

123 FERC ¶ 61,137
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.

ANR Pipeline Company

Docket No. RP07-439-000

ORDER ON INTERLOCUTORY APPEAL

(Issued May 9, 2008)

1. On April 18, 2008, ANR Pipeline Company (ANR) filed an interlocutory appeal in the instant case. ANR appeals the ruling of the Presiding Administrative Law Judge (ALJ) to strike testimony of ANR's expert witness.¹ The Chairman, acting as Motions Commissioner, referred that interlocutory appeal to the Commission on April 25, 2008, pursuant to Rule 715(c)(5) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.715(c)(5) (2007).² The Commission grants ANR's interlocutory appeal and directs the ALJ to admit the testimony of ANR's witness, for the reasons stated below.

Background

2. On May 4, 2007, ANR tendered for filing its annual Operational Purchases and Sales of Gas Report for the twelve months January 1, 2006 through December 31, 2006, as required by ANR's FERC Gas Tariff.³ The filing was protested, and on August 1, 2007, ANR submitted further information. The response was also protested. The protests centered on whether ANR or its shippers should receive the proceeds from ANR's sale of some 2.6 Bcf of excess storage gas that ANR had carried on its books since November 1, 1993, the date it completed its restructuring under Order No. 636. After an internal review, ANR had determined that it did not need the excess gas and sold

¹ See *Order Concerning Ruling*, 123 FERC ¶ 63,002 (2008) and *Order Denying Motion*, 123 FERC ¶ 63,006 (2008). The first order was an initial order based on oral argument. The second order denied ANR's request to file an interlocutory appeal.

² See Notice of Determination by the Chairman dated April 25, 2008, in the instant docket.

³ ANR FERC Gas Tariff, Second Revised Volume No.1, Third Revised Sheet No. 197.

it in June 2005. ANR disclosed the sale during the review of its annual report of operational purchases and sales. Concluding that ANR had not adequately established its right to the gas, the Commission set the matter for hearing on October 27, 2007.⁴

3. In their protests ANR's shippers asserted that ANR could not claim title to the excess gas and retain the sale proceeds unless it could trace the excess gas directly to ANR's purchases.⁵ After the hearing began, ANR presented written testimony from two witnesses in response to the shippers' assertions. The first, a company witness testified how gas was added to and subtracted from the company's accounts between November 1993 and June 2005, and how ANR made its decision to sell the excess gas. The second was an expert witness, Alan Lovinger, who testified that the accounting entries were consistent with Commission accounting regulations and protocols, and that based on those protocols, ANR had acquired title to the gas. Mr. Lovinger also testified as to the legal standards the Commission uses to determine whether the pipeline or the customer is deemed to own the gas and should obtain the benefit of the sale. Applying these standards, Mr. Lovinger concluded that ANR was the proper owner of the excess gas at issue.

4. The basis for the instant appeal arose after all parties had submitted their initial written testimony. On March 31, 2008, the ALJ issued an *Order To Show Cause Why Testimony Should Not Be Stricken or Withdrawn* on his own motion.⁶ After an oral argument, the ALJ ruled that under the Commission's Rules, the expert testimony presented by Mr. Lovinger duplicated that of the company witness and raised legal arguments that should be presented on brief. He therefore struck Mr. Lovinger's testimony pursuant to Rule 509 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.509 (2007).⁷ The ALJ stated in his subsequent order denying ANR's motion for an interlocutory appeal that his prior ruling held, "on balance, that those portions of the Lovinger testimony at pps. 1-11 were unduly repetitious and cumulative ... and that the remainder of the Lovinger testimony, pps. 11-14, comprised legal argument which should be addressed, if at all, in briefs required under the governing trial schedule."⁸

⁴ *ANR Pipeline Company*, 121 FERC ¶ 61,093 (2007).

⁵ *Id.* P 2, 9-12.

⁶ *ANR Pipeline Company*, 122 FERC ¶ 63,016 (2008).

⁷ *Order Concerning Ruling*, 123 FERC ¶ 63,002 at P 1.

⁸ *Order Denying Motion*, 123 FERC ¶ 63,006 at P 1.

ANR's Appeal

5. In its appeal, ANR argues that striking testimony is an extraordinary remedy reserved for extreme cases under both Commission Rule 509⁹ and under Rule 403 of the Federal Rules of Evidence.¹⁰ It asserts that any balance should be in favor of admissibility to assure that relevant evidence is not excluded, and that therefore the Commission has held that its “rules on admissibility are intentionally broad to allow admission of testimony by a witness with the requisite educational background, analytical experience and skills.”¹¹ ANR therefore concludes that both the courts and the Commission have narrowly construed the discretion to exclude evidence as cumulative or burdensome.¹² ANR further asserts that the ruling was incorrect given the specifics of Mr. Lovinger’s testimony. In this regard, ANR argues that the company witness testified to the accuracy and purpose of the accounting entries detailing its gas purchases and that ANR’s records establish that it has title to the excess gas at issue. It asserts that Mr. Lovinger’s testimony establishes that ANR properly applied the Commission’s accounting regulations to the issue at hand, a point that the company witness did not address, and as such do not repeat the conclusions of that witness.

6. ANR further argues that Mr. Lovinger did not make legal conclusions in his testimony, but first explained the Commission’s standard for determining whether ANR has title to the gas. It asserts that Mr. Lovinger then applied the standard to the entries in ANR’s accounts and concluded based on his analytical experience that ANR had not included the cost of the gas in its rates and that ANR bore the risk of loss from any sale of the gas. ANR states that Mr. Lovinger thereby established that ANR met the standard and was the owner of the gas at issue. It concludes that this type of analysis was consistent with Commission hearing practice and is a role commonly vested in an expert witness. Finally, ANR argues that striking the testimony would deprive it of a fair hearing and risks reversal on appeal of any final order on procedural grounds.

⁹ Citing *Power Mining Company*, 45 FERC ¶ 61,311, at 61,972 n.1 (1988) (citing C. Wright and A. Miller, *Federal Practice and Procedure*, Civil § 1262 at 268-69 (1969)). *San Diego Gas & Electric Co. v. Sellers of Ancillary Services*, 114 FERC ¶ 61,070, at P 20 (2006).

¹⁰ Citing *United States v. Mende*, 45 F.3d 1298, 1302 (9th Cir. 1995) (quoting *United States v. Patterson*, 819 F.2d 1495, 1505 (9th Cir 1987)); *United States v. Terzado-Madruga*, 897 F.2d 1099, 1117 (11th Cir. 1990).

¹¹ Citing *Entergy Service, Inc.*, 109 FERC ¶ 61,108, at P 11 (2004).

¹² Citing *United States v. Kizeart*, 102 F.3d 320, 325 (7th Cir. 1996)

Discussion

7. The Commission concludes that in the circumstances here, the ALJ should not have struck Mr. Lovinger's testimony. Rule 509(a) provides:

The presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material. The presiding officer may also exclude from evidence any other material which the presiding officer determines is not of the kind that would affect reasonable and fair minded persons in the conduct of their daily affairs.

Only the first sentence is at issue here. On review, the Commission concludes that the testimony ANR presented through its witnesses goes to two different points. The company witness testified to the timing and nature of the accounting entries establishing the prices paid for the gas at issue. This laid a factual foundation for Mr. Lovinger's testimony, which, as discussed, has two parts. The first asserts that the accounting entries as made conformed to the Commission's accounting regulations and protocols, a point that the company witness did not address. This is not the same as testifying to the facts of the accounting records themselves (which was addressed by the company witness) and is an appropriate topic for an expert witness.

8. Mr. Lovinger also reviewed Commission standards regarding the ownership interest which is the central matter at issue. In doing so, he referred to certain cases that established the standard, in this case *Democratic Central Committee*,¹³ which analyzed whether the pipeline's investors or its ratepayers bore the risk of loss of the property when it was sold. He then applied this standard to the facts involved. Thus, the purpose of his testimony was to explain, based on experience and expertise, why the facts, in light of the relevant regulatory standard, support ANR's claim that it has title to the gas. As ANR argues, this is consistent with Commission practice regarding the highly technical issues that often arise in rate cases. The ALJ did not question the relevance of Mr. Lovinger's testimony. Moreover the testimony at issue, is only 14 pages long, and does not appear burdensome. As discussed, it is not repetitive given its purpose.

9. Mr. Lovinger's testimony goes to a central point in the proceeding and is well within the conventional range of expert testimony. If the ALJ's ruling were allowed to stand, it would preclude Mr. Lovinger from providing specialized testimony on the Commission's accounting standards and procedures and the facts to which they are applied. It would not be in the public interest to eliminate relevant testimony from the evidentiary record, thus depriving the Commission of a full and complete record on

¹³ *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Commission*, 485 F.2d 786 (D.C. Cir. 1973).

which to rule, rather than maintaining a focus on the weight to be accorded the testimony. The Commission therefore concludes that ANR's interlocutory appeal should be granted. The ALJ remains free to accord the evidence the weight he deems appropriate.

The Commission orders:

ANR's interlocutory appeal is granted for the reasons stated in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.