

128 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Burlington Resources Oil & Gas Company

Docket No. GP99-15-006

Panhandle Eastern Pipe Line Company

Docket No. RP98-40-042

ORDER DENYING REHEARING

(Issued August 11, 2009)

1. On July 16, 2008, Panhandle Eastern Pipe Line Co. (Panhandle) and Northern Natural Gas Co. (Northern) filed requests for rehearing of the Commission order issued May 15, 2008, in this proceeding (Remand Order).¹ The Remand Order addressed the remand by the United States Court of Appeals for the District of Columbia Circuit, *Burlington Resources Oil & Gas Company v. FERC (Burlington II)*.² At issue in this proceeding was whether Burlington Resources Oil and Gas Co. (Burlington) was responsible for payment of the *ad valorem* tax refund obligation arising from certain sales of natural gas by Burlington³ to Panhandle and Natural. Consistent with *Burlington II*, the Remand Order directed the two pipelines to return to Burlington the refunds that Burlington paid to them under protest claiming that its earlier settlements with those pipelines relieved it of that obligation. The pipelines had flowed through these refunds to their customers, and the order further stated that the two pipelines may not seek to recover from their customers the amounts of those refunds. Panhandle and Northern seek rehearing on the latter proviso. For the reasons set forth, the Commission denies rehearing.

¹ *Burlington Resources Oil & Gas Co.*, 123 FERC ¶ 61, 151 (2008).

² 513 F.3d 242 (D.C. Cir. 2008).

³ 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.

I. Background

2. In 1993, the Commission held that Kansas *ad valorem* taxes did not qualify as a reimbursable severance tax under section 110 of the Natural Gas Policy Act (NGPA), and thus producer/first sellers could not recover such taxes as an add-on to the maximum lawful price (MLP) under the NGPA. The producers were to refund the excess revenues to the pipeline purchasers, who, in turn, were to flow through the refund to their customers who had been overcharged.⁴ The court affirmed that decision, but held that the Commission had improperly waived refunds for the period October 1983 through June 1988.⁵ The Commission accordingly ordered first sellers/producers to make refunds of *ad valorem* taxes they had collected in excess of the MLP during the October 1983 to June 1988 period.⁶ To implement the Commission's order, pipelines that had first paid the *ad valorem* taxes as an add-on to the MLP were directed to send statements of refunds due to producers.

3. Panhandle and Northern sent statements of refunds due to 836 and 790 producers, respectively, including Burlington, which had collected the add-on in its sales to those pipelines. Many producers disputed the claimed refunds. In an effort to resolve these disputes, the Commission's Dispute Resolution Service facilitated settlement discussions among the various interests, including the producers, the pipelines, their customers, and state public service commissions. These discussions led to the filing of settlement offers, pursuant to section 385.602 of the Commission's regulations, in both the Panhandle and Northern proceedings. The two settlements, known as the "Omnibus Settlements," followed the same basic outline: Producers were granted complete relief from their refund obligations up to a stated amount, and above that amount the producer was obligated to pay the refund under a formula provided in the settlement. The settlements were voluntary, and were not binding upon any producer or affected downstream customer, or state regulatory commission which chose to opt out of the settlements.

4. The Commission approved the Omnibus Settlements for those who consented to them, and Burlington exercised its right under the settlements to opt out of both settlements, and denied any liability for these *ad valorem* tax refund claims. Burlington

⁴ *Colorado Interstate Gas Co.*, 65 FERC ¶61,292 (1993), *reh'g denied*, 67 FERC ¶ 61,209 (1994).

⁵ *Public Service Co. of Colorado v. FERC*, 91 F.3d 1478 (D.C. Cir 1996).

⁶ *Public Service Co. of Colorado*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998).

contended that it was not liable for any *ad valorem* tax refund because it had entered into earlier settlements with Panhandle and Northern covering the gas contracts in question, and it asserted those settlements each included a release and indemnity clause which covered the pipelines' *ad valorem* tax refund claims (the Burlington Settlements). Burlington asserted that although the amount of the *ad valorem* refund claims against it were correct, the indemnity clause relieved it of any *ad valorem* refund liability, and the indemnity clause required each pipeline, not Burlington, to pay the refund to its customers. Specifically as to Northern, Burlington stated "To the extent that Northern's customers are entitled to refunds of amounts paid by Northern in excess of the MLP, Northern has assumed that responsibility."⁷

5. The Commission rejected Burlington's defense, holding that the NGPA prohibited a producer from receiving more than the MLP and 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.⁸ Burlington paid the refund claims to Northern and Panhandle under protest, and sought review in the court.⁹ Northern and Panhandle flowed those refunds through to their customers.

6. The clauses relied upon by Burlington were in settlements whose main purpose the court acknowledged was to exchange immediate payments for a reduction in the pipeline's future "take-or-pay obligations." The language in the two clauses was not identical. Paragraph 7 of the Panhandle settlement provided that under the settlement each party agreed to "release, discharge, waive and indemnify" the other party from all claims relating to the contracts covered by the settlement. Paragraph 5 of the Northern settlement stated that the settlement "resolves all disputes between the parties under any and all contracts" under the settlement, and "releases and discharges the other...from any and all liabilities [and] claims arising out of...or relating to said Contracts."

⁷ Burlington Request for Resolution, Docket No. SA99-1-000, May 12, 1999, at 9.

⁸ *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).

⁹ Burlington stated that on May 1, 2003, it paid Northern \$950,767.74 and Panhandle \$633,953.94, which amounts represented principle and interest.

7. In *Burlington I*,¹⁰ the court considered both clauses as “release and indemnity clauses,” and held that the *ad valorem* tax refund claims were covered by them. The court held that “the Commission reads too much into the language limiting the release and indemnification to claims between the parties relating to the contracts; the contract language does not reasonably permit exclusion of any claim that relates to payments made under the contracts,” including “Northern’s and Panhandle’s refund claims against Burlington.”¹¹ The court stated it was troubled with the apparent inconsistency it found between the Commission’s rejection of Burlington’s indemnification clause to relieve it of its *ad valorem* tax refund liability, and the Commission’s approval of Panhandle and Northern’s Omnibus Settlements. In *Burlington I* the court remanded for a more adequate explanation of the Commission’s different treatment of the Omnibus Settlements and the Burlington Settlements.

8. On remand, the Commission reaffirmed its orders, relying on a number of distinctions that it found between the Burlington Settlements and the Omnibus Settlements.¹² In the remand order, the Commission accepted the Burlington’s interpretation of the release and indemnity clauses as allowing it to retain the *ad valorem* tax reimbursements it collected from Northern and Panhandle, but requiring the two pipelines to pay those same amounts to their customers. However, the Commission held that the NGPA established a federally regulated price covering Burlington’s sale of the gas in question to the pipelines. Therefore, the Commission held that the release and indemnity clauses in the Burlington Settlements were unenforceable because “requiring Northern and Panhandle, the purchasers in Burlington’s first sales, to make refunds of *ad valorem* tax reimbursements that would otherwise be owed by Burlington, while Burlington is allowed to retain those amounts, is the equivalent of requiring the purchasers to pay the first seller in excess of the applicable maximum lawful price.”¹³

9. The order explained that the Commission approved the Omnibus Settlements for the consenting parties under the “fair and reasonable” standard applicable to uncontested settlements under section 385.602(g)(3) of the settlement rules, because of the substantial benefits that flowed from those settlements. These included refunds to customers of

¹⁰ *Burlington Resources Oil & Gas Co. v. FERC* 396 F.3d 405 (D.C. Cir. 2005).

¹¹ *Id.* at 411.

¹² *Burlington Resource Oil and Gas Co.*, 112 FERC ¶ 61,053 (2005 Remand Order), *reh’g denied*, 113 FERC ¶ 61,257 (2005) (2005 Rehearing Order).

¹³ 112 FERC ¶ 61,053 at P 47.

\$40,000,000 under the Panhandle settlement, and \$45,000,000 under the Northern settlement, as well as avoiding litigation concerning defenses raised by producers to the refunds or the immediate payment to the pipelines' customers of substantial refunds. In fact some producers had raised the same take-or-pay settlement defense as Burlington raised in this proceeding to relieve them of refund liability. *See Mobil Oil Corp. v. Northern Natural Gas Co.*, Cause No. 97-27789, 129th District Court, Harris County, Texas (May 23, 1997).¹⁴

10. The Commission stated that, by contrast, the Burlington Settlements had never been submitted to the Commission for approval, and Panhandle and Northern disputed Burlington's interpretation of the release and indemnity clauses. Thus, while the Commission had approved the Omnibus Settlements as uncontested settlements, the Burlington Settlements could at best be deemed contested settlements which must be evaluated on the merits. Unlike the Omnibus Settlements, the Burlington Settlements did not result in the payment to the pipeline's customers of substantial refunds, nor did it appear they would avoid litigation. Accordingly, the Commission did not see any basis to exercise its prosecutorial discretion with respect to the Burlington settlements, and concluded that Burlington was responsible for payment of the *ad valorem* refund claims and was not entitled to the return of the refunds it had paid to the pipelines.

11. In *Burlington II*, the court vacated the Commission's order responding to *Burlington I* and remanded the case to the Commission. The court first made clear that the interpretation of the release and indemnity clauses as stated in *Burlington I* governed this proceeding, stating "Whether or not the *ad valorem* liabilities were within the main purpose of the [Burlington] settlements, they were within their language, written at a time when, as the background described above makes clear, the law was deeply unsettled and the parties would have had reason to seek accord."¹⁵ The court rejected intervenor Northern's contention that the court's interpretation of the indemnity clause in *Burlington I*, was dictum, and that the court should allow the Commission to construe the Burlington Settlement language first with the benefit of extrinsic evidence. The court stated "*Burlington I's* construction has thus become law of the case, which ... cannot [be] challenge[d] here."¹⁶

¹⁴ Cited in Joint Brief of Intervenors, Case No. 06-1042, (D.C. Circuit) February 22, 2007, at 12.

¹⁵ 513 F.3d at 246.

¹⁶ *Id.* at 246.

12. The court found the Commission's explanation of the differences between the "ostensibly similar" settlements unpersuasive and that the Commission's reliance on "prosecutorial discretion" to enforce the Omnibus Settlement but to not enforce the Burlington Settlement was misplaced since "the factors on which the Commission justified its approval of the Omnibus Settlement are equally applicable to the Burlington Settlements."¹⁷ The court recognized that the NGPA "in a general sense invalidated any private agreement to pay more than the maximum lawful price."¹⁸ However, the court held that this did not necessarily prohibit good faith settlements at arm's length over past gas sales, like the Burlington Settlements where consideration was furnished in exchange for permitting the party to retain such excess, and "with no apparent detriments to third parties." (emphasis supplied)¹⁹

13. The court held that, where there was a regulated gas sale above the MLP, the law does not prevent the purchaser with an *ad valorem* refund claim from exchanging those accrued rights for other valuable consideration. Turning to the Burlington Settlements, the court held that while the "pipeline would have indeed have done better by preserving their claims, for (as it turned out) they were legally entitled to full *ad valorem* refunds the law does not prevent them from exchanging the entitlement for other goods."²⁰ The court also stated that the fact the pipelines now contest the meaning and legality of the Burlington Settlements does not render those settlements contested within the meaning of the Commission's procedures for contested or uncontested settlements under section 385.602, as compared to the uncontested Omnibus Settlements. The court stated that the Burlington Settlements, too, were uncontested when they were signed. The court concluded that there was no basis to disregard the otherwise lawful Burlington settlements which "at the time addressed complex clauses, avoided future litigation, and resulted in an immediate exchange of consideration for the parties."²¹ (emphasis in original). The court vacated the Commission's orders under review, and "remand[ed] the

¹⁷ *Id.* at 250.

¹⁸ *Id.* at 248.

¹⁹*Id.* at 250.

²⁰ *Id.* at 250.

²¹ *Id.* at 250-51.

case to the Commission for it to proceed with the adjudication in accordance with this opinion.”²²

14. In its Remand Order, the Commission stated that, as interpreted by the court, under the release and indemnity clauses, Burlington is released from any obligation to make refunds to the pipelines, and the pipelines must pay their customers any *ad valorem* tax refunds which would otherwise be due from Burlington. The Commission stated that there was no need for any further proceedings to adjudicate the amounts of the refunds due, because all parties agree to those amounts. Therefore, consistent with the court’s opinion in *Burlington II*, the Commission ordered Northern and Panhandle to return to Burlington, with interest, the amount of *ad valorem* tax refunds Burlington paid to them under protest. In addition, the order stated that the two pipelines could not seek to recover from their customers the amounts of those refunds.

Requests for Rehearing

15. Northern and Panhandle both seek rehearing of that part of the Remand Order that stated that they could not recoup the refunds from their customers. However, they seek rehearing on different grounds. Northern makes two primary arguments. First it contends that the release clause in its settlement with Burlington does not require Northern to pay Burlington’s *ad valorem* tax refund obligation. Second, it contends that, in any event, the consideration Burlington provided to Northern and its customers in the settlement should be treated as accomplishing a full refund to Northern’s customers of the *ad valorem* taxes, and thus there is no basis for requiring Northern to make a separate payment of those refunds to its customers.

16. Unlike Northern, Panhandle does not contest the Commission’s interpretation of its settlement with Burlington as requiring it to pay Burlington’s *ad valorem* tax refunds. Rather, Panhandle contends that the Burlington settlement was a take-or-pay settlement and therefore Panhandle’s June 2008 payment of \$859,219.06 to Burlington to indemnify it for its payment of *ad valorem* tax refunds is a take-or-pay cost. As such, Panhandle

²² *Id.* at 251.

asserts, it should be permitted to seek recovery of this cost pursuant to the Commission's Order Nos. 500²³ and 528²⁴ policies concerning the recovery of take-or-pay settlement costs.

17. Both assert that under the rulings in *Burlington I* and *Burlington II*, the Commission erred in 2003 when it ordered Burlington to pay the Kansas *ad valorem* tax refunds to the pipelines, and the pipelines detrimentally relied on this order when they passed through that refund to their customers. They both assert that the Commission is obligated to put them back in the position they would have been in but for their detrimental reliance on the Commission's 2003 order directing Burlington to pay refunds to the pipelines that they passed through to their customers.²⁵ They conclude that the Commission is required by its holding in *Transwestern* to place the pipelines in the position they would have been in had the Commission not issued the 2003 order and are entitled to seek recovery of the *ad valorem* refunds that were passed through to their customers. This would be consistent with the Commission's own prior finding that pipelines are "mere conduits" for *ad valorem* refunds and "will not be required to be guarantors of refunds."

II Discussion

18. We deny rehearing since the premises of the arguments advanced by both Northern and Panhandle are not correct.

19. The court has held that the Commission erred in failing to approve and enforce the Burlington Settlements. Our task on remand, therefore, is to give effect to those Settlements, as interpreted by the court in *Burlington I* and *Burlington II*. In the Remand Order, the Commission found that, "As interpreted by the Court, under the release and

²³ See, e.g., *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, FERC Stats. and Regs. ¶ 30,761 at 30,778-79 (1987); *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500-H, FERC Stats. and Regs. ¶ 30,867 (1989); 18 C.F.R. § 2.104 (2007).

²⁴ *Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs*, Order No. 528, 53 FERC ¶ 61,163 (1990), *reh'g*, Order No. 528-A, 54 FERC ¶ 61,095 (1991), *reh'g*, Order No. 528-B, 55 FERC ¶ 61,372 (1991).

²⁵ Citing *Transwestern Pipeline Co.*, 55 FERC ¶ 61,157 (1991), *aff'd*, *Public Utils. Comm'n of CA v. FERC*, 988 F.2d 154 (D.C. Cir. 1993) (*Transwestern*), and *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992).

indemnity clauses, Burlington is released from any obligation to make refunds to the pipelines, and the pipelines must pay their customers any *ad valorem* tax refunds which would otherwise be due from Burlington.”²⁶ Thus, the Remand Order held that the pipelines must allow their customers to retain the *ad valorem* tax refunds the pipelines previously flowed through to them, because the pipelines bound themselves in the Burlington settlements to pay those refunds on behalf of Burlington.

20. On rehearing, neither Northern nor Panhandle has provided any reason for the Commission to modify this result. The court’s holding that the Commission must enforce the Burlington Settlements was premised on its view of those settlements as uncontested settlements between Burlington and the Pipelines, with no adverse effects on third parties, including the pipeline’s customers. For example, in *Burlington II*, the court stated that, “while the NGPA presumably invalidated collusive settlements, there is no allegation that the Burlington Settlements were collusive in any way: Burlington and the pipelines appear to have negotiated in good faith and at arms length, with every incentive to enforce their legal rights and *with no apparent detriments to third parties*.”²⁷ This statement by the Court can only be true if the indemnity clauses in the Burlington Settlements have the meaning *Burlington I* stated Burlington attributed to them: “namely that it indemnifies Burlington for any *ad valorem* tax refund liability and imposes that liability on the pipelines.”²⁸ Otherwise, enforcement of the Burlington Settlements would have detriments to the third parties, because the Settlements would deprive the customers of all, or at least some, of the *ad valorem* tax refunds attributable to Burlington, which the pipelines previously flowed through to them.

²⁶ Remand Order, 123 FERC ¶ 61,151 at P 12.

²⁷ 513 F.3d at 250 (emphasis supplied).

²⁸ 396 F.3d at 408.

21. Similarly, the court found that the Commission's reliance on the court's decision in *Williams Natural Gas Co. v. FERC*²⁹ was misplaced, stating that *Williams* "involved FERC's responsibility to protect *customers*, non-parties to the settlements, from the adverse effects of transactions between pipelines and producers. It bears no apparent relevance to the present dispute between the pipelines and producer over the enforceability of their agreed-upon settlement."³⁰ This statement also can only be true, if the settlements do not deprive the pipeline's customers of their *ad valorem* tax refunds. Otherwise, the dispute between Burlington and the pipelines as to whether to enforce their settlements would very definitely involve the Commission's "responsibility to protect *customers*," who were not parties to the Burlington Settlements, "from the adverse effects of transactions between pipelines and producers."

22. More generally, the court concluded its opinion by finding that the Burlington Settlements must be treated as uncontested in the same manner as the Omnibus Settlements, because the Burlington Settlements were uncontested when Burlington and the pipelines signed them. However, this fact can only render the Burlington Settlements uncontested, if those settlements only affect Burlington and the two pipelines, and do not deprive the pipelines' customers of their refunds. Under the Omnibus Settlements customers did not agree to waive refunds above the specified amount, and it was for that reason that Burlington opted out of the Omnibus Settlements. Thus, to the extent the Burlington Settlements would deprive the Pipelines' customers of their refunds, those settlements would be contested by the customers.

23. The Commission concludes that it is inescapable that the court in *Burlington II* adopted the interpretation of the release clauses which Burlington has advanced throughout these proceedings, as discussed in detail in the next section: Those clauses

²⁹ 3 F.3d 1544 (D.C. Cir. 1993) (*Williams*). The Commission had cited *Williams* to support its holding that the Burlington Settlement could not be found to have provided the pipelines a full refund of *ad valorem* taxes, unless the settlement separately set forth the amount of consideration Burlington paid to settle possible *ad valorem* tax issues and that amount equaled the amount of the taxes. In *Williams*, the court affirmed Commission orders which held that pipelines could not treat any portion of a settlement which covered both payments for taken and take-or pay costs, as a gas purchase cost eligible for 100 percent recovery, unless the settlement expressly identified the portion of the overall settlement payment which resolved pricing disputes concerning gas actually purchased. Absent such specificity, the pipeline would have to treat the entire payment as a take-or-pay settlement cost, which it could only partially recover.

³⁰ 513 F.3d at 249-50 (emphasis in original).

released Burlington from any obligation to pay refunds to the Pipelines and required the Pipelines to pay the refunds to their customers on Burlington's behalf. In any event, allowing the pipelines to recover the refunds from their customers would be contrary to the court's holding that enforcement of the Burlington settlements would not adversely affect third parties.

24. In *Burlington II*, the court held that *Burlington I*'s construction of the settlements "has become law of the case," because no party sought reconsideration of *Burlington I*.³¹ For the same reason, *Burlington II*'s similar construction of the settlements is also law of the case. Therefore, it is the law of this case that the Burlington Settlements impose Burlington's *ad valorem* tax refund obligation upon the pipelines, and that obligation must be carried out in a manner that has no adverse effect on the non-party customers of the two pipelines. Consistent with this law of the case, the Remand Order prohibited the two pipelines from seeking to recover from their customers the amounts of the refunds.

25. We now turn to the specific contentions the two pipelines have made on rehearing. Since each advances a different theory to attack the Remand Order, we will address each separately, except when the arguments overlap.

A. Northern's Rehearing Request

26. Northern contends (1) that the release clause in its settlement with Burlington does not require Northern to pay Burlington's *ad valorem* tax refund obligation, and (2) in any event, the consideration Burlington provided to Northern and its customers in the settlement should be treated as accomplishing a full refund to Northern's customers of the *ad valorem* taxes, without the need for any separate payment by Northern.

1. Interpretation of Release Clause

27. Northern, in arguing that the Burlington Settlement does not require it to pay the *ad valorem* tax refunds, asserts that Burlington has acknowledged that this is the proper interpretation of the release clause, and cites to the following statement by Burlington in its August 5, 2005 request for rehearing of the Commission's 2005 Remand Order in response to *Burlington I*:

The consideration given by Burlington under the Settlements in the form of lower gas prices, lower take obligations, shorter contract

³¹ *Burlington II*, 513 F.3d at 246, citing *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc).

terms and lower take-or-pay liability all benefited the pipeline's customers as those benefits were passed through to the customers through the pipeline's PGA and take-or-pay and contract reformation recovery mechanisms. 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 their customers the *ad valorem* tax refunds. The Settlements only provide that Burlington is relieved of the refund obligation by reason of the release and indemnification provisions.³²

28. As discussed below, Northern's assertion that Burlington agrees that the Burlington Settlement does not shift its *ad valorem* tax refund obligation to Northern is contradicted by all the other pleadings Burlington filed in these proceedings commencing with the very first document, Request for Resolution of Burlington, SA99-1-000, filed May 12, 1999. In addition, Northern has mischaracterized Burlington's August 2005 rehearing request by quoting one passage out of context, while ignoring the rest of the rehearing request where Burlington reiterated its position that Northern through the Burlington settlement had agreed to pay any *ad valorem* tax refunds that Burlington might be responsible for.

29. In its May 12, 1999 Request for Resolution of this proceeding, Burlington stated that it did not dispute the amount of the *ad valorem* tax refund Northern claimed Burlington owed. Rather, as a result of the Burlington-Northern settlement, it was not liable for the *ad valorem* tax refund, but Northern was responsible to pay that refund to Northern's customers. Burlington stated:

Northern has, by contract, agreed to release Burlington from any responsibility regarding additional monies owed with respect to the Kansas Contracts, and Northern is contractually bound to indemnify Burlington, as the successor to Southland, with respect to any claims, including the *ad valorem* tax claims, pertaining to the Kansas Contracts.³³

³² Rehearing Request at 42 citing, Burlington Request for Rehearing (at 59-60) dated August 5, 2005 in Docket No. GP99-15.

³³ Request for Resolution, p.5.

30. Specifically, Burlington made clear that this included any *ad valorem* tax refunds:

As part of that exchange of value, Northern agreed to release Burlington from, and otherwise assume, all liability for payments that otherwise would be owed by Burlington with respect to the contracts. Accordingly, Northern is contractually obligated to pay any and all costs, expenses, and or claims with respect to any *ad valorem* tax issues pursuant to the Settlement.³⁴

31. To make it crystal clear what was at issue Burlington added:

To the extent that Northern's customers are entitled to refunds of the amount paid by Northern in excess of the maximum lawful price. Northern has assumed that responsibility.³⁵

32. Subsequently, in Burlington's January 22, 2003 request for rehearing of the Commission's "Order Setting Matters For Hearing," dated January 2, 2003, 102 FERC ¶ 61,003, Burlington conceded that there was an *ad valorem* tax refund obligation due with respect to the gas sales contract covered by the Burlington-Northern settlement. However, it then stated "Burlington's sole defense is that Northern agreed by Settlement to indemnify and release Burlington for all claims arising from or relating to Burlington's sale of gas to Northern and, therefore, Northern is the party responsible for any *ad valorem* tax liability."³⁶

33. Specifically, Burlington asserted that "Northern is obligated to pay any *ad valorem* refunds owed by Burlington"³⁷ because:

in exchange of valuable consideration, Northern agreed to release Southland from, and otherwise assume, all liability for payments that otherwise would be owed by Southland, with respect to the contracts. By reason of the mutual release and indemnification, Northern is contractually obligated to pay all claims against

³⁴ *Id.* at 6.

³⁵ *Id.* at 9.

³⁶ Request for Rehearing at 9.

³⁷ *Id.* at 9.

Burlington, as Southland's successor-in-interest, with respect to any *ad valorem* tax issues.³⁸

34. In summary, Burlington argued:

Burlington does not claim that the *ad valorem* tax amounts should not be reimbursed to the ultimate consumers. Burlington's position is that Southland, as the predecessor to Burlington, entered into an arms-length settlement with Northern under which Northern assumed the obligation to make any such payments on behalf of Southland (now Burlington) as consideration for value received from Southland pursuant to the Settlement.

* * *

To the extent that Northern's customers are entitled to refunds of amounts paid by Northern in excess of the maximum lawful price, Northern has assumed that responsibility in return for valuable consideration under the Settlement.³⁹

35. When Burlington sought review in court of the Commission's 2003 orders denying that the indemnity defense relieved it of the *ad valorem* tax refund obligations and finding that Burlington was responsible for the *ad valorem* tax refunds,⁴⁰ it asserted that the Burlington "Settlement does not reduce by a single cent the amount of refund due to consumers. Under the settlement, the *ad valorem* tax refund obligation is simply shifted to the Pipelines in return for valuable consideration."⁴¹

36. Burlington also argued that there was good reason to enforce the Burlington Settlements because they had a lesser impact on customers than did the Omnibus Settlements that the Commission had approved. Burlington stated that the Omnibus Settlements reduced the amount of refunds payable to Northern and Panhandle's

³⁸ *Id.* at 11.

³⁹ *Id.* at 16.

⁴⁰ *Supra* n. 8.

⁴¹ Initial Brief of Petitioner Burlington, Nos. 03-1340 and 03-1432, August 13, 2004 (Final Brief) at 16.

customers, while the Burlington Settlements sought only to shift to Northern and Panhandle, respectively, the obligation to pay the full amounts of refunds to consumers.⁴²

37. In *Burlington I*, the court similarly viewed the issue as whether the Burlington Settlement should be enforced to shift the *ad valorem* refund obligation from Burlington to the pipelines. Thus, the Court stated:

In the April 1 rehearing orders, the Commission questioned whether the indemnity clauses in the Settlement Agreements with Northern and Panhandle had the meaning Burlington attributed to them, namely that it indemnifies Burlington for any *ad valorem* tax refund liability and imposes that liability on the pipelines.⁴³ (emphasis supplied)

38. In *Burlington I* the court adopted Burlington's position that the release and indemnification could cover the *ad valorem* refund obligation because "the contract language does not reasonably permit exclusion of any claim that relates to payments made under the contracts."⁴⁴

39. In its 2005 Remand Order from *Burlington I*, the Commission stated that, for purposes of that order, the Commission accepted Burlington's interpretation of the settlements "as allowing it to retain the *ad valorem* tax reimbursements it collected from Northern and Panhandle, but requiring Northern and Panhandle, the purchasers in the first sales, to pay those same amounts to their customers. For purposes of this order, we accept Burlington's interpretation."⁴⁵ In Burlington's August 2005 request for rehearing of that order, relied on by Northern here, Burlington asserted that the Commission should have found Burlington's interpretation to be correct, instead of just assuming that interpretation to be correct.⁴⁶ Consistent with its position throughout these proceedings, Burlington asserted, "By reason of the mutual release and indemnification, Northern is contractually obligated to pay all claims against Burlington with respect to the refunds

⁴² *Id.* at 26.

⁴³ 396 F.3d at 408.

⁴⁴ *Id.* at 409.

⁴⁵ 2005 Remand Order, 112 FERC ¶ 61,053 at P 45.

⁴⁶ August 2005 rehearing request by Burlington at 35.

of ad valorem taxes paid to Burlington.”⁴⁷ Later in its rehearing request, Burlington stated, “As previously noted, the Burlington Settlements do not deprive consumers of the right to refunds of any payments they made in excess of NGPA ceiling prices. The Settlements simply shift Burlington’s refund obligation to the Pipelines.”⁴⁸ Moreover, in the paragraph immediately before the passage Northern quotes in its instant rehearing request, Burlington stated, “As described previously, the *Burlington* court has found that under the release and indemnification clauses the Pipelines had undertaken the responsibility for the *ad valorem* tax refunds.”⁴⁹

40. Read in context, Burlington’s point in the passage quoted by Northern was not to contradict all its statements earlier in the rehearing request and in its prior pleadings concerning the meaning of the settlement. Rather, it was to state that the Commission could give effect to the settlement’s shift of the *ad valorem* tax refund obligation from Burlington to Northern, but also exercise its prosecutorial discretion and not require Northern to make the refunds. Burlington began the paragraph which contains the language quoted by Northern with the sentence, “Further, granting Burlington relief here would not require that the Commission decide to ‘coerce’ or enforce the Burlington settlements against the pipelines.”⁵⁰ And Burlington concluded the paragraph with the statement, “Giving effect to the Burlington Settlements leaves open the question whether the Commission should decide to require the pipelines to pay the *ad valorem* tax refunds attributable to gas purchased from Burlington. 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.”⁵¹

⁴⁷ *Id.* 39.

⁴⁸ *Id.* at 56.

⁴⁹ Burlington August 2005 rehearing request at 59.

⁵⁰ *Id.*

⁵¹ *Id.* at 60. Similarly, in the next paragraph, Burlington stated, “Here Burlington requests the Commission to give effect to the Burlington Settlements, just as it gave effect to the Omnibus Settlements, and thereby decide not to take any enforcement action against Burlington to pay the *ad valorem* tax refunds. It would then remain for the Commission to decide separately whether to exercise its prosecutorial discretion with respect the Pipelines’ obligation to pay such refunds.” *Id.*

41. In its December 2005 order denying rehearing of the 2005 Remand Order, the Commission responded to Burlington's assertion that the remand order had not accepted the court's interpretation of the release indemnity clause, by reiterating its statement in the remand order that "the Commission 'accepts Burlington's interpretation of the release and indemnity clause.' By this we mean that the release and indemnity clause encompasses the ad valorem refund claims asserted against Burlington that arose from the payments under any first sale under the gas purchase contracts covered by the settlement."⁵²

42. On appeal from the Commission's *Burlington I* remand orders, Burlington once again reiterated its position that the Burlington Settlements required the pipelines to make the refunds:

Burlington's point is that the Pipelines here did not simply agree to allow Burlington to retain more than NGPA ceiling prices. Instead, Burlington gave the Pipelines valuable consideration in return for the Pipelines' release and indemnification, which shifted the responsibility for the *ad valorem* tax refunds to the Pipelines.⁵³

43. Or, as Burlington stated it another way:

Here Burlington 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.⁵⁴

Burlington also suggested that the Commission had accepted this interpretation in its 2005 Rehearing Order.⁵⁵

⁵² 2005 Rehearing Order, 113 FERC ¶ 61,257 at P 26.

⁵³ Initial Brief of Petitioner Burlington, No. 06-1042 (March 29, 2007) at 26.

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 20.

44. In their brief to the court supporting the Commission, Northern and Panhandle took issue with Burlington's assertion that the Commission had accepted its interpretation of the Settlements.⁵⁶ They pointed out that the Commission's 2005 Remand Order had only stated that the Commission accepted Burlington's interpretation for purposes of the remand order, and they asserted that the Commission had never interpreted the release and indemnity clause in the Northern-Burlington settlement. They accordingly asked the court to give the Commission an opportunity to address the meaning and intent of that settlement, and they asserted that Northern must be afforded an opportunity to present extrinsic evidence to the Commission on the meaning of its settlement with Burlington.

45. In *Burlington II* the court reiterated the *ad valorem* refund obligation was encompassed by the release and indemnification clause: "Whether or not the *ad valorem* liabilities were within the main purpose of the settlements, they were within their language, written at a time when, as the background described above makes clear, the law was deeply unsettled and the parties would have had reason to seek accord."⁵⁷ Moreover, the court rejected Northern's suggestion that the court "revisit our holding in *Burlington I*, portraying our construction as dictum and asking that the Commission, with the benefit of extrinsic evidence, be allowed to construe its settlement language first."⁵⁸ The court stated that "if Northern (which intervened in *Burlington I*) thought that any of our essential reasoning was in error, it should have petitioned for reconsiderations, which it did not. *Burlington I*'s construction has thus become law of the case, which Northern cannot challenge here."⁵⁹

46. In its instant rehearing request, Northern again requests an opportunity to present evidence concerning the meaning of its settlement with Burlington. The Commission denies that request. In *Burlington II*, the court expressly denied Northern's request that the Commission be allowed to take such evidence. Therefore, reopening the record to

⁵⁶ Joint Brief of Intervenors, Case No. 06-1042 (Feb. 22, 2007) at 19-22..

⁵⁷ 513 F.3d at 249.

⁵⁸ *Id.*

⁵⁹ *Id.*

permit Northern to present such evidence would be contrary to the court's opinion, which we are bound to follow.⁶⁰

47. Clearly, what was at issue in these proceedings was whether the Burlington Settlements should be enforced. If they were, the Pipelines would be responsible for the *ad valorem* tax refund because, as the court stated, enforcing this would not have any detrimental effect upon third parties, namely the pipeline's customers. That is because the settlements, as Burlington repeatedly urged and the court agreed, simply shifted Burlington's refund obligation to the Pipelines. The court has held that the Burlington Settlements must be enforced, and that is what the Remand Order did.

2. Whether Northern-Burlington Settlement Already Provided Refunds to Customers

48. Northern next contends that the Commission should have found that the take-or-pay relief and other consideration provided by Burlington in its settlement with Northern "effected a full refund" of the *ad valorem* taxes to Northern's customers. Northern argues that the Commission erroneously ignored the court's holding that the Burlington Settlement provided consideration that fully resolved Burlington's Kansas *ad valorem* tax refund obligation to Northern and its customers. Northern asserts that it flowed that consideration through to its customers in the form of reduced take-or-pay liability, lower gas prices, a lower take obligation, and release of all claims under the contracts. Therefore, Northern contends, the Remand Order results in Northern's customers unlawfully receiving consideration for resolution of Burlington's Kansas *ad valorem* tax refund obligation twice – once in the form of the substantial take-or-pay relief and other consideration provided under the Burlington Settlement, and secondly, through the unlawful refunds they received from Burlington in 2003.

⁶⁰ Unlike the release clause in the Panhandle-Burlington settlement, the release clause in the Northern-Burlington settlement does not include the word "indemnify." However, from the outset the court treated the release clauses in the two settlements as having the same meaning. No party, including Northern in its instant rehearing request, has suggested that the absence of the word "indemnify" from the Northern-Burlington settlement should lead to that settlement being interpreted differently from the Panhandle-Burlington settlement. The Commission thus finds that any issue that might be raised based upon that difference in wording between the two settlements has been waived.

49. We reject Northern's assertion that the take-or-pay relief and other consideration provided by Burlington in their settlement should be treated as a payment of *ad valorem* tax refunds to Northern's *customers*. The Burlington Settlements were solely between Burlington and the pipelines, as the court recognized when it distinguished its *Williams* precedent on the ground that *Williams* "involved FERC's responsibility to protect *customers*, non-parties to the settlements, from the adverse effects of transactions between pipelines and producers," and thus *Williams* "bears no apparent relevance to the present dispute between the pipelines and a producer."⁶¹ The exchange of consideration between Burlington and Northern included Northern's agreement to assume Burlington's responsibility to make any refunds of amounts it collected in excess of the maximum lawful price, as discussed in the preceding section. There would have been no reason for the parties to include a provision for Northern to pay such refunds, if they intended that the take-or-pay and other such relief would constitute the refunds. The Commission concludes that the take-or-pay and other relief which Burlington provided under the settlement cannot be treated as satisfying the customers' entitlement to *ad valorem* tax refunds when that very same settlement provided for Northern to pay any such refunds on Burlington's behalf.

50. In arguing that its Settlement with Burlington provided its customers full refunds, Northern relies on *Burlington II*'s holding that a purchaser in a first sale may enter into a settlement in which it exchanges its "right to a full refund . . . for other valuable consideration," and the Commission "cannot insist that the exchange match the parties' exact obligations as ultimately determined."⁶² This holding has no relevance to the question whether the take-or-pay and other relief provided by Burlington should be treated as providing *ad valorem* tax refunds to Northern's customers. Regardless of the customers' right to enter into a settlement exchanging their refund entitlement for other relief, they did not do so, not being parties to the Burlington-Northern settlement. Moreover, far from providing for such refunds to Northern's customers through the take-or-pay and other relief given by Burlington, the settlement as interpreted by the Court gave the customers their *ad valorem* tax refunds because under the court's interpretation implementing the settlement would have no detriments to other parties, such as Northern's customers.

⁶¹ 513 F.3d at 249-50.

⁶² *Burlington II*, 513 F.3d at .

51. Finally, Northern contends that its customers are bound by their decision not to object to the Burlington Settlement, when Northern filed to recover the costs of that settlement under the Order No. 500 equitable sharing mechanism,⁶³ and the Commission subsequently approved a settlement permitting Northern to recover those and other take-or-pay settlement costs.⁶⁴ Northern asserts that, if the customers or the Commission believed that the Burlington Settlement should have provided more consideration for release of the *ad valorem* tax refund obligation, they should have objected to the settlement at that time. However, there was no reason for the customers to object to the Burlington settlement on this ground. As already discussed, that settlement did not reduce any *ad valorem* tax refunds to be received by the customers. It simply shifted the refund responsibility from Burlington to Northern. As the Court stated, the settlement has no “detriments to third parties,” third parties meaning customers. There was thus no detriment which the customers could object to.

3. Other Northern Arguments

52. Northern argues that, contrary to the court’s decision, the Commission treated the Burlington settlements differently from the Omnibus settlements because under the Omnibus settlements the pipelines were not required to absorb the costs of any of the refund amounts that the producers were not required to pay, but here Northern must bear the cost of the refund the producer is not paying.

53. While the results for Northern may be different, the Commission treated the two settlements the same way in that the Commission enforced the terms of both, as the court required. The different outcomes for Northern results from the fact that the settlements have different provisions – under the Burlington settlement, the pipeline assumed the liability of the producer, while under the Omnibus settlements pipelines were not obligated to pay the customer for any *ad valorem* refunds that the producer did not have to pay under the settlement.

54. Northern argues that through the Burlington settlement, Northern obtained significant benefit for its customers, such as a 90% reduction in the take-or-pay obligation customers would have been obligated for, yet the Remand Order not only fails to recognize this benefit but requires Northern to absorb the cost of Burlington’s *ad valorem* tax refund obligation, while allowing the customers to retain the refund Northern had flowed through to them. What is even more ironic, Northern continues,

⁶³ *Northern Natural Gas Co.*, 47 FERC ¶ 61,154 (1989).

⁶⁴ *Northern Natural Gas Co.*, 49 FERC ¶ 61,437 (1989).

is that it was Northern that challenged the Commission's original ruling permitting the producers to retain the add-on, and it was Northern's efforts that led to the ultimate order requiring producers to refund the *ad valorem* add-on. Now, Northern, which, at great expense to it, initiated this process that resulted in customers recovering millions of refund dollars must pay the *ad valorem* tax refund to customers, who have received all the other benefits under both the Burlington and Omnibus settlements.

55. The Commission did not act arbitrarily in ignoring these factors because they do not enter into what was before the Commission. The court required the Commission to enforce the Burlington settlement, and accordingly the Commission ordered Northern to return to Burlington the refund Burlington had paid. The Commission's order simply enforced Northern's agreement in the Burlington settlement, to assume the producer's refund obligation. This meant that the customer could not be forced to return the *ad valorem* tax refund it had received from Northern when Northern flowed through Burlington's payment. There is no basis for the Commission to stand in the customer's shoes and agree to waive Northern's obligations under the settlement because of the other benefits the customer may have received from Northern's actions.

56. Finally, Northern requests, in the alternative, that the Commission permit Northern to treat the refunds made to Burlington as a regulatory asset until Northern seeks recovery in its next general rate case proceeding, and that the Commission not act on the merits at this time.

57. We will deny the request since there is no basis for the treatment Northern seeks. The Burlington settlement, as interpreted by the court, imposes the Burlington *ad valorem* tax refund obligation on Northern, and the Remand Order merely implements the court's decision. There are no pending issues that require further resolution.

B. Panhandle's Rehearing Request

58. Unlike Northern, Panhandle does not contest the Commission's interpretation of its settlement with Burlington as requiring it to pay Burlington's *ad valorem* tax refunds. Rather, Panhandle contends that the Burlington settlement was a take-or-pay settlement and accordingly Panhandle's June 2008 payment of \$859,219.06 to Burlington to indemnify it for its payment of *ad valorem* tax refunds is a take-or-pay cost. As such, Panhandle asserts, it should be permitted to seek recovery of this cost pursuant to the Commission's Order Nos. 500 and 528, supra nn. 23 & 24, policies concerning the recovery of take-or-pay settlement costs. Panhandle points out that Order No. 500 established a policy that, if a pipeline agreed to absorb between 25 and 50 percent of its take-or-pay settlement costs, it could recover an equal amount through a fixed charge and recover any remaining amount through a volumetric surcharge. Panhandle asserts that prohibiting it from recovering its payment to Burlington represents a change in

Commission policy concerning the recovery of take-or-pay costs, which could only be accomplished, if at all, through a rulemaking proceeding.

59. Panhandle also points out that in 1991 the Commission approved a settlement permitting Panhandle to recover the take-or-pay buyout and buydown costs it had then incurred, consistent with the Order Nos. 500/528 policies, which included contracts in the Burlington settlement.⁶⁵ Moreover, Panhandle contends that section 18 of its GT&C continues to provide that “[p]eriodically rates and charges under Panhandle’s FERC Gas Tariff shall be adjusted to reflect changes in Panhandle’s expenditures for Take-or-Pay....” Thus, Panhandle argues, the Remand Order was inconsistent with current Commission policies and Panhandle’s approved tariff. Further, Panhandle contends that prohibiting it from seeking to recover these costs is contrary to the Commission’s fundamental obligation under the NGA to give pipelines a reasonable opportunity to recover prudently incurred costs and earn an adequate return.⁶⁶

60. Contrary to Panhandle’s assertions, the Remand Order did not change Commission policy concerning the recovery of take-or-pay costs. As required by the court, the Commission is simply enforcing Panhandle’s settlement agreement with Burlington. Under that settlement, Panhandle agreed to assume Burlington’s responsibility for any claims for refund of amounts received under the contracts in violation of NGPA ceiling prices. Burlington’s responsibility was to pay the refunds to the pipelines for pass through to their customers and consumers, whose rates reflected the excess over the MLP, without any ability to obtain compensation for the payment of the refunds from any source. It follows that Panhandle’s assumption of Burlington’s refund responsibility necessarily also included recognition that there could not be recovery by the pipeline from its customers and consumers. That Burlington so interpreted the settlement is demonstrated by its assertion in its 2003 brief to the court that the “Settlement does not reduce by a single cent the amount of refund due to consumers. Under the settlement, the *ad valorem* tax refund obligation is simply shifted to the Pipelines in return for valuable consideration.”⁶⁷ That the Court adopted this interpretation is shown by its statement in *Burlington II* that “Burlington and the pipelines appear to have negotiated in good faith and at arms length, with every incentive

⁶⁵ *Panhandle Eastern Pipe Line Co.*, 56 FERC ¶ 61,210 (1991).

⁶⁶ *Citing Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

⁶⁷ Initial Brief of Petitioner Burlington, Nos. 03-1340 and 03-1432, August 13, 2004 (Final Brief) at 16.

to enforce their legal rights and *with no apparent detriments to third parties.*”⁶⁸ If Panhandle retained the right to seek recovery of some portion of the refunds from its customers pursuant a recovery mechanism of the type authorized by Order Nos. 500 and 528, there would be detriments to third parties, contrary to the court’s holding.

61. This result is not contrary to the Commission policies concerning pipeline recovery of take-or-pay settlement costs. In the Order No. 500 proceeding, the Commission encouraged pipelines and producers to settle their take or pay disputes and restructure their above-market gas sales contracts.⁶⁹ The Commission also encouraged pipelines, their customers, and all affected parties to resolve the pipelines’ flow through of their take-or-pay settlement costs by settlement, stating that it would “afford parties the maximum flexibility possible to achieve equitable and individual resolution of this problem.”⁷⁰ In this connection, the Commission emphasized that “all segments of the industry should share in the costs of resolving the take-or-pay problem,” and consistent with this principle, “interstate pipelines also must share in paying a portion of the costs.”⁷¹

62. In this case, Panhandle, consistent with Commission policy, negotiated a settlement with Burlington, a producer, terminating a gas purchase contract, thereby helping to resolve Panhandle’s take-or-pay problems. In that settlement, as interpreted by the court, Panhandle agreed to assume any refund obligations Burlington might subsequently incur. As matters have subsequently turned out, that agreement has led Panhandle to absorb a greater share of its take-or-pay costs than Commission policy required. But there was nothing in the Commission’s Order Nos. 500/528 policies to prevent a pipeline from agreeing by settlement to absorb a greater share of its take-or-pay settlement costs than Commission policy required. Indeed, the Commission has held that take-or-pay settlements should remain binding on the parties, despite subsequent complaints that the settlements contained provisions that were contrary to Commission policy. The Commission explained that it had encouraged resolution of take-or-pay problems by settlement, and “approved settlements are binding on the parties and should

⁶⁸ 513 F.3d at 250 (emphasis supplied).

⁶⁹ Order No. 500, FERC Stats. & Regs. ¶ 30,761 at 30,778-81; Order No. 500-H, FERC Stats. & Regs. ¶ 30,867, at 31,522-23, *aff’d in relevant part, American Gas Association v. FERC*, 912 F.2d 1496 at 1508-10 (D.C. Cir. 1990).

⁷⁰ Order No. 528, 53 FERC at 61,596.

⁷¹ *Id.* at 61,597. Order No. 528-A, 54 FERC at 61,301-5.

not be modified simply because it later appears that ‘the result is not as good as it ought to have been.’”⁷²

63. In this case, the Commission originally refused to enforce the Burlington Settlements on the ground that enforcing the settlement would require “the pipeline purchasers in the first sales to pay an amount in excess of the Congressionally mandated NGPA ceiling prices.”⁷³ However, the court reversed these holdings, finding that the pipelines could exchange their accrued right to refunds for other valuable consideration, and that the Commission’s failure to enforce the settlements was contrary to the “strong public policy that supports settling complex matters that thereby avoids the costs and burdens of litigation and mitigate administrative burdens.”⁷⁴ The court further held that the fact the pipelines now contest the meaning and legality of the settlements does not make the settlements contested or provide a basis for not enforcing them.⁷⁵ Therefore, the court having reversed our only reasons for not previously following, in this case, our usual policy of approving and enforcing uncontested settlements concerning the resolution of pipeline take-or-pay problems, there is no longer any basis not to follow that policy in this case. The Remand Order simply carried out that policy by requiring Panhandle to comply with its obligation under the settlement, as interpreted to the court, to indemnify Burlington for its refund payments without any compensation from third parties.

64. We also find no merit in Panhandle’s contention that the Remand Order violated Panhandle’s due process rights because Panhandle never had fair notice that pipeline cost recovery would be determined in the proceedings. Panhandle contended that it has an economic property interest at stake in this case as it reasonably anticipated that it would have the opportunity to seek to recover costs in accordance with Commission policy and its own FERC Gas Tariff but in the Remand Order the Commission decided that issue *sua sponte*. Panhandle asserts that since it did not receive fair notice that the issue would be raised nor did it have a meaningful opportunity to explain its position on the matter of cost recovery its due process rights were violated.

⁷² *JMC Power Projects v. Tennessee Gas Pipeline Co.*, 69 FERC ¶ 61,162, at 61,611 (1994), quoting *Texas Gas Transmission Corp. v. FPC*, 306 F.2d 245, 348 (5th Cir. 1962). *Iroquois Gas Transmission System*, 69 FERC ¶ 61,165 (1994).

⁷³ 2005 Remand Order, 112 FERC ¶ 61,053 at P 48-49.

⁷⁴ *Burlington II*, 513 F.3d at 249, quoting the Remand Order.

⁷⁵ *Id.* at 250.

65. However, the Remand Order merely complied with the court directive to implement the Burlington settlement. As described above, the issue resolved in this proceeding was who was responsible for the *ad valorem* tax refund, Burlington, as the pipelines contended, or as advocated by Burlington, under the settlement, the pipeline “on behalf of Burlington.” Burlington had advanced that position from the outset of this proceeding, and Panhandle could have raised the cost recovery issue at any time, as a fallback position in the event the court accepted Burlington’s interpretation of the settlement. The court having ruled in Burlington’s favor, and the Court having stated that this interpretation would have no detriment on third parties, namely the pipeline’s customers, the Remand Order directed the pipeline to return the money that Burlington had paid to the pipeline.⁷⁶ Since Burlington would have had no right to “cost recovery” of any refunds of amounts collected in excess of NGPA ceiling prices, neither did the pipeline, which was responsible for the refund on behalf of Burlington. Moreover, Panhandle has had an opportunity to raise the matter of cost recovery in the instant rehearing request, and we find no merit in it.

66. Finally, we reject the detrimental reliance argument raised by both Panhandle and Northern. They argue that they should be put in the same position they would be in but for the Commission’s error in directing Burlington to pay the refund to them which they then passed through to customers. The Commission recognizes that when it commits legal error “the proper remedy is one that puts the parties in the position they would have been in had the error not been made.”⁷⁷ However, had the Commission found for

⁷⁶ The *ad valorem* refund payment that Burlington was required to make was a payment to Panhandle, but under the indemnity clause Panhandle would be responsible for reimbursing Burlington for that amount. In fact, that was what Burlington proposed when Panhandle sought the *ad valorem* tax refund from Burlington. Burlington’s response to the claim in a letter it sent to Panhandle, dated March 9, 1998, was:

The obligation to make any refunds due in this matter is squarely on the shoulders of Panhandle ... as any obligation that Burlington may have had to make such refunds has been transferred to Panhandle by relevant agreements by and between Panhandle and Burlington. While I will leave open the possibility of Burlington issuing and exchanging a check to Panhandle for your claimed refunds from Burlington, this will only be done in consideration of the contemporaneous issuing and exchange of a check in a like amount from Panhandle to Burlington.

⁷⁷ *Transwestern*, 988 F.2d at 168.

Burlington, as it must do under *Burlington II*, the Commission would have then ordered the pipelines to pay the *ad valorem* refund to their customers, which is the same result that exists under the Remand Order. Thus, the Remand Order does place the pipelines in the same place they would have been in absent the Commission's error.

The Commission orders:

The requests for rehearing are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.