty and given that the Guaranty itself does not reserve the right for it to be replaced with alternative collateral, the tariff permits Kern River to insist that the CenterPoint Guaranty remain in place, consistent with Kern River's status as a project financed pipeline and its obligation to its lenders to whom the agreements are pledged. Kern River points out that while it does allow substitutions of cash collateral for letters of credit of equal value and vice versa, that is not the situation here because Complainants want to substitute security of lesser value for the Guaranty.

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<sup>16</sup> Kern River's Answer (Answer) at P 34.

<sup>17</sup> Answer at P 37.

19. Kern River responds to Complainants' allegations of discrimination that Reliant is not similarly situated to the shippers referenced by Complainants. It states that at the time those shippers entered into transportation agreements they or their parents were creditworthy and thereafter lost investment grade status. Kern River contends that at the point these shippers no longer held investment grade status they were required to re-establish credit support under the tariff. According to Kern River, none of the situations cited involved a creditworthy parent requesting to replace a guaranty with a twelve or three month letter of credit, and thus its actions here are neither unreasonable nor discriminatory.

### **Complainants' Answer and Kern River's Reply**

20. In their Answer, Complainants argue that Kern River overstates the credit impairment to its lenders and that Kern River is simply refusing to treat all non-creditworthy shippers with non-creditworthy parents equally. They argue that Kern River has understated the value of the credit support offered by Reliant, particularly the full guaranty from Reliant's parent, REI. They contend that their full offer provides Kern River with adequate credit support that is consistent with support accepted by Kern River from other non-creditworthy shippers with non-creditworthy parents. They also assert that Kern River's argument that Kern River is not discriminating against Complainants is illogical because it presumes that Centerpoint would need to fall below investment grade to be allowed to provide the alternative credit support that Kern River has accepted from other shippers.

21. Kern River replies that Complainants fail to recognize that Complainants' offer of alternative security, including the guaranty from REI, lacks value because REI is a non-investment grade company, and Kern River's tariff requires a guaranty from a creditworthy party. Kern River also argues that Complainants have provided no precedent or evidence to support their position that Kern River is obligated to accept a guaranty from a non-creditworthy party, especially as a substitute for a guaranty from an investment grade company. Kern River asserts that Complainants have not met their burden of showing why it is now unjust and unreasonable for Centerpoint to be required to maintain the Guaranty, especially given Complainants' acknowledgement that the proposed alternative security is less valuable than the existing Guaranty.

22. On the discrimination issue, Kern River reiterates that Complainants are not similarly situated to the shippers it allowed to post letters of credit. Kern River points out that none of those shippers requested to replace a creditworthy guaranty. Rather, Kern River points out that the creditworthiness of those shippers failed during the term of their transportation agreements, and Kern River required them to post additional security so that their contracts would not be terminated and they would be permitted to continue to receive service.

23. Complainants also argue that Kern River failed to support its claim that it is prevented by its financing arrangements with its lenders from accepting alternative collateral in substitution for the CenterPoint Guaranty. They contend that Kern River only provided incomplete copies of its financing documents and that those that were disclosed imply that there are certain circumstances under which Kern River could allow a waiver or substitution of the existing credit support documentation.

24. Kern River reemphasizes that allowing the substitution of collateral as proposed by Complainants would breach its agreements with its lenders. It points out that the documents provided with the Answer demonstrate that approval of a majority, if not all, of Kern River's lenders is required to forfeit the Centerpoint Guaranty. They further assert that it would be an exercise in futility to seek such approval because its lenders cannot be reasonably expected to agree to allow a guaranty from a creditworthy party to be surrendered in exchange for the less valuable credit support such as that offered by the Complainants.

25. Complainants also assert that Kern River's claim that Centerpoint entered into the CenterPoint Guaranty knowing that it would soon cease to be affiliated with Reliant is mistaken. They contend that although the Separation Agreement had been signed there were still conditions to be satisfied and that the actual disaffiliation did not occur until nearly eighteen months after the execution of the Guaranty.<sup>18</sup> According to Complainants, Centerpoint was one of the only investment grade affiliates available to guarantee Reliant's performance under the TSAs, and as a letter of credit would have been costly, it was a financially sound decision for Centerpoint to issue the Guaranty in order to secure necessary transportation services for Reliant. Moreover, Complainants state that "there was every reason to believe that once [Centerpoint] and [Reliant] were no longer affiliated, [Reliant] could substitute another form of credit support for the [Centerpoint Guaranty]."<sup>19</sup> On this issue, Kern River replies that it is clear that Complainants intended to become disaffiliated when the Guaranty was signed, they knew that it would have to be maintained for the full term of the TSAs, and nonetheless entered into the Guaranty because it was the "most economically advantageous way possible to secure the transportation services needed by [Reliant]."<sup>20</sup> Accordingly, Complainants should not be allowed to shift the risk they knowingly and willingly assumed when they executed the Guaranty because their economic interests have now changed.

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<sup>18</sup> Complainants' Answer at 9-10.

<sup>19</sup> *Id.*

<sup>20</sup> Reply at 8-9, *quoting* Complainants' Answer at 10.

26. Complainants further argue in their Answer that Kern River's apparent interpretation of its tariff that a shipper does not have an election to switch collateral, and that a guaranty must be maintained for the term of the agreement under all circumstances, is implausible and incompatible with Commission precedent because it fails to account for the situation where the previously non-creditworthy shipper regains investment status.

### **Discussion**

27. In this NGA section 5 Complaint proceeding, the burden is on the Complainants to demonstrate that the actions of Kern River about which they complain are unjust, unreasonable, unduly discriminatory or preferential. As discussed below, the Commission finds that for the three service agreements involving the Kern River expansion, the Complainants have not met their burden. However, for the standard capacity release agreement, Kern River must permit Reliant to substitute standard collateral for capacity release agreements.

#### **A. Expansion Agreements**

28. Three of the service agreements relate directly to Kern River's expansion projects. Contract No. 1716 is an agreement for expansion capacity. Contract Nos. 1504 and 1506 were agreements for permanent assignments of capacity that also related directly to Kern River expansion projects. Kern River pledged the collateral requirements for these projects, including the Centerpoint Guarantee, to the financing banks as collateral for these projects. Under Commission policy, collateral required for expansion projects may exceed the collateral required for existing shippers. As the Commission explained:

pipeline mainline expansions can be exceedingly expensive and pipelines cannot be expected to commit funds to such expansions on behalf of non-creditworthy shippers without adequate collateral protection. As recently explained in *PG&E Gas Transmission, Northwest Corp.*, a pipeline undertaking a system expansion may require larger amounts of collateral from non-creditworthy shippers than from shippers on existing facilities, since the pipeline is entitled to ensure, prior to investing significant resources in the expansion, that it will have a reasonable possibility of protecting its investment from the impact of a subsequent shipper default.<sup>21</sup>

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<sup>21</sup> *Calpine Energy Services, L.P. v. Southern Natural Gas Co.*, 103 FERC ¶ 61,273  
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As the Commission further explained in its Creditworthiness Policy Statement:

for mainline projects, the pipeline's collateral requirement must reasonably reflect the risk of the project, particularly the risk to the pipeline of remarketing the capacity should the initial shipper default. Because these risks may vary depending on the specific project, no predetermined collateral amount would be appropriate for all projects. However, the collateral may not exceed the shipper's proportionate share of the project's cost.<sup>22</sup>

29. In this case, Kern River and Reliant entered into contracts providing for a parental guarantee from Centerpoint and did not predetermine a collateral requirement to cover the risk posed by Reliant. Thus, we cannot find that Reliant and Centerpoint's proposal to substitute a collateral amounting to 12 months of firm service reasonably meets the needs of Kern River, and particularly its lenders. We further find it inappropriate to reconsider the amount of collateral after Kern River has obtained financing, pledged the collateral to its lenders, and completed the project.<sup>23</sup>

30. We find that requiring Centerpoint to honor its guarantee is not unjust and unreasonable. At the time the parties entered into these contracts, Centerpoint freely executed the Centerpoint Guaranty in lieu of Reliant putting up cash or other collateral. Indeed, Centerpoint entered into the guarantee even though at the time, it and Reliant intended to disaffiliate. Moreover, the plain language of the Guaranty states that the Guaranty is for all present and future indebtedness under the TSAs. With these understandings, Centerpoint nonetheless entered into the Guaranty because as

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at P 31 (2003), *reh'g denied*, 105 FERC ¶ 61,033 (2003). See Policy Statement at P 17.

<sup>22</sup> 111 FERC ¶ 61,412 at P 17.

<sup>23</sup> See *Calpine Energy Services, L.P. v. Southern Natural Gas Co.*, 105 FERC ¶ 61,033 at P 24 (2003)(shipper should not be permitted to benefit by inducing the pipeline to construct the project by agreeing to pay the required collateral, and then waiting until after the pipeline obtains financing, commits resources to the project, and completes the project to seek a change in the collateral required).

Complainants state, it was the “most economically advantageous way possible to secure the transportation services that [Reliant] needed...”<sup>24</sup>

31. Centerpoint now asks the Commission to release it from its obligation and to require Kern River to accept alternative credit support because the Guaranty no longer inures to Centerpoint’s benefit. Complainants are seeking to be let out of an agreement pursuant to which they acknowledge that Centerpoint “must guarantee the obligations of an entity with whom it is no longer affiliated, and for which it no longer receives any benefit.”<sup>25</sup> As noted above, Centerpoint knew when it signed this agreement that it and Reliant might disaffiliate, and it signed the agreement anyway. In essence, Complainants are seeking to be released from an agreement that they now consider to be a bad deal.<sup>26</sup>

32. The Commission has reviewed the financing documents Kern River filed as required by the August 29 Order and finds nothing in those documents that either requires Kern River to accept the substitute collateral offered by Reliant or to seek its lenders’ approval to do so. The documents do prevent Kern River from unilaterally forfeiting the Guaranty.<sup>27</sup> The Complainants point out that certain provisions in those documents, including Section 8.1 of the Collateral Agency Agreement (filed with Kern River’s Answer), permit Kern River to amend any of its collateral holdings upon certain conditions, particularly the consent of Kern River’s lenders. There is nothing in the Collateral Agency Agreement, or any of the other financing documents produced by Kern River, however, that **requires** Kern River to seek such lender approval or to present to the lenders alternatives offered by creditors. The Commission also finds persuasive Kern River’s argument that it would be an exercise in futility to require it to seek its lenders’ approval of the Complainants’ request to reduce their collateral to 12 months demand charges. Here, it is unlikely that Kern River’s lenders would be amenable to substituting credit security of admittedly lesser value for the Centerpoint Guaranty.<sup>28</sup> Accordingly, as

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<sup>24</sup> Complainant’s Answer at 10.

<sup>25</sup> Complaint at P 38.

<sup>26</sup> See *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000)(discussing the importance of contract stability).

<sup>27</sup> See e.g. Section 6 of the “Assignment of Contracts,” filed as Exhibit 3 to the Answer.

<sup>28</sup> As discussed above, Commission policy for expansion projects permits the pipeline to assess reasonable collateral up to the expansion shipper's proportionate share  
(continued)

there is no requirement in the lending documents that Kern River seek approval from its lenders of the proposed substitute credit, and because there is no showing that the Guaranty is unjust or unreasonable, there is no basis for the Commission to require Kern River to approach its lenders to seek approval as requested by Complainants.<sup>29</sup>

33. As to the tariff issues, Complainants contend the Guaranty only applied to the Precedent Agreements and not to service after the projects were completed. But we do not find that the Guaranty can be read so narrowly as not to apply once service commenced. The Precedent Agreements make clear that that service would be provided pursuant to Kern River's tariff. Pursuant to Kern River's tariff, it is not obligated to execute a transportation service agreement or initiate service for any shipper who did not meet its creditworthiness standards,<sup>30</sup> and Kern River states in its Answer that it "would not have entered into the [TSAs] without appropriate credit support having first been provided."<sup>31</sup> To that end, the Centerpoint Guaranty expressly states that Centerpoint provided the Guaranty "to induce Kern River to enter into gas transportation agreements ... for [Reliant]." Paragraph 1 of the Guaranty states that Centerpoint is guaranteeing "full payment and performance" ... of all [Reliant's] present and future indebtedness and obligations under the Agreement", with "Agreement" defined as one or more gas transportation agreements. Reliant itself acknowledges in the Complaint that Kern River required Reliant to provide credit support for its payment obligations under the TSAs. As the Commission found in *Calpine Energy Services, L.P. v. Southern Natural Gas Co.*:

As discussed above, it would make little sense to conclude that Sonat insisted on a collateral requirement equal to 30-months' worth of demand charges, only to agree 19 days later to reduce that requirement to 3 months at the very point at which Calpine would begin payment. In the absence of

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of the project's cost. Given that the project has already been constructed based on Centerpoint's Guaranty, we cannot find a reduction in collateral is appropriate. Issues with respect to the amount of collateral should be raised before the project is constructed, not after construction has been completed based on the proffered collateral. *See Calpine Energy Services, L.P. v. Southern Natural Gas Co.*, 103 FERC ¶ 61,273 at P 32, n.21.

<sup>29</sup> Of course, Centerpoint and Reliant can approach the lenders themselves to see if they are willing to substitute collateral for the pledged guarantee.

<sup>30</sup> Kern River Rate Schedule KRF-1, Section 7.

<sup>31</sup> Answer at 19.

specific language to the contrary, the Commission does not construe pipeline tariff provisions dealing with collateral as providing for a reduction in the collateral requirements applicable to initial shippers once the facilities go into service.<sup>32</sup>

34. Complainants' argument that Kern River's tariff allows it to elect which reasonable form of security they provide, and thus must be allowed now to "exercise its option to 'furnish other security' in accordance with Section 7.1 of Rate Schedule KRF-1," also fails. As the Commission has explained in *Calpine*, "the tariff is intended to determine the obligations of the parties after service has begun, and should not determine the parties' obligations with respect to construction."<sup>33</sup> Moreover, the language of section 7.1 would not require Kern River to substitute collateral in this situation. Section 7.1 states:

If Shipper otherwise fails to establish creditworthiness as provided herein, Shipper may still receive service under this rate schedule provided it either (a) furnishes and maintains for the term of the Transportation Service Agreement a written guarantee in a form satisfactory to Transporter from a third party which is creditworthy as determined above, or (b) furnishes other security acceptable to Transporter's lenders.

While the tariff language does allow a non-creditworthy shipper to initially elect which form of security to provide, there is nothing in the language to suggest that a shipper has a continuing option to switch back and forth between alternative forms. Moreover, the first option, that a shipper may "furnish and maintain **for the term of the Transportation Service Agreement**, a written guarantee from a third party...;"<sup>34</sup> strongly supports the interpretation that such collateral may not

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<sup>32</sup> 105 FERC ¶ 61,033 at P 22 (2003)(quoting *Northern Natural Gas Co.*, 103 FERC ¶ 61,276 (2003) ("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").

<sup>33</sup> 103 FERC ¶ 61,273 at P 37; *See also* Policy Statement at P 18; *North Baja Pipeline, LLC*, 102 FERC ¶ 61,239 at P 15 (2003).

<sup>34</sup> Kern River Rate Schedule KRF-1, Section 7.1 (emphasis added).

be replaced at will. Having chosen the first option, Complainants agreed to provide a guarantee for the term of the agreement. They have provided no evidence to support their presumption that “there was every reason to believe that once Centerpoint and Reliant were no longer affiliated, Reliant could substitute another form of credit for the [ ] guarantee.”<sup>35</sup> In fact, this statement makes clear that Complainants were planning, at the time Guaranty was executed, to disaffiliate. Given that knowledge, if Complainants were concerned about their future ability to substitute alternative forms of credit support, they could have included a provision to that effect in the Guaranty. Absent such a provision, the Complainants have no right to insist on a substitution of collateral in the circumstances presented here.

35. The Commission also finds that Complainants’ arguments that Kern River’s alleged “request for credit support” is inconsistent with the Policy Statement and Kern River’s tariff lack merit. The Policy Statement makes clear that project financed pipelines may seek greater amounts of collateral from potential shippers on new construction projects than three months of reservation charges. Contract No. 1716, which was for 2003 Expansion capacity and is pledged to its lenders, falls within the Policy Statement’s exception for project financed construction. According to Kern River, Contract Nos. 1504 and 1506 permanently assign to Reliant<sup>36</sup> capacity related to the Original System and the 2002 Expansion and are also pledged as security to its lenders. The relevant assignment agreements for Contract Nos. 1504 and 1506 indicate that Reliant assumed the obligations of the initial shipper. Moreover, as shown in Exhibit 2 to the Answer, Contract Nos. 1716, 1504 and 1506 have been assigned to Kern River’s lenders as collateral for its financing obligations.<sup>37</sup> As discussed above, Kern River is prohibited by the terms of its financing documents from forfeiting or releasing Reliant from the Guaranty for those agreements. Thus they are not subject to the Policy Statement’s three month reservation charge limit. Kern River is entitled to enforce the Guaranty with respect to these agreements.

36. The Commission also rejects Complainants’ arguments that Kern River is discriminating against Reliant. As Kern River explains, the shippers to which

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<sup>35</sup> Complainant Answer at 10.

<sup>36</sup> See assignment agreements contained in Exhibits 5 and 6 to the Complaint.

<sup>37</sup> Schedule A to Amendment No. 1 to Assignment of Contracts, Pledge and Security Agreement (Schedule A).

Complainants refer are not similarly situated to Complainants. The situations cited by Complainants concern shippers or parents who had investment grade status at the time of execution of the transportation agreements. These shippers were not required to provide collateral for the expansion and, therefore, unlike the Centerpoint guarantee, their collateral was not pledged to Kern River's lenders. The shippers or parents thereafter lost that status, at which point they were required to post additional security to re-establish credit support under the tariff in order to continue to receive service. The same tariff requirements would apply in the event that Centerpoint loses its creditworthiness status. In none of these cases do the Complainants show that Kern River permitted a substitution of collateral for the parental guarantee, and therefore we find Kern River has not acted in an unduly discriminatory manner.

**B. Capacity Release Contract**

37. Kern River provided no evidence to show that Contract No. 8035 is either related to construction or has been pledged to Kern River's lenders. Contract No. 8035 is a "Released Transportation Service Agreement" reflecting a temporary release of capacity from Southwest Gas Corporation's Agreement No. 1085.<sup>38</sup> Because that release is temporary in nature, Southwest Gas is the party ultimately responsible to Kern River for any obligations under its original contract. The record evidence supports this conclusion as Southwest Gas Contract No. 1085, and not Reliant Contract No. 8035, is pledged as collateral to Kern River's lenders.<sup>39</sup> Kern River has not provided sufficient evidence to support its claim that Contract No. 8035 is one of the "gas transportation agreements" referred to in the Guaranty.

38. Kern River's need for security for the expansion project is fully protected by Southwest Gas's obligation under the expansion contract. Kern River, therefore, has not shown that it cannot permit alternative collateral for the Reliant capacity release contract. Accordingly, Kern River must either permit Reliant to substitute the standard three months collateral applicable to capacity release shippers under Commission policy,<sup>40</sup> or

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<sup>38</sup> Exhibit 9 to the Complaint.

<sup>39</sup> See Schedule A. Kern River's Index of Customers also lists Contract No. 1085.

<sup>40</sup> See Policy Statement at P 11& n.11 (and cases cited therein). See also, *Kern River Gas Transmission Co.*, 98 FERC ¶ 61,079, at 61,241 (2002) (Commission policy with respect to creditworthiness requires that shippers who cannot demonstrate creditworthiness be allowed to get service by prepaying for up to 3 months of service).

file within 30 days to show why substitution of collateral is not appropriate for Replacement Contract No. 8035.

The Commission orders:

(A) Kern River must allow Reliant to substitute reasonable credit assurance for Replacement Contract No. 8035 as discussed.

(B) The Complaint is otherwise denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.