

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.

USGen New England, Inc.

Docket No. RP06-391-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 25, 2006)

1. On June 14, 2006, USGen New England, Inc. (USGen) filed a petition for declaratory order and request for expedited processing regarding the right of USGen to challenge the reasonableness of the FT-A and fuel retention rates of Tennessee Gas Pipeline Company (Tennessee) and whether Tennessee may refuse to credit certain revenues derived from the sale of USGen's turnback capacity against a claim Tennessee is making in USGen's bankruptcy proceeding for damages relating to USGen's termination of two gas transportation contracts with Tennessee. Except to the extent discussed below, we decline to address the merits of the issues raised and defer the issues to the Bankruptcy Court.

I. Background

2. Before it filed for protection in bankruptcy in 2003, USGen operated two natural-gas-fired power generating facilities and other power-related assets in New England. Its bankruptcy claims are being litigated in the U.S. Bankruptcy Court for the District of Maryland, which has approved a reorganization plan under which all creditors will be paid in full on approved claims and will receive interest dating back to the date USGen filed for bankruptcy. Tennessee, one of USGen's creditors, is an interstate natural gas pipeline engaged in the transportation and storage of natural gas, supplying markets in New England, the Midwest, and mid-Atlantic regions from supplies in the Gulf of Mexico, Texas, Appalachia, and Canada.

3. USGen and Tennessee entered into two natural gas transportation agreements in 1992, which were modified effective August 1, 2002 to provide for firm transportation service under Tennessee Rate Schedule FT-A with primary terms ending October 31,

2013.¹ Under these contracts, as modified, USGen reserved 60,000 Dth of capacity on Tennessee's 200 Line from Wright, New York to Mendon, Massachusetts. The services were provided under service agreements identical to Tennessee's tariff *pro forma* FT-A service agreements. The negotiated rates under these contracts appeared in separate letter agreements executed at the same time and consisted of Tennessee's maximum Rate Schedule FT-A rate plus a \$1.8953 surcharge per Dth for the first two years and a \$1.4580 per Dth surcharge for the following three years. In addition, the letter agreements reflect USGen's agreement to maintain an annual throughput of 19,710,000 Dth (Throughput Commitment) through January 31, 2006, or to pay the applicable FT-A rate plus \$0.0335/Dth for the difference between actual throughput and the Throughput Commitment.

4. On August 12, 2003, after filing for bankruptcy, USGen filed with the Bankruptcy Court to reject and terminate the contracts stating that they had above-market costs and USGen did not need the capacity. On September 3, 2003, Tennessee filed a notice of termination of service and request for waiver with the Commission, requesting that the Commission waive Tennessee's obligations under the contracts and permit it to treat the contracts as terminated upon the Bankruptcy Court's approval of USGen's motion for contract rejection. On September 11, 2003, the Bankruptcy Court granted USGen's motion to reject the contracts, deeming them rejected and terminated as of September 5, 2003. On September 25, 2003, 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

5. In its petition, USGEN states that Tennessee filed a proof of claim in Bankruptcy Court for \$41,349,873 in damages on September 24, 2004.³ USGen states that it objected to the Tennessee claim, asserting that Tennessee was over-recovering its cost of service with the result that Tennessee's rates are likely to decrease before the contracts are due to terminate on October 31, 2013. According to USGen, the reasonableness of Tennessee's rates is an issue to the extent Tennessee is unsuccessful in reselling the USGen turnback capacity. If it resells all the capacity, USGen states that it would have no damages from

¹ The modifications also converted USGen's contracts from firm Part 157 transportation service under Tennessee's NET 284 Rate Schedule to firm Part 284 transportation service under Tennessee's Rate Schedule FT-A.

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

³ According to Tennessee in its Protest to USGen's petition, Tennessee's claim for damages due to USGen's rejection of the contracts, after mitigation credit and net present value, currently totals \$28,040,731. Tennessee Protest at page 5.

the termination of the contracts. USGen states that Tennessee did sell all of the turnback capacity from 2005 through March 31, 2007, but its damage claim assumes it will not sell any of the capacity remaining from April 1, 2007 through October 31, 2013. USGen asserts that this assumption has the effect of increasing Tennessee's damage claim by approximately \$20 million. As confirmed by Tennessee in its Protest to USGen's petition,⁴ Tennessee followed Commission policy and calculated some \$20 million of the claimed damages by first determining the net present value of reservation charges USGen would have paid it for service over the remaining term of the contracts 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.

II. Notice, Interventions and Protest

6. On June 14, 2006, USGen filed a petition with the Commission for a declaratory order. Notice of the petition was published in the *Federal Register*, 71 Fed. Reg. 35883 (2006), with interventions and protests due on or before June 30, 2006. Several companies filed timely motions to intervene.⁵ The Independent Petroleum Association of

⁴ Tennessee Protest, at page 2 note 4, and page 5.

⁵ Timely motions to intervene were filed by Anadarko Petroleum Corporation and Anadarko Energy Services Company; Chattanooga Gas Company and Pivotal Utility Holdings, Inc., d/b/a Elizabethtown Gas; ConocoPhillips Company; Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc.; East Ohio Gas Co., d/b/a Dominion East Ohio and The Peoples Natural Gas Company, d/b/a Dominion Peoples; ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation; Gas Transmission Northwest Corporation; Hess Corporation; Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY, KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI, and Boston Gas Company, Colonial Gas Company, EnergyNorth Natural Gas, Inc., and Essex Gas Company, all subsidiaries of KeySpan Corporation; National Fuel Gas Distribution Corporation; the New England Local Distribution Companies (Bay State Gas Company, the Berkshire Gas Company, Connecticut Natural Gas Corporation, Fitchburg Gas and Electric Light Company, City of Holyoke, Massachusetts Gas and Electric Department, New England Gas Company, Northern Utilities, Inc., NSTAR Gas Company, The Southern Connecticut Gas Company, and Yankee Gas Services Company); Portland Natural Gas Transmission System; PSEG Energy Resources & Trade, LLC; and the Tennessee Customer Group (Centerpoint Energy Mississippi Gas, City of Clarksville Gas and Water Department -- City of Clarksville, City of Corinth Public Utilities Commission, Delta Natural Gas Company, Inc., Hardeman Fayette Utility District, Henderson Utility Department, Holly Springs Utility Department, Humphreys County Utility District, Town of Linden, Morehead
(continued...)

America and Process Gas Consumers Group filed timely motions to intervene with comments. The Public Service Commission of the State of New York filed a notice of intervention on June 29, 2006. NiSource Distribution Companies (Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., and Columbia Gas of Virginia, Inc.), Piedmont Natural Gas Company, Inc., and Virginia Power Energy Marketing, Inc. filed unopposed motions to intervene out of time. On June 30, 2006, Tennessee filed a timely motion to intervene and protest. On July 17, 2006, USGen filed a motion for leave to answer and an answer to Tennessee's protest.

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also grant the untimely motions to intervene given the early stage of this proceeding, the parties' interests, and the absence of any undue burden or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 CFR 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept USGen's answer because it has provided information that assisted us in our decisionmaking process.

III. The Petition for Declaratory Order

8. USGen requests that the Commission issue a declaratory order regarding whether USGen may challenge the reasonableness of the FT-A and fuel retention of Tennessee and whether Tennessee may refuse to credit revenues derived from the resale of USGen's turnback capacity against the damage claim Tennessee is making against USGen.

9. Specifically, USGen requests a Commission order declaring that USGen is not contractually precluded from filing a complaint against Tennessee under section 5 of the Natural Gas Act (NGA)⁶ challenging the reasonableness of Tennessee's tariff rates and fuel charges. USGen also seeks a Commission order stating 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 from backhauls and fuel over-recoveries from shippers who acquired the USGen capacity should be credited as mitigation of the damages owed Tennessee.

Utility Plant Board, Portland Natural Gas System – City of Portland, Savannah Utilities, Springfield Gas System – City of Springfield, City of Waynesboro, and West Tennessee Public Utility District).

⁶ 15 U.S.C. § 717d.

A. The Issue of a Contractual Bar to USGen Filing a Section 5 Complaint

1. USGen's Petition

10. USGen asserts that if Tennessee's maximum tariff rates are reduced through Commission action under section 5 of the NGA, USGen's liability for breach of contract will be reduced because part of the contract rate is the applicable maximum rate under the tariff. USGen claims that it can show that Tennessee's maximum FT-A rates and fuel charges are overstated and should be reduced, thereby reducing the amount it owes Tennessee by as much as \$10 million. According to USGen, it retained a rate expert to examine Tennessee's rates. USGen states that its expert's rate analysis, attached as Exhibit H to the petition, reflects that Tennessee's rates are overstated for all seven zones in Tennessee's system, primarily as a result of a significant increase in billing determinants and sales of excess gas. USGen states that its expert estimates that Tennessee's current rates would likely generate an over-recovery of approximately \$200 million and a projected after-tax return on equity (ROE) of 23 percent for 2006.

11. In addition, USGen states that its expert's analysis also showed that Tennessee's fuel retention rates are excessive, and that Tennessee would likely over-recover approximately \$183 million in fuel from its shippers in 2005 and would likely further inflate its after-tax ROE to 34.6 percent for 2006. According to USGen, if Tennessee's rates are reduced to a level that is just and reasonable, it would reduce Tennessee's damage claim by almost \$10 million for the period from April 1, 2007 through October 31, 2013.

12. USGen states that, after Tennessee moved to exclude the USGen expert's testimony in the bankruptcy proceeding, USGen indicated it would file a section 5 complaint at the Commission. USGen states that Tennessee responded that USGen was contractually barred from filing such a complaint, citing paragraph 4 of the 2002 negotiated rate letter agreements. According to USGen, Tennessee has threatened to sue USGen for damages if USGen files a section 5 complaint and the Commission agrees that Tennessee's rates are not just and reasonable. USGen is seeking a declaratory order stating that the cited contractual provisions have no force and effect and do not preclude USGen from filing a section 5 complaint.

13. The provision at issue is paragraph 4 of the 2002 negotiated rate letter agreements, which states:

This Negotiated Rate Agreement shall be filed with the FERC and is subject to approval by the FERC. 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.

14. USGen asserts that, to be consistent with the underlying FT-A service agreements which expressly allow challenges to Tennessee's maximum tariff rates, the restriction cited by Tennessee only precludes challenges to the negotiated and fixed surcharge and the Throughput Commitment in the letter agreements. Thus, according to USGen, paragraph 4 of the negotiated rate letter agreements does not prevent a challenge to the reasonableness of the base maximum FT-A and fuel retention rates of the letter agreements. As a result, USGen alleges that Tennessee's interpretation of paragraph 4 of the letter agreements is inconsistent with section 6.3 of the FT-A service agreements, which states that:

Transporter [Tennessee] agrees that Shipper [USGen] may protest or contest the aforementioned filings [by Transporter to unilaterally change its rates and charges applicable to service pursuant to Rate Schedule FT-A], or may seek authorization from duly constituted regulatory authorities for such adjustment of Transporter's existing FERC Gas Tariff as may be found necessary to assure Transporter just and reasonable rates.⁷

15. USGen also asserts that Tennessee's current interpretation of paragraph 4 is not consistent with representations Tennessee made to the Commission in 2002 when it requested approval of the negotiated rate arrangements. USGen states that, at that time, Tennessee represented that the FT-A service agreements did not contain any terms that materially deviated from the *pro forma* FT-A service agreement in Tennessee's tariff. USGen states that it is Commission policy that a contract provision waiving section 5 rights is non-conforming and a material deviation from a pipeline's form of service agreements.⁸ USGen states that its interpretation of paragraph 4 also is consistent with Commission policy that allows parties to agree not to seek to change an agreed-upon rate for a service to be provided under a negotiated rate, but does not permit parties to limit section 5 challenges to recourse rates on a shipper-specific basis.⁹

16. In addition, USGen claims that, even if paragraph 4 of the letter agreements were read to preclude a challenge by USGen to Tennessee's rates, the provision no longer has any effect as the contracts have been terminated. It states that nothing in the Bankruptcy Court's order or in the contracts provided for paragraph 4 to survive termination. It asserts that the only provision of the contracts that the parties agreed would survive termination concerned delivery imbalances. Given the express survival provision for

⁷ USGen Petition at 15 (*quoting* § 6.3 of each contract).

⁸ Petition at 15 (*citing* *Columbia Gas Transmission Corp.*, 111 FERC ¶61,338 at 62,506 (2005)).

⁹ *Id.* (*citing* *Columbia Gas Transmission Corp.*, 111 FERC ¶ 61,338 at 62,504 (2005)).

resolving imbalances, USGen asserts, Tennessee cannot argue for an implied survival of paragraph 4. USGen asserts that under applicable Texas law, as well as bankruptcy law, the effect of termination was to release both parties from further obligations under the contracts. Accordingly, USGen asserts that while Tennessee has a claim for unmitigated damages arising from USGen's decision to reject and terminate the contracts, Tennessee has no claim arising from acts taken by USGen after termination of the contracts. Finally, USGen asserts that Tennessee is estopped from claiming that paragraph 4 survived termination because it did not object to the termination and nowhere in Tennessee's petition to the Commission did Tennessee indicate it viewed any provisions of the contracts as surviving or that it would seek damages if USGen should allegedly violate any of them.

2. Tennessee's Protest

17. Tennessee requests that the Commission deny USGen's request for a declaratory order regarding the issue of contractual rights. In its protest, Tennessee asserts that, in matters where the Commission and the courts have concurrent jurisdiction, the Commission should not get involved in contract damages disputes that do not require its special expertise or implicate its regulatory responsibilities. Tennessee asserts that USGen's right to bring an action under section 5 is a matter of contract interpretation, not public policy, and is best left to the Bankruptcy Court. Regarding the merits of USGen's contract claim, Tennessee argues that the contracts expressly bar such a section 5 action, citing paragraph 4 of the letter agreements. It also claims that an NGA section 5 action would be irrelevant to the Bankruptcy Court's damages analysis because, under Texas law, USGen's rights to prospective rate reductions ended when the contract was terminated and because damages are measured at the time of the breach. Tennessee alleges that because USGen is no longer a customer, and lacks a cognizable interest in the outcome of a future rate proceeding, as a policy matter the Commission should not permit USGen to challenge Tennessee's future rates.

18. Tennessee states that its interpretation of the disputed paragraph 4 of the letter agreements does not conflict with Commission policy, quoting *Algonquin Gas Transmission, LLC*, which, it asserts, allows a pipeline to reach a contractual agreement with a customer not to challenge the rate negotiated.¹⁰ It argues that the agreed-upon rate is the applicable FT-A rate, plus the surcharge and Throughput Commitment. If the Commission rules on USGen's request, Tennessee asserts that the Commission should give full effect to the agreement not to challenge Tennessee's rates, including the FT-A rate.

¹⁰ 111 FERC ¶ 61,003 at P 11 (2005) ("the Commission permits 'a pipeline to reach an agreement with its customer that includes a provision that the customer will not challenge the rate obtained by virtue of the [parties'] negotiated rate agreement'").

3. USGen's Answer

19. In its Answer, USGen challenges Tennessee's contention that this is a simple contract damages dispute, alleging that "these are recurring issues that go to the heart of the protections afforded by the (NGA) and impact other similarly situated shippers."¹¹ USGen claims that the issues raised "require the Commission's special expertise, uniform interpretation, and regulatory oversight."¹² According to USGen, the dispute implicates Commission policies on negotiated agreements and material deviations from the *pro forma* service agreement because Tennessee represented to the Commission that the negotiated rate agreements did not contain material deviations from Tennessee's *pro forma* service agreement.

20. USGen states that its status as a shipper should not affect its ability to bring a section 5 complaint since it has an interest in Tennessee's rates. USGen states that the Bankruptcy Court is not required to use the rates in effect the date the contracts were terminated; damages are calculated by applying the rate in effect during the period in which the damages occurred.¹³ The filed rate doctrine would be violated by calculating damages using rates that were determined to not be just and reasonable because it would enable Tennessee to collect a rate different than that on file.

21. According to USGen, the Commission should exercise its jurisdiction over this issue because it involves contracts that were the subject of a Commission proceeding, and the Commission has an interest in ensuring consistent application of its policies. If Tennessee had intended that the paragraph 4 language constitute a waiver of USGen's section 5 rights, Tennessee should have identified the provision as a non-conforming clause that was a material deviation from the tariff *pro forma* service agreement.

22. In addition, USGen asserts that a unilateral waiver of section 5 rights would violate Commission policy prohibiting pipelines from restricting an individual shipper's section 5 rights to challenge a pipeline's recourse rate. It asserts that such a restriction affects all of the pipeline's rates for services, not just that specific transaction. Accordingly, it argues that if such agreements were allowed, pipelines would have an incentive to enter into them with the large shippers with resources to bring section 5 complaints, enabling them to get more favorable rate treatment and reducing their incentive to bring a section 5 action that might benefit other smaller shippers as well as themselves.

¹¹ USGen's Answer at 1.

¹² *Id.* at 2.

¹³ *Id.* at 4, citing *Arkansas Louisiana Co. v. Hall*, 453 U.S. 571, 579 (1981).

23. USGen asserts that the Bankruptcy Court's decision not to join USGen's petition should not prevent the Commission from granting the petition, quoting several portions of the transcript of the Bankruptcy Court proceedings wherein the court admits that some of the issues involve areas of the law with respect to which the court is not completely familiar.

4. Comments

24. The Process Gas Consumers Group (PGCG) and the Independent Petroleum Association of America (IPAA) each filed comments in addition to their motions to intervene. Although neither party takes a position on the particular questions posed by USGen, each indicates concerns regarding some of the allegations USGen has made with respect to Tennessee's transportation and fuel retention rates. IPAA states that, given that Tennessee's rates have not been through a thorough Commission review in over ten years, there is a possibility that they are "stale." IPAA believes that the rate implications of USGen's analysis warrant serious Commission consideration to determine whether Tennessee's rates are just and reasonable. PGCG states that the evidence presented by USGen shows the importance of periodic rate reviews. PGCG urges the Commission on its own to initiate a section 5 action to investigate Tennessee's rates and fuel retention percentages.

5. Commission Discussion

25. We decline to answer USGen's question regarding whether its right to bring a complaint under section 5 of the NGA is barred by its former contracts with Tennessee. Although the issue of a contractual waiver of a shipper's right to bring a section 5 complaint is within our jurisdiction, we do not believe that there is a compelling reason to become involved in this dispute at this juncture. The contracts at issue have been terminated and there is no ongoing contractual or shipper-pipeline relationship. The case is an action in Bankruptcy Court for damages for breach of contract under Texas law. Other than the matter of Commission policy on contractual waivers of section 5 rights in transportation contracts that are in effect, the court is competent to resolve the issues of contract interpretation and state law. If the contract provision at issue (paragraph 4 of the Letter Agreements) were still enforceable under Texas law, then 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.¹⁴ However, if that 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.

26. Moreover, we do not believe that USGen would benefit from filing a section 5 complaint. The Commission has 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.¹⁵ In analogous cases involving exit fees for termination of contracts, we have 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.¹⁶ In addition, the Commission's resources should not be tied up in a general section 5 investigation into a pipeline's system-wide tariff rates simply to resolve a damages issue involving a single former shipper. Current Tennessee customers and interested state commissions are free to file requesting that the Commission institute an investigation under section 5 if they believe Tennessee's rates are not just and reasonable.

B. USGen's Entitlement to Additional Mitigation Credits

1. USGen's Petition

27. In addition to the mitigation Tennessee has already agreed to provide to account for future reservation charges from the resale of USGen's former capacity, USGen claims

¹⁴ As a policy matter, the Commission 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. *Columbia Gas Transmission Corp.*, 111 FERC ¶ 61,338 (2005), *appeal docketed*, No. 05-1285 (D.C. Cir. July 20, 2005). The Tennessee-USGen contracts did not reflect such additional rights and benefits.

¹⁵ *See 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"). *See also 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."); *cf. 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).

¹⁶ *Columbia Gas Transmission Corp.*, 70 FERC ¶ 61,157 at 61,473 (1995).

that it is entitled to mitigation credits for two other sources of revenues that it claims result from the resale of that capacity: (1) FT-A reservation rates that Tennessee is charging for what Tennessee claims are backhauls from Dracut to Bridgeport or other points in Connecticut, and (2) excess fuel recoveries. However, USGen states that Tennessee had argued to the Bankruptcy Court that giving USGen mitigation credit for revenues derived from backhauls and excess fuel would contravene the filed rate doctrine.¹⁷ According to USGen, the suggestion throughout Tennessee's pleading to the Bankruptcy Court is that Tennessee's Commission-approved tariff addresses the calculation of damages in the event of a breach by a shipper such as USGen. USGen asserts that Tennessee's tariff does not address such issues and that the Commission indicated in 2003 that such issue is a matter of state law. According to USGen, the Commission found in *Tennessee Gas Pipeline Company*¹⁸ that Tennessee was entitled to recover damages for a shipper's breach to the extent that such damages had not been mitigated and that such action should be brought in the appropriate jurisdiction using state law remedies. Further, USGen states that the Commission did not purport to define how mitigation would be determined. Moreover, it claims, in its order the Bankruptcy Court admitted both an unfamiliarity and lack of resources to deal with this area of the law. Finally, USGen claims that Commission action is warranted because Tennessee's position results in double recovery (once in the form of demand charges and excess fuel from replacement shippers and later in the form of damages) and, therefore, is against Commission policy.

¹⁷ In a Motion for Summary Judgment before the Bankruptcy Court, Tennessee sought a ruling from the court that the filed rate doctrine bars the court from entertaining USGen's arguments for calculating damages based on a tariff rate reduction and for additional mitigation. Tennessee asserted that the Commission has exclusive jurisdiction over the rates Tennessee charges its shippers and, under the filed rate doctrine, the Bankruptcy Court has no authority to award damages based on a rate other than the rate on file with the FERC. Tennessee further argued that, because its tariff does not entitle shippers to receive a credit against their Rate Schedule FT-A obligations for revenues from Tennessee's sales of backhauls or for excess fuel, permitting mitigation for such revenues would contravene the tariff rate approved by the Commission and, therefore, would violate the filed rate doctrine. The Bankruptcy Court granted Tennessee's motion for summary judgment, finding that the issue of whether a pipeline is required to modify its filed rate to account for such non-reservation charge revenues "is an issue to be determined either by a far higher level of court or perhaps initially by the Federal Energy Regulatory Commission."

¹⁸ 103 FERC ¶ 61,275, at 62,066 (2003).

2. Tennessee's Protest

28. According to Tennessee, it obtained summary judgment from the Bankruptcy Court, which found that the filed rate doctrine prohibited USGen from receiving credits under bankruptcy that it would not be entitled to outside of bankruptcy. Tennessee characterizes USGen's petition as an improper attempt to get the Commission to review the decision of the Bankruptcy Court. According to Tennessee, the Bankruptcy Court's decision does not conflict with any Commission rules or policies.

29. Tennessee argues that the filed rate doctrine prohibits a court from granting contract damages that would effectively lower the rate the customer paid below the rate on file. Thus, Tennessee claims the Bankruptcy Court was correct in finding that it could not provide USGen with credits that USGen would not receive outside of bankruptcy. Tennessee observes that Tennessee's rates do not credit shippers for Tennessee's sales of backhaul services or retained fuel. On that basis Tennessee asserts that USGen's interpretation would give it benefits that non-defaulting shippers do not get. Tennessee also claims that the relief USGen seeks from the Commission amounts to a collateral attack on the Bankruptcy Court's summary judgment order. Reiterating arguments it made to the court regarding USGen's claim for mitigation for Tennessee's revenues from backhaul service and alleged fuel over-recoveries, Tennessee asserts that the court "correctly concluded that the filed rate doctrine prohibited granting USGen those rights because it was in bankruptcy."

3. USGen's Answer

30. USGen challenges Tennessee's claim that USGen's mitigation claim is merely a contract damages dispute, noting that in Bankruptcy Court, Tennessee argued that the claim was precluded under the filed rate doctrine. USGen argues that Tennessee has not cited any provision of its tariff that allows Tennessee to pick and choose which revenues generated from the turnback capacity constitute mitigation or to exclude revenues from backhauls and excess fuel retention from mitigation.

31. In its Answer, USGen asserts that the tariff applies Texas law and, under that law, it is not limited to any particular type of revenues to calculate mitigation. USGen asserts that, under Texas law, all revenues derived from rejected capacity count as mitigation; it does not distinguish backhauls, forward hauls, or fuel retention. According to USGen, because Tennessee's tariff does not address damages in the event of a breach, and because the tariff provides that Texas law applies in the event of a breach, "the filed rate

doctrine compels application of Texas law to determine damages.”¹⁹ USGen states that it is not trying to get a better deal than non-defaulting shippers, it is just trying to get the mitigation credit it is entitled to under Texas law.

4. Commission Discussion

32. We agree with USGen that Tennessee’s tariff does not address mitigation. Further, we recognize that the Bankruptcy Court’s statements in its ruling on Tennessee’s Motion for Summary Judgment reflect its 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. We will now provide that guidance. We clarify that the filed rate doctrine does not preclude the additional mitigation USGen is seeking, 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. Mitigation does not change the filed rate; it only changes the net amount owed as an equitable remedy for the breach of the contract.

33. However, because the Commission and the Bankruptcy Court have concurrent jurisdiction over a breach of contract damages claim such as this, we find that the issue of additional mitigation may be resolved by the Bankruptcy Court by applying state law. Although we take no position on what damages or mitigation may be available under state law, we will note that it is inconsistent with the Commission’s exit fee policies to allow mitigation for future non-reservation charge revenues, like the claimed fuel over-recoveries, because of the speculative nature of such revenues.²⁰ Therefore, although additional mitigation is not prohibited by the filed rate doctrine, mitigation for fuel over-recoveries claimed by USGen does not appear to involve the types of revenues that the Commission would allow as offsets against the amount of damages USGen owes Tennessee. Further, we will note that USGen would bear the burden to show that the Dracut contract reservation charge revenues, which Tennessee claims are actually backhauls, result from the resale of USGen’s former forwardhaul capacity and would not otherwise be obtained but for the resale of that capacity, to warrant their inclusion as mitigation credits.

¹⁹ *Id.* at 11.

²⁰ For example, the Commission has rejected claims for mitigation for future revenues from volumetric IT rates in cases involving exit fees. *See Columbia Gas Transmission Corp.*, 70 FERC ¶61,157 at 61,473 (1995).

The Commission orders:

The Petition for Declaratory Order is granted in part as discussed in the text above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.