UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

USGen New England, Inc. Docket No. RP06-391-001

ORDER ON REHEARING

(Issued March 2, 2007)

1. On October 25, 2006, Tennessee Gas Pipeline Company (Tennessee) filed a request for rehearing of the Commission's September 25, 2006 Declaratory Order in the captioned docket.[1] In the September 25, 2006 Order the Commission issued a Declaratory Order deferring certain contract issues to a court and addressing certain other policy issues raised by USGen New England, Inc. (USGen) in its petition for declaratory order. As discussed below, the Commission grants in part and denies in part rehearing.

I. Background

A. USGen-Tennessee Contracts and the Bankruptcy Proceedings

2. In 2002, USGen entered into two service agreements and related negotiated rate letter agreements with Tennessee for firm transportation service under Tennessee Rate Schedule FT-A, effective August 1, 2002, through October 31, 2013. The letter agreements provided for negotiated formula rates under which Tennessee would charge its maximum lawful tariff rate for FT-A service, as that rate may change, plus fixed negotiated surcharges of $1.8953 per Dth per month for the first three years and $1.45 per Dth thereafter coupled with a $0.0335 per Dth additional surcharge if USGen did not meet a certain minimum throughput level. Further, the contracts contained the following clause: "For five (5) years from the Commencement Date, Shipper shall not file or support any filing at the FERC that proposes to decrease the rate under this Negotiated Rate Agreement." At that time, it operated two natural-gas-fired power generating facilities and other power-related assets in New England.

3. In 2003, USGen filed for bankruptcy in the U.S. Bankruptcy Court for the District of Maryland (Bankruptcy Court), which approved a reorganization plan under which all creditors will be paid in full on approved claims and will receive interest dating back to

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[1] *USGen New England, Inc.*, 116 FERC ¶61,285 (2006) (September 25, 2006 Order).

the date USGen filed for bankruptcy. After filing for bankruptcy, USGen filed with the Bankruptcy Court to terminate the two transportation agreements it held with Tennessee. The Bankruptcy Court granted USGen's motion to reject the contracts, deeming them rejected and terminated and the Commission granted Tennessee's request for waiver of article VI, section 2 of the GT&C tariff, permitting Tennessee to remarket the capacity.[2]

4. Tennessee sought damages for breach of contract and, consistent with Commission exit fee precedent, calculated approximately $20 million of the claimed damages[3] by first determining the net present value of reservation charges USGen would have paid it for service over the remaining term of the contracts ending October 31, 2013, and then subtracting some $12 million from that amount as a mitigation credit to reflect the net present value of future reservation charges it expects to receive from the shippers to whom the former USGen capacity was sold.[4]

5. USGen objected to Tennessee's damages claim, asserting that Tennessee is significantly over-recovering its cost of service, both as to its base rates and its fixed fuel rate, and that Tennessee's FT-A tariff rates and fuel charge would have likely decreased before the subject contracts were scheduled to terminate on October 31, 2013. Since its negotiated contract rate, which established the damages Tennessee sought, was based on the FT-A tariff rate, *i.e.*, the FT-A maximum rate plus surcharges, USGen reasoned that a reduction in the FT-A maximum rate would, likewise, reduce the contract rate and, as a further consequence, would reduce (*i.e.*, mitigate) the damages. As such, it claimed, the reasonableness of Tennessee's maximum tariff rates is an issue and gave notice that it would be filing a section 5 complaint to reduce Tennessee's tariff rates in order to eliminate any remaining damage claim. USGen also argued that other additional mitigation to reflect non-reservation charge revenues from the replacement shippers should be factored in to reduce the damages. Tennessee responded by raising two claims relevant to the instant rehearing proceeding. First, Tennessee claimed that under state contract law, the 5-year bar on seeking reductions in its contract rate still was enforceable despite the termination of the service agreement and would bar such a section 5 complaint regarding its maximum tariff rates. Further, in a Motion for Summary Judgment to the Bankruptcy Court seeking an order rejecting USGen's claims for additional mitigation, Tennessee argued that the Bankruptcy Court lacked jurisdiction over USGen's claims for additional mitigation because the claims would be barred by the

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[2] *Tennessee Gas Pipeline Co.*, Docket No. RP03-603-000 at 2 (September 25, 2003) (unpublished letter order).

[3] According to Tennessee, Tennessee's claim for damages due to USGen's rejection of the contracts, after mitigation credit and net present value, totaled $28,040,731. Tennessee Protest, Docket No. RP06-391-000, at page 5.

[4] Tennessee Protest, Docket No. RP06-391-000, at page 2 note 4, and page 5.

filed rate doctrine.[5] Tennessee claimed that such mitigation would effectively modify the tariff rate on file. Although the Court stated that it "will not feign a familiarity with the particular area of the law at issue here" and that "this is an issue to be determined either by a far higher level of court or perhaps initially by the Federal Energy Regulatory Commission,"[6] the Court nonetheless granted Tennessee's Motion and summarily rejected USGen's claims for additional mitigation.

B. The Petition for Declaratory Order

6. On June 14, 2006, USGen filed a petition for declaratory order requesting a Commission order declaring that: (1) USGen is not contractually precluded from filing a complaint against Tennessee under section 5 of the Natural Gas Act (NGA) challenging the reasonableness of Tennessee's tariff rates and fuel charges; (2) Tennessee's tariff does not address the calculation of damages or mitigation of damages arising from a shipper's breach, and, therefore, state law governs mitigation, including whether revenues from backhauls and fuel over-recoveries from shippers who acquired the USGen capacity should be credited as mitigation of the damages owed Tennessee. Regarding the matter of the section 5 waiver provisions, USGen argued that the waiver provision should be interpreted to only apply as a bar against seeking a reduction in the negotiated surcharge component of the contract rate, but not to the base maximum tariff rate that the surcharges were added to. Further, it argued that Tennessee's interpretation of the provision, to the extent that it applied to challenges to Tennessee's maximum base rates, was inconsistent with Commission policy.[7]

7. In its protest to USGen's Petition, Tennessee argued that the matter of USGen's right to bring an action under section 5 is a matter of contract interpretation best left to the Bankruptcy Court, both as to the enforceability of that provision and the interpretation to be given that provision. However, that claim notwithstanding, Tennessee argued that the subject contracts expressly prohibited a complaint by USGen under section 5, thus requiring no interpretation. Further, in response to USGen's claim that the section 5 waiver provisions were inconsistent with Commission policy, Tennessee argued that Commission policy does, in fact, permit such provisions. Tennessee also reiterated arguments it successfully made to the Bankruptcy Court that the filed rate doctrine effectively prohibits the Bankruptcy Court from granting the additional mitigation USGen was seeking. Tennessee's theory was that such mitigation effectively modifies the rate paid by the customer to one below the rate on file with the Commission, and that,

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[5] *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

[6] USGen Petition for Declaratory Order, Exhibit M (Memorandum of Decision, United States Bankruptcy Court for the District of Maryland, Case No. 03-30465PM, May 8, 2006).

[7] USGen Petition for Declaratory Order at 15.

accordingly, the Bankruptcy Court was correct in granting Tennessee's Motion for Summary Judgment rejecting USGen's claim for additional mitigation on the basis that the filed rate doctrine prohibited such relief.

C. **The September 25, 2006 Declaratory Order**

8. On September 25, 2006, the Commission issued a Declaratory Order in which the Commission deferred contract interpretation and other state contract law issues to the Bankruptcy Court, but addressed certain issues of Commission policy and the filed rate doctrine raised by the parties. First, the Commission stated that it would decline to answer USGen's question regarding whether its right to bring a complaint under section 5 of the NGA to seek a reduction in Tennessee's rates was barred by its former contracts with Tennessee. The Commission found that, although the issue of a contractual waiver of a shipper's right to bring a NGA section 5 complaint is within its jurisdiction, the Commission stated that it did not believe that there was a compelling reason to become involved in the dispute at this juncture.

9. The Commission set forth several factors that formed the basis for the foregoing determination. First, the Commission reasoned that the contracts at issue had been terminated and there was no ongoing contractual or shipper-pipeline relationship. Second, the Commission stated that, although the issue of contractual waiver of section 5 rights is within the Commission's jurisdiction, the case is an action in Bankruptcy Court for damages for breach of contract under Texas law. Third, the Commission stated that, other than the matter of Commission policy on contractual waivers of section 5 rights in transportation contracts that are still in effect, the court is competent to resolve the issues of contract interpretation and state law. Fourth, the Commission stated that if the contract provision at issue, *i.e.*, waiver of USGen's right to seek a decrease in Tennessee's rights, were still enforceable under Texas law, the Commission would likely find it unjust and unreasonable under Commission policy and unenforceable prospectively from the date of such order, but not before such date.[8] However, the Commission further stated that, if

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[8] In response to Tennessee's assertion that the section 5 waiver provision of the contracts were permitted under Commission policy, the Commission stated that as a policy matter, it has been reluctant to permit broad waivers of section 5 rights in non-conforming provisions of individual contracts except in narrow cases where additional rights and benefits are provided, such as a pipeline rate increase moratorium in a settlement. *Citing, Columbia Gas Transmission Corp.*, 111 FERC ¶ 61,338 (2005) (*Columbia*), *aff'd Columbia Gas Transmission Corp. v. FERC*, No. 05-1285 (D.C. Cir. 2007). The Commission stated that the Tennessee-USGen contracts did not reflect such additional rights and benefits. 116 FERC ¶ 61,285 at note 14.

this were the case, it still would be up to the Bankruptcy Court to decide what effect, if any, such ruling would have in the Bankruptcy proceeding where the Court would be applying Texas law, given that the proceeding commenced in 2003.[9]

10. Lastly, the Commission stated that it did not believe that USGen would benefit from filing a section 5 complaint, in any event. The Commission reasoned that it had discretion to decide whether to initiate a section 5 investigation into a pipeline's tariff rates, and could decline to do so in the circumstances of this case.[10] The Commission pointed out that in the past it has found that it is not unreasonable for such fees to be based on rates in effect at the time the exit fees are set as it could always be argued that the tariff rates might decrease in the future.[11] Therefore, the Commission reasoned that it would not expend its resources in a general NGA section 5 investigation into a pipeline's system-wide tariff rates simply to resolve a damages issue involving a single former shipper.

11. The Commission then addressed USGen's second, two-part request, that the Commission find that Tennessee's tariff does not address the calculation of damages or mitigation of damages arising from a shipper's breach, and, therefore, state law governs mitigation, including whether revenues and cost savings from backhauls and fuel over-recoveries from shippers who acquired the USGen capacity should be credited as mitigation of the damages owed Tennessee. The Commission agreed with the first part of that request that Tennessee's tariff did not address mitigation and that the Bankruptcy Court could resolve the issue of additional mitigation. However, in so ruling, the Commission also stated that it recognized that the Bankruptcy Court's statements in its ruling on Tennessee's Motion for Summary Judgment reflected the court's uncertainty over certain matters within the expertise of the Commission and that additional guidance from the Commission on those matters might have been helpful to the Court at that time.

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[9] The section 5 waiver provision of the contracts only was to apply for a period of 5 years, ending August 1, 2007, and any action by the Commission under NGA section 5 to reduce Tennessee's rates following such a complaint only could take effect prospectively from the date new replacement rates, if any, are established.

[10] C*iting, General Motors Corp. v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979) ("In general, an administrative agency's decision to conduct or not conduct an investigation is committed to the agency's discretion"); *Algonquin Gas Transmission Co.*, 84 FERC ¶ 61,174, at 61,912 (1998) ("The Commission has the discretion in determining whether to initiate investigations pursuant to section 5 or whether to set issues for formal hearing."); *Columbia Gas Transmission Corp.*, 85 FERC ¶ 61,437, at 62,642 (1998) (declining to initiate investigation based on finding that that investigation was not worth the investment of the Commission's resources).

[11] *Columbia Gas Transmission Corp.*, 70 FERC ¶ 61,157 at 61,473 (1995).

12. The Commission clarified that, contrary to Tennessee's arguments made to the Bankruptcy Court and to the Commission, the filed rate doctrine does not preclude the additional mitigation sought by USGen for non-reservation charge revenues, just as it did not bar the mitigation Tennessee already agreed to provide for reservation charges it expects to receive from the sale of USGen's turnback capacity. The Commission stated that mitigation does not change the filed rate; it only changes the net amount owed as an equitable remedy for the breach of the contract. However, the Commission determined that, because the Commission and the Bankruptcy Court have concurrent jurisdiction over a breach of contract damages claim such as this, the issue of additional mitigation may be resolved by the Bankruptcy Court by applying state law. The Commission stated that it would take no position on what damages or mitigation may be available under state law, but, regarding USGen's request to declare that certain non-reservation charge revenues could be counted for purposes of mitigation, the Commission stated that such mitigation would be inconsistent with the Commission's policies on exit fees.

II. Tennessee's Request for Rehearing

13. On rehearing, Tennessee does not contest the Commission's decision to defer the state contract law issues to the Bankruptcy Court and, instead, objects to the Commission's discussion of its policies on contractual waivers of section 5 rights and the filed rate doctrine. Tennessee asserts that once the Commission declined to assert "primary jurisdiction", the Commission should have ended its discussion instead of providing guidance to the Bankruptcy Court. Secondly, Tennessee argues that the Commission erred in finding that it was likely that the contract provisions restricting USGen's rights to make an NGA section 5 filing to reduce Tennessee's rates would be found to be unjust and unreasonable under Commission policy. Finally, Tennessee argues that the Commission erred in stating that the filed rate doctrine does not bar mitigation credits. As discussed below, the Commission denies rehearing.

III. Discussion

A. The Commission's Decision To Issue a Declaratory Order

14. Tennessee asserts that, after determining that no cause exists for the Commission to assert primary jurisdiction, the Commission erred by issuing what Tennessee asserts is speculation about what mitigation credit USGen could receive from the Bankruptcy Court and by providing an opinion about the five-year promise by USGen not to challenge TGP's tariff rates. Tennessee argues that, in both instances, the Commission's pronouncements were not necessary to its final disposition of USGen's petition and, so, in the judicial sense, appear as dicta.

15. Tennessee argues that in assessing whether to assert jurisdiction over contractual issues subject to the concurrent jurisdiction of the Commission and courts, the Commission will consider whether: (1) the Commission possesses some special expertise

that makes the case peculiarly appropriate for Commission decision; (2) there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) the case is important in relation to the regulatory responsibilities of the Commission.[12]

16. Tennessee argues that in orders declining primary jurisdiction, the Commission typically limits any discussion of the merits of the case and the Commission departed from this practice in the instant case.[13] Tennessee asserts that opinions such as those presented by the Commission offer little probative value, risk interference with the just and efficient resolution of court proceedings, and would announce rulings without the benefit of the crucible of a truly adversarial process. Therefore, Tennessee asserts that once the Commission determines no grounds exist for asserting primary jurisdiction, that the Commission's involvement with the matter at hand should be concluded. Tennessee requests that the Commission clarify that its pronouncements on the merits before the Bankruptcy Court are merely advisory opinions that carry no force of precedent or policy.

17. Tennessee has attempted to blur the distinction between the issues the Commission decided to defer to the Bankruptcy Court, *i.e.*, state contract law issues, with the issues the Commission decided to address, *i.e.*, Commission policies on contractual waiver of section 5 rights and the NGA filed rate doctrine issue. The latter issues the Commission addressed do not involve contract interpretation or other contract matters that can be deferred to a court to apply state contract law under the standards Tennessee raises. They involve Commission policies that cannot be left to the courts to resolve. Accordingly, the Commission cannot agree that it should have declined to address the matters of Commission policy and the NGA filed rate doctrine raised by Tennessee itself to the Bankruptcy Bank and the Commission. Nor, obviously, can we agree to clarify that the Commission's discussion of Commission policy and the filed rate doctrine will "carry no force of precedent or policy."

18. Tennessee appears to believe that the Commission does not issue declaratory orders, citing the policy courts have against issuing advisory opinions. The Commission is not subject to the limitation against issuing advisory opinions that applies to the courts. As the Commission has stated, section 554(e) of the Administrative Procedure Act provides that an agency in its sound discretion may issue a declaratory order to terminate a controversy or remove uncertainty.[14] Rule 207(a)(2) of the Commission's Rules of

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[12] *Citing The City of Glendale, California Portland General Electric Corp.,* 115 FERC ¶ 61,175 (2006)(*citing Arkansas Louisiana Co. v. Hall,* 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla v. Hall*).

[13] *Citing Arkla v. Hall; Kentucky Utilities Co.*, 109 FERC ¶ 61,033 (2004); *Illinois Power Co.*, 102 FERC ¶ 61,257 (2003); *Louisiana Natural Gas Pipeline Inc.*, 65 FERC ¶ 61,191 (1993); *Entergy Arkansas Inc.*, 112 FERC ¶ 61,206 (2005).

[14] 5 U.S.C. § 554(e) (2006).

Practice and Procedure expressly provides for petitions seeking: "A declaratory order or rule to terminate a controversy or remove uncertainty."[15] Thus, whether to consider providing declaratory relief under this provision is discretionary with the Commission and the Commission has previously articulated the purpose and standards for issuing a declaratory order.[16] Under these standards, the Commission found that it was in the public interest and a proper exercise of its discretion to provide guidance and clarification in this dispute regarding the Commission's policies on contractual section 5 waivers and the filed rate doctrine vis-a-vis mitigation of damages. In this manner, the Commission could promote a uniform interpretation of these matters that fall within the Commission's expertise and which should not be deferred to a court for resolution or left uncommented on. The parties to this proceeding, both USGen and Tennessee, raised these Commission policy and Natural Gas Act issues in arguments before both the Bankruptcy Court and this Commission to support, directly or indirectly their positions in the bankruptcy case and, as such, it is reasonable for the Commission to clarify its position by addressing these policy-related arguments.

B. The Commission's Discussion of Commission Policy on Contractual Waiver of NGA Section 5 Rights

19. Tennessee claims that the Commission erred to the extent that it found that, if the Bankruptcy Court were to find that the contract provision which prohibits USGen from challenging Tennessee's rates were still enforceable under Texas law, then the Commission "would likely find" such provision "unjust and unreasonable under Commission policy and unenforceable prospectively from the date of such order, but not before such date." Tennessee states that this dicta suggests that USGen's conversion from Rate Schedule NET to Rate Schedule FT-A did not confer upon USGen sufficient rights and benefits, mischaracterizes the record, and fails to account for the parties' bargained-for exchange.

20. Tennessee argues that the binding twenty-year transportation agreement between TGP and USGen had ten years of remaining life at the time service was converted from the NET 284 Rate Schedule to the FT-A Rate Schedule. Tennessee argues that had no obligation to permit that conversion and, therefore, its assent to that conversion was properly conditioned on receiving a binding, enforceable promise from USGen not to challenge Tennessee's rates for five years. Tennessee asserts that to the extent the September 25, 2006 Order ruled that such rate conversions do not provide adequate justification for sustaining a shipper's promise not to challenge rates for a specified negotiated term, the Commission erred as a matter of law and policy.

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[15] 18 C.F.R. § 385.207(a)(2) (2006).

[16] Express Pipeline Partnership, 75 FERC ¶ 61,303 at 61,967 (1996); *Nicole Gas Production, LTD.*, 103 FERC ¶ 61,328 at 62,260, *reh'g denied*, 105 FERC ¶ 61,371 (2003); *SFPP, Ltd*, 102 FERC ¶ 61,089 (2003).

21. Tennessee asserts that the Commission has approved section 5 waiver provisions when the provision does not result in the customer receiving a different quality of service from that provided other customers under the tariff. Tennessee states that it recognizes the Commission's legitimate concern that, except in narrow cases where the parties have received additional rights and benefits, a party should not unilaterally forgo its section 5 rights. Tennessee argues, however, that USGen received additional rights and benefits in the form of a rate schedule change and the concomitant savings from a lower rate[17] with no difference in service quality and, therefore, the waiver was appropriate. Furthermore, Tennessee asserts that the Commission previously approved the negotiated rate agreements with the waiver provisions in the agreements and, therefore, was just and reasonable. Tennessee assert that, if USGen had not agreed to the section 5 waiver, Tennessee would not have been able to realize the benefit of its bargain, and, therefore, would have had no incentive to offer USGen the lower rate. Furthermore, Tennessee argues that similarly situated shippers will never have the opportunity of a rate reduction for the full term of its transportation agreement. For these reasons, Tennessee requests that the Commission clarify that its opinion contained in the September Order, did not announce a new policy or regulatory requirement not to challenge rates.

22. We agree and clarify that the September 25, 2006 Order was intended to provide guidance on existing Commission policy on contractual waiver of section 5 rights; not to establish new policy. In *Columbia*, the Commission stated that "the Commission has been reluctant to sanction a section 5 waiver in a service agreement for a particular transaction, where the customer waives its section 5 rights not only as to the rate for its particular transaction at issue, but as to the pipeline's rates for all services."[18] An exception to this general rule, as explained in *Columbia*, would include a circumstance where, in settlement of a general section 4 rate case, the pipeline gave up its right under section 4 of the NGA to file for a general system-wide rate increase for the same period that the signatory customers gave up their right to seek a reduction in the pipeline's system-wide rates.[19] The Commission's finding in the September 25, 2006 Order, that "[t]he Tennessee-USGen contracts do not reflect such additional rights and benefits," reflected that Tennessee had not included such a general section 4 rate filing moratorium in its agreements with USGen as part of a settlement of a general section 4 rate case involving all of the pipeline's maximum rates.

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[17] Tennessee states that the NET 284 tariff rate at the time of the conversion was $10.61 (per Dth) whereas the FT-A tariff rate was $4.93 (per Dth). However, while Tennessee does not include the $1.8953 per Dth surcharge under the subject negotiated rate agreements, the total charges under its negotiated rate FT-A agreements was significantly less than under the NET 284. Thus, although Tennessee agreed to charge a rate much lower than the NET 284 rate, USGen agreed to pay a negotiated rate significantly higher than the tariff FT-A maximum rate for essentially the same service.

[18] *Columbia Gas Transmission Corp.*, 111 FERC ¶ 61,338 at P 14 (2005).

[19] *Id.* at P 18.

23. However, the Commission recognizes that it has not previously specifically addressed a contract provision like the one at issue which provides for a bar on filing to seek the negotiated rate to be lowered but which negotiated rate incorporates a maximum tariff rate. We believe that the subject provision in this context can be interpreted to be consistent with Commission policy in the following way. Although the clause cannot be applied to bar USGen from filing to seek reductions under section 5 in Tennessee's maximum tariff rates, any such potential reduction in a tariff maximum rate as the result of such filing cannot change the negotiated rate under the instant contract because USGen agreed not to make any filing that would result in a reduction in the negotiated rate. Hence, for the foregoing reasons, we find that, as so interpreted in the circumstances of this case, the subject waiver provision is not inconsistent with Commission policy and grant rehearing to that limited extent.

C. <u>The Commission's Discussion of the Filed Rate Doctrine</u>

24. In its rehearing request, Tennessee argues that the Commission erred in finding that the filed rate doctrine does not apply to USGen's proposed mitigation credits for certain claimed non-reservation charge revenues allegedly attributable to the resale of the USGen capacity. Tennessee states that while the filed rate doctrine does not preclude mitigation in general, the specific contracts between USGen and Tennessee preclude mitigation because otherwise, USGen would receive credits that USGen would not have had outside of bankruptcy. Tennessee argues that the filed rate doctrine requires courts and FERC to give full effect to those rates, and consequently, a defaulting shipper can not be rewarded be receiving credits that it would not have been eligible for absent bankruptcy. Tennessee asserts that otherwise, a defaulting shipper in bankruptcy would receive a discount that non-defaulting shippers could not receive. Tennessee argues that this policy would unfairly penalize non-defaulting shippers and pipelines.

25. Tennessee argues that the filed rate doctrine, and the rule against retroactive ratemaking embodied within the doctrine, apply to equitable remedies[20] and prohibit any shipper from receiving default credits not provided for under the parties' agreements, nor allowed any non-defaulting shipper. Tennessee requests that the Commission clarify that a defaulting shipper can not receive credits or offsets that non-defaulting shippers do not receive.

26. Contrary to Tennessee's arguments, mitigation credits do not affect the filed rate; consequently, the filed rate doctrine does not bar additional mitigation. As the Commission stated in the September 25, 2006 Order, at P 32, the filed rate doctrine does not preclude the additional mitigation USGen is seeking, just as it did not bar the

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[20] *Citing Public Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 761 (9th Cir. 2004); *In Re Mirant Corp.*, 378 F.3d 511, 519-20 (5th Cir. 2004); *Bryan v. BellSouth Communs., Inc.*, 377 F.3d 424, 429-30 (4th Cir. 2004); *California v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004).

mitigation Tennessee already agreed to provide for reservation charges it expects to receive from the sale of USGen's turnback capacity. The Commission explained that mitigation does not change the filed rate; it only changes the net amount owed as an equitable remedy for the breach of the contract. Accordingly, while it is correct that the Bankruptcy Court had no jurisdiction to use a rate other than the filed rate to determine damages, that truism begs the question of whether the court was being asked to change the filed rate or use a rate other than the filed rate when USGen sought additional mitigation.[21] In the cases Tennessee cites, courts held that the court could not award damages using a rate not on file,[22] whereas, here, under USGen's proposal and consistent with Tennessee's exit fee methodology, damages would be calculated starting with the filed rates, and then subtracting revenues expected to be received from the shippers who acquired the USGen capacity. The only difference is that USGen would expand the type of revenues to be subtracted. Tennessee calculated the damages it seeks from USGen as the future reservation charge revenues it is due under its contract with USGen, *i.e.*, the filed rate, less the reservation charge revenues it will get from shippers to whom it remarketed USGen's capacity after the contracts were terminated under the contracts with those shippers, *i.e.*, their filed rate. Tennessee never claimed that the subtraction of future reservation charge revenues from the resale of the USGen capacity would cause a violation of the FT-A maximum rate on file. USGen now claims future additional revenues are attributable to the resale of USGen's capacity and, like the future reservation charges receivable from those shippers, these additional revenues and costs savings should also be subtracted from the exit fee Tennessee has sought as damages. As such, its proposal for additional mitigation is theoretically consistent with Tennessee's exit fee methodology and would not result in a violation of the filed rate doctrine.

27. Tennessee has attempted to restate the issue in terms of a comparison between USGen, who is seeking additional mitigation, and non-defaulting shippers who do not receive the same reduction in the rate under their contracts for transportation service with Tennessee, implying that it is somehow unfair to allow mitigation only for a defaulting

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[21] Although Tennessee is not clear on whether its filed rate argument extends to USGen's claim that it would be able to show in a section 5 complaint that Tennessee's tariff rates should be reduced in order so as to reduce the damages, there would be no filed rate problem as to that prospect because the tariff rates on file would be reduced if USGen were successful. USGen was not asking the Bankruptcy Court to modify the filed rate; it was seeking assurance that it could request the Commission to reduce Tennessee's tariff rates in a section 5 complaint and that it would be those reduced tariff rates that the damages would be based on.

[22] For example, in the 2004 *Public Util. Dist. No. 1*decision, supra note 21, the appeals court found that calculating damages as the difference between the rate collected and a hypothetical market rate would violate the filed rate doctrine by utilizing a rate not on file with the Commission. 384 F.3d at 761-762. *See also In re Mirant*, 378 F.3d at 519 (Federal Power Act preempts breach of contract claims in District Court that challenge a filed rate).

shipper. These are simply not comparable circumstances. The other shippers are receiving service and pay for that service at rates established by contract. There is nothing to mitigate. USGen, on the other hand is no longer receiving service from Tennessee who, in turn, is proposing an exit fee as the amount of damages for its breach of contract.

28. However, Tennessee then asserts that the Commission has erred in its characterization of Tennessee argument and that, in fact, Tennessee does not contend that the filed rate doctrine precludes mitigation; it asserts, instead, that its contracts with USGen preclude such mitigation and the filed rate doctrine requires the courts and the Commission to give effect to those contract rates. In other words, if we understand Tennessee's restated argument correctly, it asserts that the contract rate is the filed rate and requiring mitigation credits effectively allows USGen to charge a rate different than its contract rate on file, thereby violating the filed rate doctrine that way. We find that this restated argument is the same as the above argument. Now it simply is clarifying that it was referring to the contract rate rather than the tariff maximum rate. Tennessee again confuses a scenario involving charging more than the "filed" rate (here, the contract rate) for transportation services provided by the pipeline with the equitable remedy of an exit fee for termination of a firm transportation contract that Tennessee itself has proposed in the bankruptcy proceedings below. Moreover, Tennessee's argument ignores the fact that the USGen contracts and, accordingly, the USGen contract rates, no longer are on file with the Commission.

29. Accordingly, although USGen may have other far more difficult hurdles to pass in the bankruptcy proceedings below before it can even proceed down the path of obtaining the proposed additional mitigation credits,[23] the filed rate doctrine is not one of those hurdles. It was, therefore, appropriate for the Commission to clarify that for the Bankruptcy Court.

The Commission orders:

Tennessee's request for rehearing is granted in part and denied in part as discussed above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[23] *See* September 25, 2006 Order at P 33.