UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Burlington Resources Oil & Gas Company — Docket No. GP99-15-004

Panhandle Eastern Pipe Line Company — Docket No. RP98-40-040

ORDER DENYING REHEARING

(Issued December 12, 2005)

1. Burlington Resources Oil and Gas Co. (Burlington)[1] requests rehearing of the Commission's July 5, 2005 Order[2] (Remand Order) which addressed the remand by the United States Court Of Appeals for the District of Columbia Circuit, *Burlington Resources Oil & Gas Company v. FERC (Burlington Resources)*.[3] The Remand Order explained why there is no inconsistency in the Commission's approval of "Omnibus" *ad valorem* settlements, and its refusal to permit Burlington, a producer which declined to participate in those Omnibus settlements, to rely on "indemnity" clauses in its take or-pay settlements with pipelines, to relieve Burlington of its *ad valorem* refund obligation. The Remand Order reaffirmed the prior decision to require Burlington to pay its *ad valorem* refund obligation. For the reasons set forth, the Commission denies rehearing.

I. Background

2. The Remand Order fully describes the background, and this order will not repeat the material except as necessary to understand the issue involved. After the Court upheld the Commission's decision that Kansas *ad valorem* taxes were improperly added to the maximum lawful prices (MLP) under the Natural Gas Policy Act (NGPA) of 1978,[4] the

[1] Burlington was the successor of Southland Royalty Company which had the gas purchase contracts at issue here. This order will refer to Burlington in all instances.

[2] 112 FERC ¶ 61,053 (2005).

[3] 396 F.3d 405 (D.C. Cir. 2005).

[4] *Public Service Company of Colorado v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997).

Commission issued an order (Procedural Order) which established procedures and timetables for producers to make refunds to the pipelines, and for the pipelines to flow the refunds through to their customers.[5]

3. In compliance with the Procedural Order, each pipeline that had paid the *ad valorem* add-on taxes sent Statements of Refunds Due to producers and working interest owners (WIO). When many producers disputed the claims against them and filed numerous petitions for adjustments representatives of the various interests participated in extensive settlement discussions, which were facilitated by the Commission's Dispute Resolution Service. These discussions ultimately led to settlements with every pipeline, which were submitted to the Commission for its approval under Rule 602 of the Commission's regulations governing settlement offers.

4. Panhandle Eastern Pipe Line Co. (Panhandle) and Northern Natural Gas Co. (Northern) each sent a Statement of Refunds Due to Burlington. In Docket No. GP99-15-000, and Docket No. SA99-1-000, Burlington denied any liability for these *ad valorem* claims. Subsequently Panhandle and Northern entered into settlement agreements with producers, customers, and state regulatory agencies, which the Commission approved (the Omnibus Settlements). After Burlington opted out of these settlements, the Commission set these claims against Burlington for hearing.

5. Burlington contended that although an *ad valorem* refund was due in the amount claimed, it was not liable for any *ad valorem* refund because it had entered into earlier settlements with Panhandle and Northern which included an indemnity clause which relieved it of any *ad valorem* refund liabilities, and that each pipeline was responsible for payment of the refund. The Commission rejected Burlington's defense holding that the "indemnity" clause Burlington relied upon cannot relieve the producer from paying the refund when it receives more than the MLP in a first sale, because NGPA section 504(a) prohibits a producer from receiving an excess over the MLP in a first sale. The Commission also found no basis for granting Burlington adjustment relief under NGPA section 502(c).[6]

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[5] *Public Service Co. of Colorado*, 80 FERC & 61,264 (1997), *reh'g denied*, 82 FERC & 61,058 (1998).

[6] *Burlington Resource Oil and Gas Co.*, 103 FERC & 61,005, *reh'g denied*, 104 FERC & 61,317 (2003), and *Panhandle Eastern Pipe Line Co.*, 103 FERC & 61,007, *reh'g denied*,105 FERC & 61,141 (2003).

A. Burlington Resources

6. In *Burlington Resources* the Court stated it was troubled with the apparent inconsistency it found between the Commission's rejection of Burlington's indemnity clauses to relieve it of its *ad valorem* liability, and the Commission's approval of Panhandle's and Northern's "Omnibus Settlements." Those settlements, the Court stated reduced or eliminated *ad valorem* refund claims against some producers. The Court found that the Commission's basis for its approval of the Omnibus Settlements, but not Burlington's indemnity clause not convincing. Moreover, the Commission's position that its encouragement of settlement of take-or-pay liability did not intend for NGPA ceiling prices to be exceeded "begs the question of how it could approve the Omnibus Settlement Agreements, although such settlements would likewise violate section 504(a) of the NGPA under the Commission's interpretation here."[7]

7. The crux of the Court's remand decision was that by approving the Omnibus Settlements under the mantle of "prosecutorial discretion" the Commission "betrays a recognition that section 504 of the NGPA does not render unlawful all private agreements allowing a producer to retain funds collected pursuant to unlawfully high prices."[8]

8. The Court also questioned why "in light of the substantial consideration paid by Burlington in part for release and indemnification by Northern and Panhandle for all claims arising from the take-or-pay contracts, it refused to exercise its prosecutorial discretion to give effect to the release and indemnity clauses in the 1989 and 1992 Settlement Agreements."[9]

9. The Court remanded with the caveat "we do not decide whether there could be a legally relevant distinction between the Northern and Panhandle Settlement Agreements and the Omnibus Settlement Agreements."[10] In view of its ruling, the Court did not address Burlington's claim for adjustment relief under NGPA section 502(c).

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[7] 396 F.3d at 411.

[8] *Id*.

[9] *Id.*

[10] *Id.* at 412.

B. The Remand Order

10. The Remand Order reaffirms the Commission's decision to require Burlington to refund to Northern and Panhandle the *ad valorem* tax reimbursements it collected from them and to not enforce the release and indemnity clause in Burlington's take-or-pay 1989 and 1992 settlement agreements. The Commission found that the significant differences between the take-or-pay settlement agreements Burlington relies upon, and the Omnibus Settlements entered into by Panhandle and Northern to resolve the outstanding *ad valorem* refund claims against hundreds of producers, justified the Commission's differing actions with respect to each.

11. First, the NGPA rendered illegal and unenforceable all private contracts between the seller and purchaser in first sales which required the purchaser to pay in excess of the statutorily mandated maximum ceiling prices set forth in the NGPA.[11] The Commission referred to NGPA section 504(a), and to cases that hold that Congressionally-mandated federal ceiling prices cannot be modified by individuals or even by the Commission *citing Arkla v. Hall*, 453 U.S. 571 (1981) (*Arkla*), and *Southern Union Gas Co. v. FERC*, 857 F.2d 812 (D.C. Cir. 1988) *cert. denied*, 493 U.S. 1072 (1990) (*Southern Union*).

12. However, the Remand Order noted that in administering the NGPA, the Commission did have two limited avenues to permit a first seller to retain amounts unlawfully collected in excess of NGPA ceiling prices: (1) prosecutorial discretion not to bring an enforcement action with respect to a particular violation of the act, and (2) to grant adjustment relief under NGPA section 502(c). The order cited *Heckler v. Chaney*, 470 U.S. 821 (1985) (*Heckler*), where the Supreme Court upheld an administrative agency's refusal to exercise its enforcement authority, or its exercise of that authority in a particular way, and referred to the conservation of resources as one of the reasons why administrative agencies are granted such prosecutorial discretion.

13. However, consistent with *Heckler*, the Remand Order stated that prosecutorial discretion did not include a positive right to approve and enforce private agreements requiring purchasers in first sales to pay in excess of the Congressionally mandated maximum lawful prices for such sales. Rather, it stated that the Commission views its

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[11] *Public Service Commission of New York v. Mid-La Gas Co.*, 463 U.S. 319, 334 (1983) ("The statute replaces the Commission's authority to fix rates of return to gas producers according to what is 'just and reasonable' with a precise schedule of price ceilings.")

prosecutorial discretion in the nature of a negative right to withhold action, *i.e.*, a right to conserve its resources by not taking all the actions necessary in a particular case to provide a full remedy for a violation.

14. The Remand Order then described the circumstances surrounding the Omnibus Settlements which resolved hundreds, possibly thousands of *ad valorem* refund claims. The Omnibus Settlements were typical of the settlements of the other pipelines having *ad valorem* refund claims. These factors justified the Commission's exercise of its prosecutorial discretion to not require every producer under those settlements to pay the entire amount of alleged excess payment it had received.

15. Under these circumstances Commission approval of the Omnibus Settlements was an appropriate exercise of prosecutorial discretion pursuant to the standards discussed in *Heckler*. The Commission determined that once the producer parties to the settlements having agreed to make the specified refunds, the Commission would allow the status quo to remain in effect with respect to those producers, and take no further action. Approval of the Omnibus Settlements did not constitute the exercise of coercive power over any party to the settlement, or even as to any non-consenting party. The Commission did not take any positive action to enforce any private agreement that violated the NGPA ceiling price, for example by requiring the pipeline purchaser to make additional payments to, or on behalf of, the producer seller in the relevant first sales.

16. In response to the Court's query whether Commission approval of the Omnibus Settlement reflects the Commission's recognition that there can be agreements that permit a producer to retain funds in excess of the MLP in a first sale, the Remand Order stated:

> That as a result of the Omnibus Settlements some producers may end up retaining some amounts they collected in excess of the MLP, is not the equivalent of the Commission recognizing that NGPA section 504 does not render unlawful all private agreement allowing a producer to retain funds collected in excess of the MLP.[12]

17. Under the circumstances presented in the Omnibus Settlement proceedings, the Commission concluded that it better served the public interest to terminate Commission enforcement actions with respect to the multitude of producers, as long as the settlement provided for the recovery of the bulk of the refunds claimed. Since many of the settling producers had challenged the correctness of the amount of the claim against them, or

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[12] 112 FERC at 61,385 P 30.

questioned whether they were the party responsible for the refund, while the settlement did not provide for recovery of the entire amount of the pipelines' claim, the precise amounts a producer actually may have retained in excess of the MLP was not established.

18. The result also followed from the purpose of the settlement which was "to resolve all matters associated with the payment of the Kansas *ad valorem* tax refunds," and to provide for the maximum amount of refunds to customers without the expenditure of substantial Commission resources that could be devoted to other Commission activities.[13]

19. The Remand Order then described the Burlington settlements. These settlements were the consequences of the Commission's furthering the resolution of the industry's take-or-pay problem through the "payment of one-time non-recoupable amounts in exchange for contractual revisions or termination."[14] Each Burlington settlement provided for payments to Burlington in exchange for contract reformation or revision as to future takes of gas. The Remand Order concluded that the Burlington settlements arose in a completely different context, and bore little similarity to the Omnibus Settlements except for the fact that they related to gas purchase contracts between Burlington and Panhandle and Northern.

20. The Remand Order then summarized the various ways in which the Burlington Settlement differs from the Omnibus Settlement. Without repeating them in detail, the main elements were first that the Omnibus Settlements were submitted to the Commission for approval under the Commission's settlement regulations, and the Commission approved them for all consenting parties. On this basis the Commission therefore could "approve these settlements without resolving on the merits any litigated issues."

21. Next, the Remand Order stated that to enforce the Burlington settlements would require coercive action against the pipeline purchaser, requiring it to pay more than the MLP, whereas the Omnibus Settlements allowed the status quo to remain. In addition, the Omnibus Settlement presented a paradigm of the exercise of prosecutorial discretion since it would further the Commission objective of obtaining maximum refunds for

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[13] Page 2 of Explanatory Statement to Panhandle June 22, 2001 Stipulation and Agreement.

[14] Regulatory Treatment of Payments in Lieu of Take-or-Pay Obligation, Regulation Preambles, FERC Statutes & Regulations ¶ 30,637 (April 24, 1985) (the Policy Statement).

customers while conserving Commission resources which could be devoted to accomplishing other Commission's activities and functions. None of these elements were present in the Burlington settlements to warrant the exercise of prosecutorial discretion.

22. Finally, the Commission denied adjustment relief under NGPA section 502(c) since Burlington had not shown any hardship and the inequity claim was based on the "alleged consideration" Burlington had furnished under the settlements. However, this provided no different grounds than those Burlington advanced for enforcing the release and indemnity clause, which argument the Commission had rejected.

C. Burlington's Request for Rehearing

23. In its request, Burlington sets forth the following Specification of Error by the Commission:

1. The Commission erred in holding that the Burlington Settlements operate to violate the NGPA by permitting Burlington to retain more than the applicable NGPA ceiling prices.

2. The Commission erred in holding that all private agreements between a first seller of natural gas and the purchaser providing for the payment to the purchaser of a price higher than the applicable NGPA ceiling price are illegal and unenforceable.

3. The Commission erred in disregarding the *Burlington* court's determination that the release and indemnification provisions in the Burlington Settlements encompass the claims for refunds of *ad valorem* tax amounts against Burlington.

4. The Commission abused its discretion and acted in an arbitrary, capricious and otherwise unlawful manner in refusing to give effect to the release and indemnification provisions in the Burlington Settlements and in ordering Burlington to pay refunds of *ad valorem* tax amounts.

5. The Commission abused its discretion and acted in an arbitrary, capricious and otherwise unlawful manner by refusing to enforce the Burlington Settlements while approving the Panhandle and Northern Omnibus Settlements and certain other *ad valorem* tax settlements.

6. The Commission abused its discretion and acted in an arbitrary, capricious and otherwise unlawful manner by failing to give full effect to the Burlington Settlements notwithstanding the Commission's active encouragement of such settlements.

7. The Commission erred by failing to exercise its authority to waive Burlington's refund liability under the Commission's authority under NGPA section 502(c) to grant adjustment relief.

24. Burlington's request for rehearing, expressed in a variety of ways, as set forth above, is that in each of its settlements with the pipelines, it gave to the pipeline, and thereby to the pipeline's customers, consideration far in excess of any *ad valorem* refund at issue here. That consideration, Burlington argues, supports enforcing the release and indemnity clause, which, as the Court ruled in *Burlington Resources*, by its terms, relieves it of any refund obligation. That refund obligation, Burlington contends, is the responsibility of the pipeline, since the pipeline has received the consideration Burlington was required to furnish to it under the settlement. In fact, Burlington contends, the consideration then flowed to the pipelines' customers, which provides a basis for the Commission to exercise its prosecutorial discretion so as to not require the pipeline to pay the refund to its customers. Thus, it argues, if the Commission were to enforce the release and indemnity clause no coercive conduct is required.

25. Burlington also argues that the consideration it furnished in its settlements with the pipeline is a basis for granting Burlington relief under NGPA section 502(c). Burlington contends that it did not seek that relief under any "financial hardship" test, but rather under the "special inequity" standard. The inequity claimed in Burlington is that "of a selective enforcement of the Settlements under which the Pipelines and their customers would retain all the benefits of the bargain underlying the Settlements but Burlington would lose the important benefit provided under the release and indemnification provisions."[15]

II. Discussion

26. At the outset, contrary to the implication in Burlington's rehearing request that the Remand Order did not accept the Court's interpretation of the release and indemnity clause, the Remand Order stated that the Commission "accepts Burlington's

[15] Rehearing request at 62.

interpretation of the release and indemnity clauses."[16] By this we mean that the release and indemnity clause encompasses the *ad* valorem refund claims asserted against Burlington that arose from payments under any first sale under the gas purchase contracts covered by the settlement.

27. However, given Burlington's continuing emphasis on the "consideration" it allegedly furnished under its settlements, which was described as "substantial consideration" in *Burlington Resources*, the Remand Order did note that both pipelines, who were the other parties to the settlements and the beneficiary of the consideration, disputed Burlington's interpretation. They both maintained that *ad valorem* refund claims relating to gas previously purchased was never addressed by the parties to the settlement since, as Panhandle asserted, the settlement "had absolutely no connection to the volume of gas that Panhandle had already taken under the subject contract …."[17] It should also be remembered that Burlington was not the party involved in those negotiations, the other party to the settlement being Southland, Burlington becoming its successor much later.

28. Before addressing the legal issue, which the Commission believes fully supports its determination, it is important to recognize that Burlington's argument distorts what is the actual consequence of upholding the Commission's position. As framed in Burlington's request, Burlington seeks to leave the impression that the Commission's position that the release and indemnity clause cannot apply to the *ad valorem* refund claim, is inequitable because Burlington has furnished the other side all the "substantial consideration" promised, but the other side will not be required to furnish the consideration Burlington was to receive. Thus, Burlington makes repeated reference in its request to the more than $25,000,000 in take-or-pay claims that it asserts it gave up under the Northern settlement, and argues that it is unfair that it will not receive all the consideration it should have received if the Commission's position is accepted.

29. This argument is without merit for a number of reasons. It must be remembered that except for application of the release and indemnity clause to the *ad valorem* refunds, Burlington received all the consideration that was specified in those settlements. Thus, Burlington does not argue that it did not receive the payments that the pipelines were to make, or that the pipelines did not make the future takes of gas that they were obligated to make under the settlements. The only consideration Burlington will not have received if the Commission's position is upheld is application of the release and indemnity clause

[16] Remand Order P 45.

[17] Remand Order at P 39.

to the subsequently arising *ad valorem* refund obligation that was to be the pipelines' responsibility. Thus, it is not as if Burlington agreed to forego $25,000,000 and now will receive nothing in exchange for that $25,000,000. Rather, Burlington has received all the consideration it was promised, except that it will be responsible for any *ad valorem* refund claims, and the pipelines will not be required to be responsible for payment of those claims.

A. To the Extent the Release and Indemnity Clause Permits Burlington to Receive in Excess of the Federally Regulated Price, it is a Bargain that Cannot be Enforced.

30. The Commission's position that Burlington cannot rely on the release and indemnity clause to retain the excess it received over the MLP, despite the fact that it gave consideration for that release, is required by the NGPA section 504(a). Where there is a federally-regulated price governing the sale of gas, any agreement by the buyer to pay in excess of that price is unenforceable, even if the seller furnished consideration in exchange for being entitled to receive that excess amount. The excess amount cannot be retained by the seller, but must be refunded to the buyer.

31. Burlington argues in its request that the Court has rejected the Commission's position that that type of agreement in unenforceable and "the Commission is not free to depart from the conclusion under the 'law of the case doctrine.'"[18] Burlington's statement does not accurately reflect the Court's ruling. The Court's concern in *Burlington Resources* was that the Commission had not adequately addressed the consideration Burlington had furnished to the pipelines in its settlements with them and remanded the case for further proceeding. The remand order more fully addressed that issue and affirmed its prior conclusion. Where a court remands a case for further explanation, as it did here, the remand leaves open a "wide range of action," one of which is for the agency to maintain its prior order "if it could provide adequate justification."[19]

[18]Rehearing request at 26.

[19] *Radio Television S.A. De CV v. FCC*, 130 F.3d 1078 at 1083 (D.C. Cir. 1997).

Thus, as the D.C. Circuit recently stated "an agency that cures a problem identified by a court is free to reinstate the original result on remand."[20]

32. The Commission's position here follows inexorably from the ruling by the United States Court of Appeals for the District of Columbia Circuit in *Southern Union, supra,* cited by the Remand Order. In that case the pipeline, Southern Union Company (Southern Union) purchased gas from Consolidated Oil and Gas Co., Inc. (Consolidated), a small producer in New Mexico. Southern Union and Consolidated entered into ten gas purchase contracts, four involving interstate gas, and six that involved only intrastate gas. Consolidated sold the interstate gas to Southern Union under certificates which limited the price for the gas to a federally-regulated level. The commingled gas stream was sold by Southern Union in both intrastate and interstate commerce.

33. In September 1974, Consolidated, and a number of other producers, filed suit in the New Mexico state district court for breach of contract against Southern Union, alleging that certain favored nations pricing provisions in the intrastate gas contracts had been activated, entitling them to higher gas prices for gas sold under those contracts. The parties then entered into a settlement agreement which provided for higher prices under the disputed contracts, and included a lump-sum payment relative to past sales made under these contracts (1976 Settlement Agreement). Consolidated then dismissed its pending court action against Southern Union.

34. The 1976 settlement agreement, at the insistence of Consolidated, covered all ten previously mentioned contracts between the parties, and contained a recitation that all gas covered by the settlement agreement was solely intrastate. Subsequently, Southern Union, claiming mistake, refused to pay any amount higher than the interstate rate on four interstate contracts included in the 1976 Settlement Agreement. It asserted that the gas sold under those four contracts was in fact interstate gas, with a federally-regulated price, so that any payment for that gas in excess of that price was illegal.

35. When Southern Union paid Consolidated only the lower federally-regulated price, Consolidated sued Southern Union on the 1976 Settlement Agreement in New Mexico state court, seeking specific performance and damages equal to the unpaid difference between the rate specified in the 1976 Settlement Agreement and the lower interstate rate

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[20] *Heartland Regional Medical Center v. Leavitt*, 415 F.3d 24 at 29-30 (D.C. Cir. 2005) citing NTEU v. FLRA, 30 F.3d 1510, 1514 (D.C. Cir. 1994) ("we frequently remand matters to agencies while leaving open the possibility that the agencies can reach exactly the same result as long as they… explain themselves better or develop better evidence for their position.")

that Southern Union paid to Consolidated. The issue of what gas was covered by the four disputed contracts was referred to the Commission, which ruled that the gas under those four contracts was interstate gas for which Consolidated could not collect contract damages in excess of federal rates without authority from the Commission. The Commission stated that, effective December 1, 1978, the NGPA price ceilings applied.[21]

36. In addition to breach of contract, Consolidated's state court action complaint alleged both fraud and negligent misrepresentation, and Consolidated won a judgment on the latter theory in state court. The New Mexico trial court found that Southern Union had negligently misrepresented that the gas purchased under the four contracts at issue was resold intrastate, inducing Consolidated to release its claims in the 1974 litigation and dismissing that action. The state court awarded Consolidated over $8,000,000 as damages, the amount representing the difference between the interstate rate actually paid and the higher rate that "would have been paid had the representations of Southern Union been true."[22]

37. Southern Union petitioned the Commission seeking a declaratory order that Consolidated could not collect its judgment because to do so would constitute exacting an unlawful price for interstate gas. The Commission denied Southern Union's request on the grounds that the judgment was an award of damages for tort and not for the purchase price of gas. The Commission stated, as found by the state court, "Consolidated, by relying on Southern Union's negligent misrepresentation, gave up valuable consideration, by not pursuing its court claim, and suffered damages as a result." [23] The Commission concluded that the damages were not compensation for gas and that no federal interests were infringed. Southern Union appealed, arguing that the Commission's ruling was contrary to the decision in *Arkansas Louisiana Gas Co. v. Hall*, 543 U.S. 571, (1981) (*Arkla*).

38. In *Arkla*, where a favored nation clause was triggered, the seller sued on the contract and won in state court, so the seller was owed a higher price for interstate gas unless it was barred from collecting it under the filed rate doctrine. That doctrine provides that no regulated seller is legally entitled to collect a rate in excess of the one filed with the Commission for a particular period.[24] The Louisiana Supreme Court

[21] *Southern Union*, 28 FERC & 61,225 at 61,427 (1984).

[22] 859 F.2d at 814.

[23] *Southern Union Co.*, 41 FERC & 61,203 at 61,531 (1987).

[24] *Arkla*, 453 U.S. at 576.

determined that it was the buyer's failure to inform the seller of the provision-triggering payments that had prevented the seller from filing necessary rate increase requests, and that such requests probably would have been approved because the new rates still would have been within applicable ceilings.

39. The Supreme Court vacated the state court damage award. The Court indicated that neither state nor federal courts can exercise the Commission's power to determine what are just and reasonable rates, and the Commission itself cannot make retroactive rate adjustments. The Court was not persuaded that it was the buyer's concealment that prevented the seller from making the necessary filings justified an estoppel exception to the doctrine.[25]

40. In *Southern Union*, the Court agreed with the Commission's statement that the distinction between amounts in excess of a rate filed pursuant to the NGA at issue in *Arkla* and amounts in excess of the applicable NGPA price ceiling at issue in the case before it was not a material difference with respect to damages awarded for breach of contract. Turning to the specifics, the Court stated that to remedy the effects of Southern Union's negligent representation, the state awarded damages that unquestionably were for the price of gas. The damages, as the Commission had concluded, were "compensation for rights surrendered by Consolidated in reliance on Southern Union's negligent representation regarding the jurisdictional status of the gas."[26] In short, the Court held it was clear from the state court's ruling that "the damages represented the values Consolidated thought it would receive when it relied on the representations made by" Southern Union.[27] The Court pointed out that the subject matter of these expectations and representations was the price agreed to be paid for gas in the settlement agreement.

41. The Court concluded that since the gas sold under four of those contracts has been determined to be subject to the interstate price limitation, it follows that the state measure of damages is based upon, and has the effect of awarding, a price for interstate gas. Thus, the Court stated, "to the extent that price exceeds federal guidelines, the state court has no power to award. To that extent, the settlement agreement simply is a bargain that the

[25] *Id.* at 583 and n.13. In *Arkla*, the Court stated that certain misconduct by a party might allow an exception to the filed rate doctrine.

[26] 857 F.2d at 815.

[27] 857 F.2d at 818.

state has no power to enforce."[28] (emphasis added). Accordingly, the Court set aside the Commission's order and remanded the matter to the Commission.

42. Upon remand, the Commission vacated its prior order, and directed Consolidated to refund to Southern Union any amount that Southern Union had paid to it under the state court judgment.[29] Thus, despite the consideration Consolidated had given to Southern Union in the settlement agreement, including the dismissal of its 1974 state court suit in which it might have obtained higher rates for the intrastate contracts, Consolidated could not retain any excess over the federally-regulated price with respect to the interstate contracts. The Commission concludes that *Southern Union* is clear precedent that any agreement by a buyer in a first sale to pay more than the NGPA ceiling price is unenforceable, even if the first seller provided consideration in exchange for being entitled to receive that excess amount.

43. In the face of *Arkla* and *Southern Union*, Burlington argues in its rehearing request that "Intervenors cited *Arkla* in their brief to the Court but the court disregarded the precedent in rejecting the Commission's position."[30]

44. The argument is disingenuous. Intervenors cited *Arkla*, but did not cite *Southern Union*. Intervenors did describe the filed rate doctrine in their brief, but did not discuss whether consideration granted by a producer will permit it to receive more than the MLP in a first sale.[31] The court's decision in *Burlington Resources,* discussed neither *Southern Union* nor *Arkla*, because the Commission's orders on review before the Court in *Burlington Resources* did not cite *Southern Union*. Clearly, *Burlington Resources* cannot be held as rejecting the analysis in *Southern Union* and holding it inapplicable, and the Commission is free to rely on *Southern Union* in responding to the court's remand.

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[28] *Id.*

[29] 51 FERC & 61,041 (1990). Southern Union stated that in 1988 it had paid Consolidated $11,377,899.20 which represented the damages awarded by the New Mexico court and prejudgement and postjudgment interest.

[30] Rehearing request at 32.

[31] *See* Intervenors Brief to the Court in *Burlington Resources* at 10.

B. <u>Application of *Southern Union* in This Case</u>

45. Burlington seeks to distinguish *Southern Union* on the grounds that both *Arkla* and *Southern Union* involve a state court judgment for damages, and that it is not seeking recovery of damages awarded by a state court. Instead it contends that "it has not recovered more than the applicable ceiling prices because it gave valuable consideration to the Pipeline purchasers in return for the Pipelines' agreement to give Burlington the release and indemnification under which they accepted the obligation to bear Burlington's responsibility for *any* claims for refund of amounts received under the contracts."[32]

46. Burlington's argument is contrary to the holding in *Southern Union*. In *Southern Union*, the Court stated that regardless of how it was framed, at issue is "the practical effect" of the action in question. In *Southern Union* it was the state court awarding damages in enforcing the settlement agreement between the parties. The Court held that allowing the damages awarded to the seller would have "the effect of awarding, a price for interstate gas that, to the extent that it exceeds federal guidelines, the state court has no power to award. To that extent, the settlement agreement is a bargain that the state has no power to enforce."[33] (emphasis added).

47. This reasoning is directly applicable to the issue here. To the extent Burlington's private take-or-pay settlements would allow Burlington to retain the excess of the Congressionally-mandated price it had received previously, it is a bargain that cannot be enforced. That result follows notwithstanding that in those settlements Burlington may have granted the pipelines certain consideration in order to settle contractual disputes not involving the particular first sales in which the NGPA ceiling price was violated. The same situation was present in *Southern Union* when the producer agreed to dismiss its state court action, and thus did not pursue its full contract claims with respect to the intrastate contracts. However, that did not prevent the producer in *Southern Union* from having to disgorge the excess over the federally-regulated price without regard to any offsetting consideration provided to the purchaser by the settlement with respect to the intrastate contracts.

48. By not requiring Burlington to pay the *ad valorem* refund, Burlington would be permitted to retain "more than the applicable ceiling price." That it may have given consideration in the settlement with respect to other contractual disputes was not relevant

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[32] Rehearing request at 33

[33] 857 F.2d at 818.

in *Southern Union*, nor is it relevant here. That portion of the settlement is a "bargain that cannot be enforced." Just as the producer in *Southern Union* was required to refund the excess amount the pipeline had paid to it as a result of the settlement, here too Burlington must refund the excess over the MLP that it received in the first sale.

49. Moreover, there is no basis for Burlington's assertion that it has already "repaid its *ad valorem* taxes, albeit in the form of debt forgiveness, gas sales contract reformation, and other valuable consideration."[34] In essence, Burlington is contending that the Commission should treat the consideration Burlington furnished in the two settlements as including a full refund of the amounts the pipeline paid in excess of the MLP. This the Commission will not do. The Commission could only find that the settlements effected a full refund, if it could be shown that the consideration furnished by Burlington included a component attributable to the pipelines' agreement to release the claim for *ad valorem* refunds which equaled the amount of those refunds. For example, if Burlington accepted lump sum payments that were lower than they would have been without resolution of the *ad valorem* tax refund issue by an amount equal to its refund obligation, it could be found that that the settlements effected a full refund of the amounts in excess of the MLP which the pipelines had paid for the past gas purchases.

50. However, the Commission can make no such finding with respect to the settlements at issue here, since there is nothing in the settlements to show what consideration, if any, Burlington gave for the specific purpose of obtaining a release from its potential *ad valorem* tax refund obligation. Each of the settlements resolved multiple disputes between the parties, including disputes over take-or-pay liability and the price of gas actually purchased by the pipelines, with significant consideration flowing both ways. The benefits obtained by Burlington included, among other things, (1) the release of gas reserves in Kansas and other states from their dedication to the pipeline, enabling Burlington to sell the gas to other buyers, (2) the ability to obtain open access transportation of that gas without the need to grant take-or-pay credits under section 284.8(f) of the Commission's regulations as adopted by Order No. 500, (3) the avoidance of substantial litigation costs in pursuing court action against the pipelines, (4) the agreed-upon lump sum payments from the pipeline, as well as (5) the release of all future claims by the pipeline for refunds. In return for these benefits, Burlington agreed to provide the pipelines substantial consideration, including for example, the more than $25,000,000 reduction in take-or-pay liability provided in the Northern settlement. However, as Burlington concedes, neither settlement identified what component of the overall the consideration provided by Burlington was given for each of the benefits it

[34] Rehearing request at 30.

obtained under the settlement, including the refund release.[35] Rather, "each party to the Settlements concluded that, as a package, the exchange of consideration fairly compensated the other."[36]

51. In the circumstances of this case, the Commission believes it would be reasonable to presume that the settlements' exchange of consideration does not reflect a full refund of the *ad valorem* taxes. That is because the parties executed these settlements before the Commission's December 1, 1993 Order reversing its previous position that the *ad valorem* taxes were permissible add-on to NGPA ceiling prices,[37] and it would appear highly unlikely Burlington would agree to provide a full refund of *ad valorem* taxes at a time when the Commission's position was that the amounts were a permissible add-on to the NGPA ceiling prices.

52. However, regardless of the reasonableness of the above presumption, our fundamental reason for refusing to treat the instant settlements as satisfying Burlington's refund obligation is that there is no way of determining precisely what consideration, if any, Burlington may have given for the specific purpose of satisfying its refund obligations. As the Commission has previously held, where, as here, a comprehensive settlement resolving numerous issues fails to identify what components of the consideration paid by a party are given for what purpose, it is simply "not possible to distinguish reliably" what portion of the costs incurred by that party was incurred for the purpose of resolving any particular issue.[38] Thus, particularly in a case such as this, where the primary focus of the settlement is to resolve significant contractual disputes between a producer and a pipeline unrelated to any alleged violation of NGPA ceiling

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[35] For example, Burlington states in its rehearing request (at 30-31):

Accordingly, the fact that the Burlington Settlements did not identify or tie the consideration Burlington gave to the Pipelines for their agreement to provide a release and indemnification of claims against Burlington does not provide a reasoned basis to conclude that the Settlements are unlawful or unenforceable. *See also* Rehearing request at 48-49.

[36] *Id*. at 49.

[37] *Colorado Interstate Gas Co.*, 65 FERC ¶ 61,292 (1993).

[38] *Williams Natural Gas Co.*, 51 FERC ¶ 61,244 at 61,678 (1990), *reh'g*, 52 FERC ¶ 61,410 (1990), *reh'g*, 56 FERC ¶ 61,410 (1994), *aff'd, Williams Natural Gas Co. v FERC*, 3 F.3d 1644 (1993) (*Williams v. FERC*).

prices, the Commission is unwilling to treat any portion of the consideration given by the producer as constituting a refund of a pipeline's actual payment for gas in excess of the NGPA ceiling price.

53. While Burlington attacks the Commission's refusal to treat the consideration it gave in its settlements as satisfying its refund obligation,[39] the Commission is simply applying in this case the same policy which the D.C. Circuit affirmed in *Williams v. FERC*. In that case, as here, a pipeline entered into settlements, under which it made lump sum payments to producers in order to resolve both take-or-pay liabilities for the pipeline's failure to take gas and pricing disputes concerning gas actually purchased in first sales, but the settlement did not identify what portion of the payment was allocable to disputes over the price of the purchased gas. As the court stated, "The Commission acknowledge[d] that at least a portion of the settlement amounts was paid to resolve purchased gas pricing disputes."[40] Nevertheless, the Commission refused to treat any portion of the settlement amount as an "amount paid in any sale of natural gas" for purposes of NGPA section 601(c), which guarantees pass through of amounts paid with respect to a first sale of natural gas. In affirming this decision, the court held, "FERC's responsibility to administer and enforce the NGPA implies a power to develop procedural and evidentiary standards to govern the process of ascertaining what are and are not gas costs."[41] The court concluded that the Commission had not abused its discretion in establishing a standard that no portion of an undivided lump sum settlement payment could be treated as a gas cost incurred in a first sale, stating the Commission's "rule is founded on the eminently sensible concern that, as a general matter, it is not possible to reliably divide lump-sum settlement payments into their component parts."

54. The only difference between this case and *Williams v. FERC* is that in that case a purchaser in a first sale sought to have a portion of its lump sum settlement payment treated as part of the amount it paid for a first sale of gas, while here the first seller is seeking to have a portion of the overall non-cash consideration it provided under a similar settlement as a refund of amounts it received from the pipeline in a first sale. The Commission sees no reason to apply a different evidentiary standard in determining a first seller's refunds of amounts received in first sales, than it does in determining the purchaser's payments in such a sale.

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[39] *See, e.g.*, Rehearing Request at 45, 47, and 49.

[40] *Williams v. FERC*, 3 F.3d at 1551.

[41] *Id*. at 1551-2.

55. Indeed, to accept Burlington's position would render the NGPA ceiling prices unenforceable in the context of comprehensive settlements of this nature, and fly in the face of the court's decision in *Southern Union*. In essence, Burlington's argument is that any comprehensive settlement agreement between a producer and a pipeline relating to a "first sale" gas purchase contract which has a general release and indemnity clause, would permit the seller to retain any excess over the MLP that it had received under that contract because the parties had exchanged "valuable consideration" in executing the agreement. This would be true, even in the absence of any showing that the settlement's exchange of consideration reflects a full refund of the overcollection, and, worse, where there is every reason to believe that the settlement's exchange of consideration does not reflect a full refund, as here.

56. Burlington's position makes it clear that its true argument is that a settlement agreement between a producer and a buyer relating to a first sale gas contract can provide for that producer to receive in excess of the federally-regulated price. Indeed, that is implicit in Burlington's request during the course of this proceeding that the Commission enforce the release and indemnity clause and require the pipelines to make the refunds in Burlington's behalf. If Burlington had already made the refunds through the consideration given in the two settlements, there would be no remaining refund obligation on Burlington's part to impose upon the pipelines today.

57. Clearly, NGPA section 504(a) provides the answer to Burlington's contention that a settlement can enable a producer to receive more than the MLP, which is no. Modifying the question by stating that the producer provides "valuable consideration" to the customer in that agreement does not change the answer, as *Southern Union* clearly holds. In that case the producer gave up its rights to recover what it was entitled to on its past sales of intrastate gas in exchange for an agreement setting the new price on all the contracts covered by that agreement. When the Court ruled that the producer/seller was not entitled to that price on certain interstate contracts, it was required to disgorge the excess it had received on those contracts, even though it had given up the right to recover additional amounts on its intrastate sales.

58. Burlington argues that the Commission's disregard of the consideration Burlington granted to the pipelines in the settlements is in stark contrast to the Commission enforcing certain settlements between the pipelines and their customers, where the pipelines were permitted to keep the *ad valorem* refunds they had received from producers and did not have to flow them through to their customers *citing El Paso Natural Gas Co.*, 85 FERC &61,003 (1998), and *ANR* Pipeline *Co.*, 85 FERC & 61,005 (1998). Burlington argues that there the Commission relied upon the fact that the pipelines had given valuable consideration to their customers in exchange for the customers' agreement to permit the pipeline to retain the refund. This, Burlington argues,

is the same as what Burlington has done under the 1989 Northern and 1992 Panhandle Settlements, and therefore Burlington should be allowed to retain the excess over the NGPA ceiling price applicable to its sales to Northern and Panhandle. Burlington asserts that just as the pipelines were entitled to rely on their customers' agreement to give up any refunds, so too here Burlington is entitled to rely upon the pipelines' agreement in the settlements to be responsible for any *ad valorem* refunds.

59. Neither case is relevant. At issue in those cases was whether the pipeline could retain the *ad valorem* refunds that producers had paid to them, and not pass them on to customers. The Commission regulates the pipelines' rates, including their flow through of any refunds received from producers, under the NGA, not the NGPA. The Commission held that in prior settlements determining how the pipelines could close out their accounts for the recovery of their gas purchase costs, customers had agreed that in exchange for the pipeline foregoing certain costs the pipelines would not have to flow through any refunds that it received from gas sellers after a certain date. The Commission had approved those settlements as just and reasonable under the NGA. Since the *ad valorem* refunds were received by the pipelines after that date, the Commission held they were entitled to retain the refunds. Producers had paid the *ad valorem* refund, so there was no issue as to any first seller retaining more than the statutorily mandated NGPA ceiling price in a first sale subject to the NGPA. Rather, the issue in those cases was whether the pipeline was required to flow the refund to its customers pursuant to its NGA regulated rates. NGPA section 504 has no application in those cases, while its application is the crux of the issue presented here. As demonstrated above, that section bars Burlington from retaining the excess, and the release and indemnity clause is a "bargain that cannot be enforced."

C. Equitable Issues and Prosecutorial Discretion

60. In light of its ruling, the Court in *Burlington Resources* stated it would not address Burlington's claim for adjustment relief under NGPA section 502(c). The Remand Order did address that aspect of Burlington's request and denied any adjustment relief. Burlington's request for rehearing takes issue with that ruling.

61. In the prior order, the Commission denied Burlington adjustment relief since Burlington had requested that relief "for the reason it advanced for not being liable for the refund and the Commission had found no merit in that reason."[42] The Commission also stated that Burlington did not show it would suffer any hardship in paying the refund.

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[42] 104 FERC at 62,192 P 32.

62. The Remand Order stated that Burlington's request for adjustment relief clearly did not meet the hardship standard in NGPA section 502(c), but it appeared that Burlington was relying upon the consideration it granted under its settlements. The Remand Order held that the equitable relief could not be granted because it was based upon an "unlawful agreement," namely that Burlington could keep more than federally-regulated price for the gas. Moreover, the Remand Order stated that the consideration under the Burlington settlements was not related to the *ad valorem* refund, but to take-or-pay issues that were resolved under the settlement. The Remand Order stated that in promoting take-or-pay buyout agreements, the Commission never intended to sanction agreements that violated the NGPA.

63. In its request for rehearing, Burlington basically makes the same argument why the consideration it granted under its settlements with the pipelines provides a basis for granting equitable relief. The discussion in the previous part of this order addresses this matter, and we rely upon that discussion to reject Burlington's argument, except to discuss one matter.

64. The Remand Order noted that the release and indemnity clause was a general, or boilerplate clause, that would probably be included in any take-or-pay buyout settlement. The clause does not specifically refer to *ad valorem* refunds. Rather, it was designed to resolve all contract claims that could arise relating to the gas purchase contracts covered by the settlement that were not specifically covered by the terms of the settlement. The Remand Order noted that since this type of clause would probably be included in any take-or-pay settlement, and most major producers entered into such agreements, to accept Burlington's position would in effect mean that the industry's take-or-pay settlements would virtually eliminate those producers' *ad valorem* refund obligations.

65. This, the Remand Order stated, was never the Commission's intent. The Commission never intended take-or-pay buyouts to relieve producers of their *ad valorem* refund obligations. The Remand Order referred to the Commission's 1985 Policy Statement on take-or-pay buyout contracts which discussed whether payment under such contracts would implicate the MLP provisions of NGPA section 504(a). In response to that question the Commission referred to the new э 2.76(a), which specifically stated that such payments do not violate NGPA section 504(a)[43] because that section relates to a first sale, while the buyout was for actual or potential breaches of contract in not purchasing

[43] *See* Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations, FERC Statutes & Regulations, Regulations Preambles 1982-1985 & 30,637 at 31,303 (April 24, 1985).

gas. If, as Burlington argues, the take-or-pay settlement agreement can override NGPA section 504(a), why was the Commission so careful in ruling that NGPA section 504(a) is not implicated in such a buyout?

66. In *Associated Gas Distribution v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), the Court explained that the Commission implemented the 1985 Policy Statement through the take-or-pay cost passthrough provisions of Order No. 500, with its "equitable sharing mechanism."[44] Certain parties had challenged the Commission's determination not to include buyout payments in calculating whether the MLP had been exceeded with respect to gas that was taken and paid for. The Court affirmed the Commission's ruling stating: "For purposes of section 504(a) of Title V of the NGPA, 15 U.S.C. э 3414(a), we agree with the Tenth Circuit's conclusion in *Kaiser-Francis* that prepayments are not payments for gas to the extent that the gas is not taken."[45]

67. The court then added that "*Southern Union* is not controlling in this case because it involved an award of damages intended to increase the price of natural gas that had actually been taken by the purchaser. In the case before us, the issue arises precisely because prepayments are made for gas that is *not taken*."[46] Here Burlington is seeking to use the take-or-pay settlement to relieve it of an NGPA violation with respect to gas taken, which was not a matter the Commission intended to be accomplished through take-or-pay buyouts.

68. In its rehearing request Burlington argues that its take-or-pay settlements "were in no way intended to circumvent the ceiling prices established under the NGPA" and were in conformity with the Commission's policy to encourage such settlements. Accordingly, it argues that in taking only ten cents on the dollar for its take-or-pay claims under the settlement, it granted valuable consideration which should not be ignored in determining whether as an equitable matter, Burlington's release clause should be enforced. However, the Commission does not see this as an equitable reason not to require refunds, since, as shown by the Commission's 1985 Policy Statement on take-or-pay buyout and buy down payments, the Commission never authorized waiver of NGPA ceiling price violations as a means to settle pipelines' take-or-pay problems. The prior orders in this proceeding had cited to the Commission's statement in *Williams Natural Gas Co.*, 67 FERC & 61,153 that "take-or-pay … settlement cannot interfere with refunds required by

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[44] 893 F.2d at 359.

[45] 893 F.2d at 359.

[46] *Id.* at 359.

the Commission to remedy violation of NGPA ceiling prices …."[47] In *Burlington Resources* the Court stated that even if *Williams* was on point, "in the face of Burlington's challenges" based upon the "valuable consideration" it furnished in its settlements, the Commission had to "justify the basis of [that] rule" in this case.

69. The Remand Order has addressed the contentions urged by Burlington regarding the consideration it furnished and our ruling here, as more fully explained above, is consistent with all past rulings on this issue. Thus Burlington's contention based upon consideration to resolve take-or-pay problems does not undermine the Remand Order's conclusion. Nor has Burlington responded to the Commission's analysis that since settlements usually contain a boilerplate release and indemnity clause, take-or-pay settlements would also probably include it, so the practical effect of accepting Burlington's position would be the elimination of the *ad valorem* refund obligation of producers that entered into take-or-pay settlements. Burlington asserts that the Commission's contention is speculative, the Commission having cited to only one other take-or-pay settlement that contained such a clause.

70. Burlington does not challenge the description of its release and indemnity clause as not unique to Burlington's situation and as the type of clause that probably would be included in any buyout contract. That not all producers have raised this defense to their *ad valorem* tax refund obligation is understandable in light of the Commission's clear position that a take-or-pay settlement has no application to *ad valorem* relief obligations that may arise under the contracts covered by that settlement. Only with the Court's questioning that position in *Burlington Resources*, was there any doubt that the release and indemnity clause would not shield the producer from its *ad valorem* refund obligation.

71. Burlington further argues that, even assuming the Commission was correct and that other producers could make the same claim for relief, that does not detract from Burlington's position because Burlington's action in granting "valuable consideration" merits equitable relief. As stated above, the Commission sought to promote and advance settlements of pipeline take-or-pay problems through its treatment of payments made to settle take-or-pay liabilities and reform contracts for the future. However, it was never the intent of the Commission to void the application of NGPA section 504(a) to parties to such agreements. Thus, we see no reason to change our ruling denying adjustment relief to Burlington.

[47] 67 FERC at 61,400.

72. The Remand Order also addressed the Court's question of why the Commission had exercised its prosecutorial discretion as to the Omnibus Settlements, but did not as to the Burlington Settlements. The Remand Order explained that the Omnibus Settlements provided that substantial *ad valorem* refund payments were to be made by the selling producers to the pipelines within a short period of time, which refund would be promptly flowed through to the pipelines' customers. Thus, the Panhandle Settlement required refund payments in excess of $40,000,000, and the Northern Settlement provided for payments in excess of $45,000,000. The Burlington settlements, on the other hand, provided for certain payments to Burlington, and the reformation of the existing gas contracts through reduced future takes or early termination of those contracts.

73. To the extent the Omnibus Settlement allowed certain parties to retain any excess over the MLP in their first sales, approval of the settlement thus was an exercise of the Commission's prosecutorial discretion to conclude these enforcement actions, particularly since the Commission had encouraged the parties to resolve these numerous pending proceedings. Moreover, the Commission's agent, the Commission Dispute Resolution Service, facilitated achieving the settlement.

74. In its rehearing request Burlington argues that there is no difference between its settlement agreements and the Omnibus Settlements since the Commission encouraged these take-or-pay settlements, and accepted the pipelines' passthrough of these payments under these settlements. Thus Burlington asserts that:

> The Commission cannot plausibly distance itself from the Burlington Settlements given its active encouragement of such settlements and its approval of the passthrough of the costs of such settlements to consumers.[48]

75. Burlington's argument fails because the purpose of the take-or-pay buyout was to address the industry problems that had arisen as a result of the pre-existing contractual gas purchase commitments of pipelines at above-market prices, and the related accrual of take-or-pay liabilities. Commission approval of the passthrough of the pipelines' payment under the Burlington Settlements did not represent Commission approval that the release and indemnity clauses contained in those settlements relieved Burlington of its *ad valorem* refund obligation.

76. As explained above, PP 65-68 *supra*, there was never any intent by the Commission to eliminate the operation of the NGPA ceiling prices governing the first sale of gas under contracts covered by a buyout agreement. Thus, Commission approval

[48] Rehearing request at 53.

of the pipelines' passthrough of Burlington's payment under a buyout agreement, is not the equivalent of the Commission's approval of the Omnibus Settlements, settlements whose very purpose was to resolve the multitude of pending *ad valorem* refund proceedings.

77. Burlington seeks to dismiss the Remand Order's reliance on the fact that under the Omnibus Settlements producers agreed to disgorge a substantial amount of the overcharges which may have not been recovered as quickly or at all, absent those settlements because those Settlements "in fact eliminate in full the refund obligations of many producers, and substantially reduced the obligations of other producers."[49]

78. The Remand Order explained why the Commission accepted those Omnibus Settlements. Burlington's futile attempt to equate its settlements with the substantial amount of refunds the Omnibus Settlement provides again relies on the "valuable consideration" it gave to the pipelines under its settlements. However, as already discussed (at PP 49-53), there is nothing to show that it gave any consideration to be relieved of any future *ad valorem* refund obligations.

79. The Remand Order explained that approval of the Omnibus Settlement was an exercise of the Commission's prosecutorial discretion since the settlement would conserve Commission resources. Burlington seeks to refute the Commission's reasoning by noting not all refund claims resolved by the Omnibus Settlement were "genuinely in dispute."[50] This argument in fact supports the Commission action since it would require substantial Commission resources to determine which claims were "genuinely in dispute," and which were not.

80. Moreover, the fact that the Burlington Settlements avoided litigation over the take-or-pay issue, as Burlington asserts, is not relevant to the issue here, which is whether the release and indemnity clause in those settlements should be enforced these many years after the settlements were entered into. The Omnibus Settlements resolved hundreds of *ad valorem* refund claims, many of which were challenged, so resolution of all claims clearly conserved Commission resources. At issue here, is not whether to approve Burlington's 1989 and 1992 settlements, since the specific terms in those settlements were implemented at those times, but whether to enforce a boilerplate release and indemnity clause in those settlements to be applied so that Burlington may retain the illegal amounts it had received in a first sale.

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[49] Rehearing request at 55.

[50] Rehearing request at 55.

81. Burlington also takes issue with the Remand Order finding that a distinction between the Burlington Settlements and the Omnibus Settlements is that the Commission possesses prosecutorial discretion to approve the latter but not the former. Burlington refers to the Commission's assertion that the Burlington Settlements would entail affirmative action to enforce and coerce the pipelines to pay the *ad valorem* refund amounts in lieu of Burlington.

82. Burlington asserts that this "presuppose that Burlington has violated the NGPA and it is left to the Commission to decide whether to prosecute. Burlington does not concede that the Settlements constitute a violation of the NGPA."[51]

83. However, Burlington's argument is fallacious because Burlington has conceded that it violated the NGPA by receipt of the excess over the MLP through the ad valorem tax reimbursement. The Commission does not contend that the Burlington Settlements violates the NGPA, only that the release and indemnity clause cannot be applied to require the pipelines to pay the *ad valorem* refund in place of Burlington.

84. Burlington also challenges the Remand Order's reasoning that enforcing the release and indemnity clause so as to require the pipelines to be responsible for the *ad valorem* refund obligation would not be an appropriate exercise of prosecutorial discretion because it would require the Commission to order the pipelines to pay the refund, something the Commission has never done. First, Burlington argues, the Commission fails to demonstrate that coercion would be involved in giving effect to the Settlements since all that those settlements require is that the pipelines honor their obligation in the settlement. This, Burlington contends, the Court in *Burlington Resources* found was "to undertake the responsibility for the *ad valorem* tax refunds."[52]

85. Burlington misstates what was stated in *Burlington Resources*. In *Burlington Resources*, the Court did not make such a finding but posed the question of why in light of the consideration Burlington granted the Commission "refused to exercise its prosecutorial discretion to give effect to the release and indemnity clauses" in the Burlington Settlements," or explain "its differing views of the enforceability of such settlement agreements."[53]

[51] Rehearing request at 58.

[52] Rehearing request at 59.

[53] 396 F.3d at 411.

86. The Remand Order (112 FERC & 61,053 at P 48-49) explained that giving effect to the release and indemnity clause by requiring the pipeline to be responsible for payment of the *ad valorem* refund, would be coercive, and not consistent with the exercise of prosecutorial discretion. It would entail the Commission ordering the pipelines to make payments to their customers without having received any refunds from Burlington. This would be the equivalent of ordering the pipelines to make payments in excess of the NGPA ceiling prices, something which the Commission had never done in the history of its administration of the NGPA. In contrast, the Omnibus Settlements allowed the status quo to remain, except for the required refund payments that the producers had agreed to make.

87. Recognizing that its position is not sustainable, Burlington then argues that:

> The question as to whether to require Burlington to bear the *ad valorem* tax refund burden is separate from the question whether to require the Pipelines to do so given the passthrough of the benefits received from Burlington. The Burlington Settlements themselves do not require that the Pipelines pay to their customers the *ad valorem* tax refunds.[54]

88. Burlington further contends "it would plainly remain within the Commission's prosecutorial discretion to decide not to require the Pipelines to pay the refunds, given their pass through of the consideration received under the Burlington Settlements."[55] However, as already discussed there is no basis for the Commission to find that the consideration exchanged in the settlements reflected any refunds by Burlington to the pipelines of the *ad valorem* tax amounts Burlington collected. The pipelines having thus far received no refunds from Burlington, there is no basis for the Commission to conclude that the pipeline's passthrough of the costs of the settlements in any way gave the customers the benefit of such refunds. Thus, this argument of Burlington also fails.

89. Accordingly, the Commission denies rehearing, and affirms that Burlington is the party responsible for payment of its *ad valorem* refund obligation.

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[54] Rehearing request at 59.

[55] Rehearing request at 60.

The Commission orders:

Burlington's request for rehearing of the Remand Order is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.