

INITIAL COMMENTS OF CALPINE CORPORATION.
CONCERNING THE NORTH AMERICAN ENERGY STANDARDS BOARD
PROPOSED CREDITWORTHINESS STANDARDS

Calpine Corporation, (“Calpine” or “the Company”) files these initial comments in response to the North American Energy Standards Board’s (“NAESB”) proposed creditworthy standards.

INITIAL COMMENTS

A. Transportation Service Providers’ Creditworthiness Provisions Should Be Transparent, Consistent and Reliable.

Although Calpine respects the work that the Wholesale Gas Quadrant’s (“WGQ”) Business Practices Subcommittee (“BPS”) has completed to date on the development of effective and reliable creditworthiness standards, much work still remains. From the outset of the NAESB creditworthiness standards development process, Calpine has advocated its desire to develop standards with that would promote the efficiency of and access to the natural gas transportation grid. FERC Order No. 636 would be best served if creditworthiness standards were transparent, consistent and reliable between all transportation service providers (“TSP”). The Federal Energy Regulatory Commission (“Commission”) apparently shares Calpine’s concern that unduly burdensome creditworthiness standards would be detrimental to open access, when it stated that unfettered and unjustified creditworthiness standards “could impede the movement of

gas”¹ and “Creditworthiness standards are designed to assure the availability of capacity on an open access basis to all service requesters.”²

Transparency All of a TSP’s creditworthiness standards should be disclosed in its tariff. There should be no “shroud” over any part of a TSP’s creditworthiness standards, including the criteria a TSP uses to determine whether a service requester is non-creditworthy. Transparency allows service requesters to assess the full cost of transporting on a TSP, and allows them to make the best economic decisions in a timely manner.

Consistency Formalized creditworthiness standards that are generally consistent from one TSP to another allow service requesters to better gauge the time and cost associated with obtaining capacity on the interstate transmission grid. They also aid in the efficiency of the market because the risk of “over-collateralization” i.e. the risk that a TSP will require excessive security amounts, is eliminated, thus allowing for more efficient and better use of capital in the markets. Instead of capital uselessly tied up in excessive security requirements imposed by the TSPs, service requesters are instead able to invest that capital in their businesses. This promotes a healthier industry.

Reliability In order for the gas transportation market to work efficiently, service requesters must be able to rely on a TSP’s tariff provisions as the necessary source that guides the terms and conditions (including creditworthiness provisions) for service. Without reliable creditworthiness standards, a service requester remains at risk to potentially unduly discriminatory behavior. This is the situation of the interstate

¹ *Natural Gas Pipeline Company of America*, 102 FERC ¶ 61,355 (2003) (hereinafter referred to as “*Natural*”).

² *Tennessee Gas Pipeline Company*, 102 FERC ¶ 61,075 (2003) (hereinafter referred to as “*Tennessee*”).

transportation industry, as we know it today. The potential for abuse is real and significant; without a set of clear, consistent and reliable generic creditworthiness standards, the potential for abuse will continue to exist. Reliable creditworthiness standards will help mitigate the risk of abusive behavior.

B. The NAESB WGQ Creditworthiness Standards Must Be Expanded Upon to Include Creditworthiness Criteria and Measurements.

On November 6-7, 2002 the WGQ BPS met to develop a work plan from which the BPS could work on creating standards. Calpine advocated a work plan that would include developing creditworthiness criteria and measurements. Calpine explained to the WGQ BPS participants that without clearly established creditworthiness criteria and measurements, a service requester remains at the mercy of the “black-box” method employed by many TSPs. Numerous parties argued at the time that there was not sufficient Commission policy in place to tackle creditworthiness criteria and measurement standardization. The BPS voting record indicates that in December of 2002, the opportunity to include creditworthiness criteria and measurements was narrowly defeated.

However, since that time, the Commission has provided new guidance associated with its policy of establishing a TSP’s creditworthiness criteria in its tariff. In *Tennessee*, the Commission agreed with commenting parties that Tennessee should “include objective criteria for determining whether a service requester is creditworthy in its tariff.”³ Similarly in *Natural*, the Commission concluded, “we will require Natural to include objective criteria for determining whether a service requester is creditworthy in

³ *Tennessee*, ¶ 41.

its tariff.”⁴ Most recently, the Commission ruled in *Gulf South Pipeline Company, L.P.* “the Commission will require Gulf South to include objective criteria for determining whether a shipper is creditworthy in its tariff.”⁵ Calpine agrees with the Commission’s findings in *Natural* that not including objective criteria in a TSP’s tariff is “unjust and unreasonable in that it allows Natural too much discretion in determining when a service requester becomes non-creditworthy and allows for possible undue discrimination.”⁶ This basic tenet is at the heart of Calpine’s desire to see objective criteria clearly stated in every TSP’s tariff. Calpine is not advocating a “bright-line test” because it does, similar to the Commission’s findings in *Natural*, recognize the need for TSPs to consider the individual circumstances of its service requesters. However, a service requester needs to have a clear understating of the criteria a TSP uses when determining a service requester’s creditworthiness from which it can rely upon. Creditworthiness criteria must be reasonably related to the risk of default actually borne by the pipeline, giving consideration to: (i) the pipeline’s duty to mitigate the harm associated with the default; (ii) the likelihood or probability of a default considering the critical and often non-substitutable service that a pipeline provides to the shipper; and (iii) the Commission’s policy to promote competition in the nation’s energy markets by limiting barriers to entry. Currently there exists nothing in a large number of TSP tariffs regarding the criteria and measurement used to assess a service requester’s credit status.⁷

⁴ *Natural*, ¶ 69.

⁵ *Gulf South Pipeline Company, L.P.*, 103 FERC ¶ 61,129 P. 24 (2003) (“Gulf South”).

⁶ *Natural*, ¶ 69.

⁷ For example, just a small sampling of TSP tariffs reveals that Algonquin Gas Transmission, ANR Pipeline Co., Colorado Interstate Gas Co., Columbia Gas Transmission Corp., Columbia Gulf Transmission Co., East Tennessee Natural Gas Co., El Paso Natural Gas Co., KN Interstate Gas Transmission Co.,

The NAESB record should also note that the services and end-user segments tried on two separate occasions to expand the WGQ creditworthiness standards development process work plan to include the development of objective criteria and measurements. In fact, there were two votes, one in late February, and one in early March. Both times, the Pipeline and LDC segments voted unanimously that the work plan should not be expanded to include the development of standards associated with objective criteria and measurements. The most vocal reason from the opposition was that there was insufficient time to work on creditworthiness criteria prior to the June 1, 2003 progress report date. Another argument set forth by the opposition was that the Commission Orders in *Tennessee* (and presumably, *Natural* and *Gulf South*) are subject to rehearing, and that the Commission may reverse its position on requiring objective criteria in a TSP's tariff. Primarily due to these arguments, by a narrow margin, the effort to include developing criteria standards failed, and the BPS did not include creditworthiness criteria in the WGQ creditworthiness standards development process work plan.

Because of the decisions made on the "criteria issue" at the BPS, the standards the WGQ Executive Committee has before it today makes no mention of, nor do they include, a single standard promoting the concept the Commission has advocated on three occasions now, that is, the adoption of a standard or set of standards requiring TSPs to include objective criteria for determining creditworthiness in their tariffs. The WGQ was assigned the responsibility of developing creditworthiness standards by the Board of Directors, standards development restricted to the implementation of existing

Northern Border TSP Co., Southern Natural Gas Co., Texas Gas Transmission Co., Transcontinental Gas Pipeline Corp., and Williams Gas Pipeline Central are devoid of objective criteria for determining whether a service requester is creditworthy in their tariffs.

Commission policy, new Commission policy after it has been ordered and non-policy oriented aspects of creditworthiness. Because the Commission ordered a new policy on creditworthiness criteria in *Tennessee* on January 29, 2003, there was adequate time to address criteria in the BPS. Thus, the BPS has failed to meet the Board's directives.

Therefore, the WGQ Executive Committee should report to the Board, and to the Commission that the BPS failed to develop creditworthiness criteria and measurement standards, even though there was sufficient Commission policy to do so. The BPS should also be directed to develop creditworthiness criteria and measurements in order to address the risks the Commission expressed in *Tennessee*, *Natural*, and *Gulf South*.

C. The NAESB WGQ Executive Committee Should Adopt As A Formal Creditworthiness Standard That Service requesters Determined To Be Non-Creditworthy Have Thirty Days To Provide The Required Security.

The Commission, in *Tennessee*, *Northern*, and *Natural* encouraged parties to initiate the standard development process at the NAESB to see whether a consensus could be developed supporting a creditworthiness standard regarding the amount of time a non-creditworthy service requester has to post the requisite security.⁸ In each of these orders, the Commission also suggested that TSPs may adopt a timeline whereby TSPs would require a one-month advance payment within five business days of receipt of the notification. In addition, the TSP would allow the service requester to have at least thirty days to provide the next three months of security for service.⁹ While the Commission did not state its suggestion was adoption of a formal policy, the Commission clearly rejected the pipelines' proposals of five and ten-day cure periods. The Commission also

⁸ E.g., *Tennessee*, ¶ 20.

⁹ See *Tennessee*, ¶ 18; *Northern*, ¶ 49; and *Natural*, 52.

consistently allowed non-creditworthy shippers a thirty-day period to provide up to three months of estimated service charges, since the Commission wanted to (a) ensure the Commission had adequate time to respond to a complaint and (b) protect a shipper in the event multiple pipelines are requiring similar collateral requirements simultaneously.¹⁰

Calpine, along with others, believe the Commission's thirty day cure period to provide three months of estimated service charges is a fair and balanced approach regarding security timelines, Calpine strongly urges the WGQ Executive Committee to adopt it as a formal standard.

D. The NAESB Executive Committee Should Amend Certain NAESB Adopted Standards.

Calpine requests the WGQ Executive Committee amend the following NAESB creditworthiness standards based on the reasons provided below.

Standard 0.3zG – Currently written, this standard requires a TSP to provide a service requester determined to be non-creditworthy with written notification clearly stating the reason(s) for the TSP's decision. However, given the magnitude of cost and burden a “non-creditworthy” grade has on a service requester, Calpine, along with representatives of Process Gas Consumers Group, Encana Corporation, and Reliant Energy Services, Inc. advocated at NAESB that much stronger language should be included in the standards (either as a separate stand-alone standard or incorporated with this standard), which would require the TSPs to provide all financial ratios, analyses, as well as any subjective factors that led to the non-creditworthy determination. Although the Pipeline segment opposed such a position, and Calpine's proposal (supported by the end-user and services segments) ultimately failed at the BPS, it nevertheless is just and reasonable for a service

¹⁰ See *Tennessee*, ¶ 17; *Northern*, ¶ 48; *Natural*, ¶ 51.

requester to expect that upon a TSP's determination that it is no longer creditworthy, the TSP should be required to provide in writing, with as much specificity as possible, the reason(s) for the non-creditworthy determination. As currently written, Standard 0.3zG would allow a TSP to meet its notification obligations by merely providing general statements. Such statements may not give the service requester sufficient information necessary to challenge the non-creditworthy determination.

Posting collateral is a burdensome and costly issue for service requesters, and service requesters should be supplied with as much information as possible at the time of the notification in order to offer themselves the opportunity to alleviate themselves from such burdens. Service requesters can only do this by being provided as much information as possible, up front and in writing. TSPs have already performed the work; all Calpine is requesting is that they put the analysis down on paper and supply the information to the service requester so that the service requester has the basic information necessary to protect its own economic interests.

Therefore, Calpine urges the WGQ Executive Committee to amend Standard 0.3zG by requiring TSPs to provide specific information related to the non-creditworthy determination, including all financial analyses and ratios relied upon, as well as any subjective factors that went into the non-creditworthy determination.

Standard 0.3zO – Calpine urges the WGQ Executive Committee to reject this standard altogether because it is fraught with problems. The standard implies that a TSP can require collateral in excess of what is stated in its tariff in the event a service requester's service requires construction, expansion, acquisition or lease of new facilities.

Essentially, what this standard would do is render a TSP's tariff meaningless, and allow

the TSP unfettered ability to require as much security as it wants when serving a non-creditworthy service requester in the event construction, expansion, acquisition or lease of facilities is involved. Worse, a TSP could hold on to the collateral indefinitely. Undoubtedly, this standard contravenes the Commission's long established policy of prohibiting provisions not specifically stated in the TSPs tariffs. In *Williston Basin Interstate Pipeline Co.*,¹¹ the Commission determined that pipelines may not enforce policies that are not specifically stated in their tariffs. Although a pipeline may impose reasonable operational conditions on any service, "[s]uch conditions must be filed by the pipeline as part of its transportation tariff."¹² As this language makes clear, a tariff filing is mandatory whenever a pipeline wishes to impose new conditions on its shippers. The Commission has also held that in order to impose new conditions on shippers, "these conditions must be spelled out in the pipeline's tariff."¹³ In its Order on Rehearing in *Williston Basin*, the Commission affirmed its position, that "notwithstanding what *Williston may have thought* its tariff provided for, that requirement was not reflected in the tariff itself."¹⁴ The Commission reasoned that "[u]nless pipelines reflect material terms of service in their tariffs, they could engage in practices that have a significant rate impact on shippers, and neither the Commission nor shippers would have prior knowledge of those terms and conditions."¹⁵ Because this standard would allow the TSP to require excessive collateral amounts not specified in its tariff, and thus not specifically

¹¹ 57 FERC ¶ 61,374 at 62,263 (1991).

¹² 18 C.F.R. § 284.7(c) (emphasis added).

¹³ *Gulf States Transmission Corporation*, 60 FERC ¶ 61,045, at 61,166 (1992).

¹⁴ *Williston Basin Interstate Pipeline Company*, 59 FERC ¶ 61,326 at 62,207 (1992)(emphasis added).

¹⁵ *Id*

authorized by the Commission, it runs counter to existing Commission policy, and therefore *cannot* be accepted as a standard. In addition, this open-ended standard increases the potential for undue discrimination and abuse, and could limit access to the natural gas transportation grid, running counter to the open-access goals of FERC Order No. 636.

Moreover, the standard is overly broad and unduly vague and makes no attempt to match the actual financial risk of the TSP with the size of the collateral requirement. Why should a TSP be allowed to hold excessive collateral requirements from a handful of service requesters, and have the ability to “roll-in” expansions into existing rate base structures, thereby significantly reducing the financial risks associated with the construction, not to mention reaping the benefit of higher revenues from existing service requesters, that rolled in rate treatment allows? Also, what happens to the “facility cost” collateral if a non-creditworthy customer indeed defaults, and the TSP receives the collateral, and then the TSP is able to turnaround and remarket that capacity? Why should the remaining service requesters receive no rate relief? Because it is readily apparent that there are too many problems associated with Standard 0.3zO, the NAESB Executive Committee should not adopt it as a formal standard.

Instead, the WGQ should adhere to the Commission’s existing policy of limiting security amounts to no more than three months of estimated service charges. Indeed, since it is plain that the three-month limit is the Commission’s existing policy, upheld in *Natural, Gulf South* and *PG&E Gas Transmission, Northwest Corporation*¹⁶, the WGQ Executive Committee should amend the BPS’s creditworthiness standards by adding a

¹⁶ *PG&E Gas Transmission, Northwest Corporation*, 103 FERC ¶ 61,137 (2003).

standard to state that collateral assurances in amounts up to three months of estimated service charges is the limit, unless the Commission specifically waives its policy.

It is important for NAESB to globally establish and implement the Commission's existing and long established policy of the three-month limit, and any TSP with a tariff requirement requiring credit assurances from non-creditworthy service requesters in amounts greater than three months of estimated service charges is operating under a tariff provision that is patently unjust and unreasonable. Clearly, the Commission has addressed this issue, since it has ruled on numerous occasions that collateral assurance amounts greater than three months of estimated service charges is unjust and unreasonable.¹⁷ For example, the Commission has stated in *North Baja Pipeline, LLC* and *Natural*:

The Commission has held that “the three-month prepayment has been the standard used through the natural gas industry in the past and in the new post-Order 636 industry. We agree that a prepayment requirement for any period longer than three months is excessive and should be rejected.”

North Baja Pipeline, LLC, 102 FERC ¶ 61,239 (2003); *Natural*, paragraph 30.

Therefore, based on established Commission precedent, Calpine strongly urges the NAESB Executive Committee to develop a standard limiting a TSP's collateral requirements from non-creditworthy service requesters to amounts no greater than three months of estimated service charges. If TSPs wish to obtain security amounts from non-creditworthy customers in excess of three-months, they should be required to request it from the Commission, and to be prepared to bear the burden of proving that their

¹⁷ The Commission, of course, has exercised its authority by granting exceptions to the three month standard, but it should remain the TSP's burden of proving that any request to require collateral from non-creditworthy service requesters in amounts greater than three months of estimated service charges is just and reasonable.

proposals are just and reasonable.¹⁸ The NAESB Board of Directors charged the WGQ with developing standards based on either existing or newly ordered Commission policy. Clearly, the “three-month limit” is the Commission’s policy on collateral amounts. Because the BPS did not set a standard based on long established Commission policy, it has failed to do what the Board directed. This failure can only be cured if language is included in a standard that establishes that a TSP can require security from a non-creditworthy service requester in amounts up to three months of estimated service charges.

Standard 5.3zC – This standard, as currently written, would require a service requester to “pre-qualify”, or in other words receive pre-approval from a TSP in order to bid into the capacity release market. This is a destructive standard since its intent is to discriminate against non-creditworthy service requesters from participating in the secondary market.

In order to “pre-qualify” a service requester would have to meet the TSPs terms and conditions, among which are its creditworthiness standards. If a service requester were deemed non-creditworthy by the TSP, that service requester would be barred from participating in the secondary market because it could not “pre-qualify”, unless that service requester is willing to provide a theoretical security amount up-front, even before that service requester knows if it had won the capacity it bid for, and how much of the capacity it actually contracted for. In essence, the non-creditworthy service requester would be required to post security simply to get on an approved bidders list. Such a standard is unduly discriminatory and will impede a significant number of service requesters’ ability to participate in the secondary market since the cost of participating will be high, and the terms and conditions unduly burdensome, since potential service

¹⁸ See, 15 U.S.C. § 717(c).

requesters will necessarily have to use up valuable capital reserves simply to participate in the secondary market.

This standard, as proposed, uses a TSP's creditworthiness standards to impede open access to the transportation grid, which is completely opposite to the reasons for having creditworthiness standards. The Commission, in *Tennessee*, explained that "Creditworthiness standards are designed to assure the availability of capacity on an open access basis to all service requesters."¹⁹ Yet, this standard, as written, would impose an unnecessary obstacle to service requesters in obtaining capacity in the secondary market. Numerous service requesters that use the interstate natural gas transportation grid have been deemed "non-creditworthy" by the TSPs, yet those service requesters have remained excellent customers with outstanding track records for paying their bills in full and on time. These service requesters have done nothing to be shut out of the secondary market, or to be unduly required to post expensive security amounts simply to be on an approved bidders list. For these reasons, Calpine strongly urges the WGQ Executive Committee to reject standard 5.3zC.

¹⁹ *Tennessee*, ¶ 62.

CONCLUSION

For the foregoing reasons, Calpine asks the NAESB WGQ Executive Committee to accept Calpine's proposals in these initial comments.

Respectfully Submitted,

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