131 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

ANR Pipeline Company | Docket Nos. RP07-439-000
RP07-439-001

OPINION NO. 508

ORDER AFFIRMING INITIAL DECISION

(Issued May 6, 2010)

1. This matter is before the Commission on exceptions to an Initial Decision issued by the Presiding Judge in this proceeding.[1] The proceeding stems from ANR Pipeline Company's (ANR) filing a report on May 1, 2007, that in 2006 ANR sold 2.6 Bcf of "Excess Gas" owned by ANR and not used in its operations and received $28,145,771 from the sales. In view of the protests to ANR's filing, which questioned ANR's holding the gas in storage for many years and its right to retain the proceeds, the Commission established an evidentiary hearing to examine all of the issues raised in the protests.[2] The Presiding Judge found that ANR owned the gas that was sold, that ANR was entitled to the proceeds from the sale of gas, and there is no evidence to warrant equitable relief to ANR's customers for ANR's holding the gas as part of its storage capacity at no cost to it from 1993 until it was sold in 2006. In this order we deny the exceptions and affirm the Presiding Judge.

Background

2. The origin of this proceeding relates back to the restructuring of ANR as a consequence of Commission Order No. 636.[3] As set forth in the I.D., before 1992, ANR

[1] *ANR Pipeline Co.*, 125 FERC ¶ 63,026 (2008) (I.D.).

[2] *ANR Pipeline Co.*, 121 FERC ¶ 61,093 (2007) (Hearing Order).

[3] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial*

(continued…)

was in the merchant business in which it provided a bundled sales service of gas, among other services. In ANR's restructuring proceeding in Docket No. RS92-1, ANR eliminated its sales function altogether. In a restructuring order effective November 1, 1993, the Commission authorized, subject to review in ANR's next rate proceeding, ANR's allocation of 25 Bcf of storage capacity for system balancing purposes, and permitted ANR to include in its rates the costs associated with 20 Bcf of gas for system balancing and no-notice service.[4] The 20 Bcf of inventory gas is intended to accommodate system short positions (i.e., when total gas receipts from customers are less than gas deliveries) related to imbalance and no-notice activities, while the 5 Bcf of capacity above the inventory level, or headroom, is intended to accommodate system long positions (when gas receipts from customers exceed gas deliveries) related to those activities. When the restructuring became effective on November 1, 1993, ANR had approximately 22.6 Bcf of inventory gas.

3. On the same date that restructuring became effective on its system ANR filed its next Natural Gas Act (NGA) section 4 general rate proceeding in Docket No. RP94-43-000. In that filing ANR included the costs associated with: (1) 20 Bcf of gas inventory for system balancing and no-notice service, and (2) 25 Bcf of storage capacity for the 20 Bcf of gas inventory. The Commission accepted and suspended ANR's proposal and set the matter for hearing[5] and an Initial Decision was issued. While the Initial Decision was pending before the Commission, ANR and its customers resolved the rate case in a black-box settlement that was filed on October 17, 1997. The Commission approved the settlement February 3, 1998.[6] Since that 1998 settlement, ANR has continued to include the costs associated with the 20 Bcf in its rates for system balancing and no-notice service. ANR has not had another rate case since the 1998 settlement.

Wellhead Decontrol, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom.* United Distribution Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997) (Order No. 636).

[4] *ANR Pipeline Co.*, *third order on compliance filing, second order on rehearing and order on complaint*, 65 FERC ¶ 61,162, at 61,790 (1993) (Third Compliance Order).

[5] *ANR Pipeline Co.*, 65 FERC ¶ 61,280 (1993), *order on reh'g*, 66 FERC ¶ 61,123 (1994).

[6] *ANR Pipeline Co.*, 82 FERC ¶ 61,145 (1998) (1998 settlement).

4. On May 1, 2007, as required by its tariff, ANR filed a report of Operational Purchases and Sales of Gas for the 12-month period from January 1, 2006 through December 31, 2006. The report stated that ANR "made sales of excess gas owned by ANR and not used in operations" and received $28,145,771 from the sales in 2006. The supporting schedule showed six sales totaling 2,633,464 Dth at different prices ranging from $9.07 to $14.1950 per Dth, for a total amount of $28,145,776. On August 1, 2009, in response to an informal request by Commission staff, ANR filed a supplemental statement that stated that "ANR has owned and held in storage [the excess gas] since at least 1993, the time of the unbundling of its sales service in compliance with the FERC's Order 636." However, ANR added that while it reasonably can be assumed that most, or all of this amount, the excess 2.6 Bcf of gas, resulted from purchases by ANR prior to unbundling "the exact source of such gas is unknown."

5. Protests were filed questioning ANR's right to the proceeds of the sale, particularly since ANR stated that the source of the gas was unknown, and urged that shippers should be credited with the revenue. Accordingly, the Commission set the matter for hearing to resolve the issues including "the source of excess gas, the need to retain the gas in storage for 14 years, and the entitlement to the proceeds from the sale of the gas…."[7] At the prehearing conference the Presiding Judge ruled that the Commission's hearing order required an NGA section 4 hearing at which ANR had the burden of proof establishing a *prima facie* case and the ultimate burden of proof concerning the lawfulness of its filings.[8]

6. In the I.D. the Presiding Judge held that ANR owned the excess gas, that ANR was entitled to the proceeds from the sale of the gas, and rejected the contention that equitable relief should be awarded to ANR's customers because ANR held that gas in its storage capacity at no charge to it until it sold the gas.

7. Briefs on Exceptions were filed by ConocoPhillips Company and ExxonMobil Gas & Power Markets Company (CE), The Wisconsin Distributor Group (WDG),[9]

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[7] 121 FERC ¶ 61,093 at P 24.

[8] ANR timely sought rehearing and argued essentially that the hearing was a section 5 hearing and not a section 4 hearing. The Commission did not act on the rehearing before the I.D. was issued. Since we affirm the Presiding Judge, the rehearing request in Docket No. RP07-439-002 is moot.

[9] Members of WDG are: Wisconsin Power & Light Company, Wisconsin Gas LLC, Wisconsin Electric Power Company, Madison Gas & Electric Company, Wisconsin Public Service Corporation, and City Gas Company.

Commission Trial Staff (Staff), and Proliance Energy LLC (Proliance). ANR filed Brief Opposing Exceptions. CE filed a Brief Opposing Proliance's Exceptions regarding how the proceeds from the sale of gas should be allocated to ANR's customers.

The Initial Decision

8. The Presiding Judge went through the stipulated issues finding in favor of ANR on all the issues. We will list the issues and the Presiding Judge's treatment of each issue. We find no error in his rulings, and to the extent any ruling is not discussed we affirm the Presiding Judge's rulings.

9. The first issue was "Did ANR own the 2.6 Bcf of excess gas sold in 2006?" The Presiding Judge described the background leading to ANR's restructuring. He then went through the accounting records produced by ANR, and followed the progression of the 2.6 Bcf of excess gas in these records. He found that:

> From October 31, 1993 until the sales of the excess 2.6 Bcf of gas in 2006, ANR included the 2.6 Bcf of excess gas with the 20 Bcf that ANR used for system balancing and no-notice service. The 2.6 Bcf was available for system balancing. For accounting purposes, ANR tracked the 2.6 Bcf of excess gas as part of the system balancing gas that was stored in the 25 Bcf of capacity. Thus, ANR treated the 22.6 Bcf as stored in the 25 Bcf of capacity, and the 2.6 Bcf of excess gas as stored in the 5 Bcf of headroom.[10]

10. The Presiding Judge described that ANR initially recorded the gas it retained, both the 20 Bcf for system balancing and the excess 2.6 Bcf of gas in Account 164.1, and then moved it to Account 117 where ANR accounted for all its base and working gas in 1994. In 1996 the accounting treatment of 2.6 Bcf changed under Order No. 581, which replaced Account 117 with Sub-Accounts 117.1 through 117.4, and ANR placed the gas in Account 117.2, System Balancing Gas, and in 2004 ANR reclassified the gas to Account 117.4, Gas Owed to System Gas.

11. The Presiding Judge concluded "Based on the chronology and the matters just discussed, I find and conclude, on balance, that ANR owned the 2.6 Bcf of excess gas that was sold in 2006."[11] On June 24, 2005, ANR's Risk Management Committee

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[10] I.D. at P 29 (Exhibit references excluded).

[11] I.D. at P 45.

approved the sale of the 2.6 Bcf of excess gas, and ANR later sold the gas to three parties. For each of these transactions ANR exchanged the gas to the purchasers through an in field storage transfer. ANR booked the revenues from the sales in Account 495 and credited Account 117.4 for the cost of the gas.[12]

12. The second issue was "Do ANR's customers possess any ownership interest in the 2.6 Bcf of excess gas?" The Presiding Judge discussed the arguments advanced why ANR's customers possessed an ownership interest in the 2.6 Bcf of gas and found no merit in the arguments. He found no basis for the main argument that the costs associated with the 2.6 Bcf of excess gas were included in the rates of ANR's transportation customers in ANR's last rate case, Docket No. RP94-43 "because the Stipulation and Agreement in Docket No. RP94-43 was a black-box settlement" and the objectors[13] "cannot definitively demonstrate that the costs associated with the 2.6 Bcf were in ANR's rates."[14]

13. The third issue was "Is ANR entitled to any of the proceeds from the sale of the 2.6 Bcf of gas?" In answer to this issue the Presiding Judge found:

> In the above discussion of Issue I, I found that ANR owned the 2.6 Bcf of excess gas. In the discussion of Issue II, I found that ANR's customers have not shown that they possess an ownership interest in the 2.6 Bcf of gas. Thus, I find and conclude that ANR was the sole owner of the 2.6 Bcf of gas and, thus, is entitled to all of the proceeds from the sale of gas.[15]

14. Since the Presiding Judge found that ANR was entitled to the proceeds, the answer to Issue IV, "If ANR is not entitled to any of the proceeds from the sale of the gas, which customers should receive the proceeds?" was that none were.

15. The next issue was "Should ANR be required to compensate its customers for the use of the storage capacity utilized to store the 2.6 Bcf of gas?" The Presiding Judge held ANR did not have to compensate its customers. In reaching that conclusion he held that there is no evidence that ANR stored the 2.6 Bcf of gas at the expense of its customers

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[12] I.D. at P 27.

[13] We will refer to parties filing Briefs on Exceptions as objectors.

[14] I.D. at P 54.

[15] I.D. at P 62.

and relied on the fact that the settlement in Docket No. RP94-43 was a black-box settlement.[16]

16. Moreover, he noted that "the settlement's cost of service amount represented a significant reduction from the filed cost of service, so given this reduction, it is not gainsaid that ANR's customers paid for 100 percent of the costs associated with ANR's storage capacity. It also is not gainsaid that ANR's customers paid for the 2.6 Bcf of headroom."[17]

17. The Presiding Judge referred to the fact that the settlement cost-of-service was $110 million less than the filed cost-of-service, representing approximately a 16 percent reduction. He then explained that assuming a *pro-rata* reduction in the costs of all the services, this 16 percent reduction to the 25 Bcf of capacity would thus remove the costs associated with 4 Bcf of capacity, "Consequently, ANR's customers would not have paid ANR for the costs associated with the 4 Bcf of capacity," which 4 Bcf "could have included the 2.6 Bcf headroom used to store the excess gas."[18]

18. The Presiding Judge noted that objectors claimed ANR's action violated Order No. 636 by retaining the excess gas and storing it in its storage capacity at no cost to it. He found no violation of that order and that the sale complied with ANR's tariff since the sales of the excess gas were "operational sales made on an unbundled basis at a receipt point." The Presiding Judge added that even assuming "that ANR violated Order No. 636 by storing the 2.6 Bcf without Commission authorization it does not necessarily follow that ANR's customers should receive restitution" since "there is no evidence that customers paid for the headroom or were actually harmed in the first place. Thus, awarding ANR's customers $28 million or more would be giving them a windfall."[19]

19. The Presiding Judge stated that he found unpersuasive WDG's argument that ANR's use of the headroom deprived ANR's customers of the security and assurance of capacity for system long positions, noting that WDG acknowledged that ANR's customers were not denied system balancing or no-notice service on any occasion.[20]

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[16] I.D. at P 89.

[17] I.D. at P 89.

[18] I.D. at P 90.

[19] I.D. at P 102.

[20] I.D. at P 92.

20. Finally, the Presiding Judge concluded that the settlement in Docket No. RP94-43 and the rule against retroactive ratemaking bar the imposition of restitution. Thus, since ANR never failed to provide the services it offered to customers "purported equitable relief that would require ANR to disgorge itself of the proceeds from the sale of gas it labels working gas appears to be anything but equitable or appropriate."[21]

21. Given his rulings on the prior issues, the Presiding Judge held that Issue No. 6, "Which customers should receive compensation?" was moot.[22]

Briefs on Exceptions

A. CE

22. CE takes exception to all the conclusions of the Presiding Judge. It contends the Presiding Judge's rejection of the argument that ANR's current transportation shippers have an equitable ownership interest in the "excess" gas was error because they bear the financial burden, and associated risks, of the "excess" gas including, but not limited to, the costs associated with the capacity used to store the gas. CE therefore argues that the proceeds from the sale of the excess gas should be distributed to ANR's current transportation customers.

23. CE asserts that the Presiding Judge erred in holding that ANR's accounting for the gas in certain accounts was proper and did not mislead the Commission and ANR's customers as to how ANR was treating the gas. CE argues that if ANR had accounted for the gas differently, by placing it in a different accounts, the Commission and ANR's customers would have been on notice that ANR believed it had the right to sell the "excess" gas and presumably to retain the proceeds from any sale. CE refers to Account 117.3 which CE argues is designed to "include the cost of stored gas owned by the utility and available for sale or other purposes," and argue that ANR, by not including the excess gas in that account, misled ANR's customers and Staff.[23]

24. CE asserts that the Presiding Judge relied on ANR's accounting records in finding that ANR owned the gas but CE argues that ANR's accounting records are unreliable to establish ANR's ownership of the excess gas because the accounting records are inconsistent. CE cites to the Presiding Judge's failure to address certain inconsistencies in ANR's records.

[21] I.D. at P 104.

[22] I.D. at P 105.

[23] CE Brief on Exceptions at 9.

25. CE argues that the Presiding Judge's determination that the 2.6 Bcf of excess gas was not included in ANR's rates as system balancing gas is unsupported and inconsistent with Commission precedent regarding black box settlements (as well as how ANR treated and accounted for the gas after the rate case).

26. Finally, CE contends that the Presiding Judge erred in failing to require ANR to establish the exact source of the excess gas. CE states the Presiding Judge did so because he found that requiring ANR to track the excess gas from its date of purchase to its date of sale is "an impossible standard."[24] This, CE argues, was error since the hearing order sought to identify the source of the excess gas. The issue, CE insists, is not whether ANR can trace the physical gas molecules of the excess gas from purchase to sale, but rather whether ANR can demonstrate that it actually purchased, and paid for, the "excess" gas.[25]

27. CE concludes that the Commission should reverse the Presiding Judge, and determine that ANR's current transportation customers are entitled to the proceeds from the sale of the "excess" gas.

B. Proliance

28. Proliance asserts that the Presiding Judge erred in failing to recognize that ANR utilized customer's gas when it stored the excess 2.6 Bcf of gas for over twelve years in ANR's storage capacity. It contends there was no evidence to suggest that ANR ever allocated any storage capacity costs to itself or otherwise contributed to storage revenues collected through rates.

29. Proliance argues that the Presiding Judge erred in concluding that ANR's customers would not be entitled to equitable relief because there was no evidence that ANR's customers were harmed by ANR's use of the storage capacity. Finally, Proliance asserts that the Presiding Judge erred in holding as moot the issue of how customers should be compensated by ANR's use of its storage capacity and how the compensation should be determined. Rather, Proliance argues, the Commission should direct ANR to distribute the proceeds from the sales to all customers during the 12 year period the gas was in storage based on their average contract basis in that period.

C. Commission Trial Staff and Wisconsin Distributor Group

30. Since both WDG and Staff primarily focus on the Presiding Judge's rulings that ANR is entitled to retain the full amount of the proceeds of the sale and ANR's customers

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[24] I.D. at P 43.

[25] Brief on Exceptions at 22.

are not entitled to any credit from ANR's storage of the excess gas for over 14 years, we will treat their exceptions together. They do not seriously question the Presiding Judge's ruling that ANR owned the "excess" gas that ANR sold in 2006. However, Staff contends that in the I.D. the Presiding Judge improperly failed to apply his ruling that ANR had an NGA section 4 burden of proof to show that its retention of the $28.1 million in sales proceeds is just and reasonable, and Staff contends this error was evident in many of the Judge's rulings.

31. Staff and WDG argue that the Presiding Judge erred in finding that there is no evidence that ANR's customers paid for the costs associated with the capacity to store the 2.6 Bcf of gas.[26] In fact, both contend that the record clearly shows that ANR used storage capacity, paid by and reserved solely for its customers, at no cost to itself, and therefore should compensate its customers in the amount of $28.1 million, the full amount of the sale proceeds. To support the claim that ANR's customers paid the costs associated with the excess gas Staff cites to testimony in a 2003 ANR proceeding, Docket No. RP02-335, that the costs of the entire 25 Bcf of storage capacity reserved for system balancing and no-notice service were fully recovered in rates charged to ANR's customers.[27] Further, Staff asserts that the Presiding Judge's explanation of why the black box settlement in Docket No. RP94-43 showed that ANR's customers did not pay for the cost of storage that ANR used for the excess gas it sold is based on an erroneous premise. Staff argues the Presiding Judge assumed facts not in evidence in his hypothetical that if the initially-filed cost-of-service were reduced in the settlement by a certain percentage, then the parties to a black box settlement may be understood to have agreed to reduce the specific cost-of-service items by that percentage amount.[28]

32. WDG similarly argues that the record evidence demonstrates that ANR's customers paid for the storage capacity used by ANR to store the excess gas, and the Presiding Judge erred in holding that they did not. WDG further contends that the Presiding Judge's comparison of the settlement's cost-of-service compared to the filed cost-of-service in the Docket No. RP93-94 rate proceeding to support his conclusion is flawed and illogical.

33. WDG argues that the Presiding Judge's reasons for denying equitable relief to ANR's customers is based on a series of errors. First, it asserts, the Presiding Judge

[26] I.D. at P 89-91,

[27] Docket No. RP02-335 was not a rate case but involved ANR's annual cashout price surcharge filing, which surcharge is paid by shippers who are out of balance.

[28] I.D. at P 89-90.

erroneously concluded that ANR's customers did not pay for the storage capacity used to store the excess gas, and therefore were not entitled to equitable relief for ANR's use of that capacity. There was evidence in the record, WDG maintains, which includes sworn statements by ANR's own employees explaining that ANR's customers paid for storage capacity withheld to support system balancing and no-notice service, which included the storage capacity required for the 2.6 Bcf of excess gas.

34. Second WDG contends the Presiding Judge also erroneously held that ANR's customers were not harmed by ANR's conduct and therefore were not entitled to any equitable relief. The Presiding Judge's assertion that only a service failure by the pipeline, and not unjust enrichment, constitutes a harm that can be addressed by equitable relief, WDG argues, is inconsistent with precedent. Moreover, WDG argues the Presiding Judge erred because the record clearly demonstrates that ANR's customers were harmed because ANR stored the excess gas in part of the 25 Bcf of reserved capacity, and ANR's customers paid for that capacity. As a consequence, ANR's customers were harmed since they subsidized ANR's improper storage of excess gas.

35. Third, WDG claims the Presiding Judge erred in ignoring the gravamen of the WDG's claim that ANR's misuse of the reserved storage paid for by its customers violated the requirements of Order No. 636 since ANR used that storage to store its own gas at no cost to it. Fourth, the Presiding Judge also held that equitable relief could not be ordered for ANR's customers because the settlement of ANR's rates in Docket No. RP94-43-000 bars such action, and by the rule against retroactive ratemaking. WDG asserts the Presiding Judge failed to recognize that WDG was not seeking to change ANR's rates, but only to recompense for ANR's improper conduct.

36. Because of these errors, WDG continues, the Presiding Judge never addressed additional equitable factors identified by WDG that support the Commission's exercise of NGA section 16 powers to grant relief to ANR's customers.[29] WDG states these factors include: (i) ANR's repeated claims that it needed the full 25 Bcf of storage capacity to support system balancing and no-notice service at the same time it was using part of that capacity to store its own excess gas; (ii) ANR's knowledge that it was storing the excess gas in part of the reserved capacity; and (iii) ANR's failure to disclose affirmatively to

[29] NGA section 16 provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act.

the Commission and its customers, the existence of the excess gas, and how it was storing the excess gas.

37. WDG argues, because the Presiding Judge found that ANR's customers should not be compensated for ANR's use of part of the reserved capacity to store the excess gas, the Presiding Judge erroneously found moot the issue of how compensation should be determined and allocated to ANR's customers.

38. Both WDG and Staff submit different calculations of the amount ANR should be charged for storing the excess gas from 1993 until it was sold in 2006. WDG claims the compensation to ANR's customers should be $53,944,076, consisting of $28,818,018 in cumulative reservation charges, $24,124,509 in interest through May 2008, and $1,001,549 for fuel cycling charges.[30] Staff calculated the compensation owing to ANR's customers at $32.2 million, consisting of $18.1 million for the storage costs and $14.1 in interest.[31]

39. Staff similarly argued that the Presiding Judge erred in finding that ANR's customers are not entitled to equitable relief because there is allegedly no evidence that ANR's customers were harmed by ANR's use of the storage capacity.[32] Staff argues this is error because ANR's customers were harmed to the extent they were overcharged and were allocated costs for capacity they could not use, while at the same time they subsidized ANR's free use of that same storage capacity through these excessive payments.

40. Staff asserts ANR's customers were also harmed because the 5 Bcf of headroom capacity reserved for customers and paid for by them but used by ANR to store its own excess gas meant that customers did not have instantaneous access to the full amount of that capacity should they have a need for it, which is what customers are entitled to when they pay the firm reservation charge.

[30] *Citing* Exh. WDG-11.

[31] *Citing* Exh. S-1.

[32] I.D. at P 92. Staff repeatedly notes that in numerous places the Presiding Judge relied on supposed "lack of evidence." This was clearly error Staff contends since the Presiding Judge ruled that this was a section 4 proceeding so ANR had the burden of demonstrating why it was just and reasonable to act as it did. Thus the "lack of evidence" bears on ANR's burden and not on those objecting to ANR's position.

41. Staff concedes that ANR met all its service obligations, but asserts ANR did not have in each year following 1993, the 27.6 Bcf of storage capacity needed to cover the storage of its 2.6 Bcf of excess gas and provide 25 Bcf for system balancing and no-notice service.[33]

42. Staff contends that the Presiding Judge erroneously held that ANR did not violate Order No. 636 by storing its excess 2.6 Bcf of gas for 12 years and selling it in 2006, because Order No. 636 not only prohibits the bundling of storage and sales services, but also explicitly prohibits pipelines from retaining storage capacity that exceeds the amount needed to provide system balancing and no-notice service. Staff cites to *Starks Gas Storage LLC*,[34] where the Commission rejected a pipeline's application to do what ANR did here, namely, retain inventory gas that it would sell at a later time.

43. Staff asserts that rather than retaining the "excess gas," as it did, ANR should have sold the excess gas to its storage customers at cost as the Commission instructed ANR to do in its restructuring proceeding, citing *ANR Pipeline Co.*,[35] or otherwise divested itself of the excess gas. Staff asserts that during the restructuring proceeding the Commission denied as premature ANR's original request for a write-down of excess gas if it sold it below cost, and on rehearing, the Commission made clear that its denial of the write-down proposal was based on its supposition that the purpose of the retained storage gas was to provide system balancing and no-notice service. Indeed, Staff argues, the Commission assumed that the retained storage gas served no other purpose, certainly not for the purpose of selling in the future.[36]

44. WDG urges that the I.D. erroneously found that ANR's customers were not harmed by ANR's free use of the storage capacity for twelve years. WDG asserts that contrary to the Presiding Judge's conclusion that customers must experience an actual service failure in order for the Commission to be empowered to grant equitable relief, the Commission has ordered compensation be paid to customers where, as here, a pipeline misused its pipeline capacity to store vestiges of gas from the merchant period, following unbundling under Order No. 636, regardless of whether or not any service disruptions to customers had occurred. WDG states that Order No. 636 mandates that storage capacity withheld from the open-access market can be used only for system balancing and

[33] Staff Brief on Exceptions at 27.

[34] 111 FERC ¶ 61,105, *reh'g denied*, 111 FERC ¶ 61,484 (2005) (*Starks*).

[35] 62 FERC ¶ 61,079 (1993).

[36] *Citing ANR Pipeline Co.*, 64 FERC ¶ 61,140 at 62,080 (1993).

no-notice service and for no other purpose. When the capacity is used for other purposes a pipeline must compensate its customers for any use of its storage capacity not associated with system balancing and no-notice service. WDG cites to *Tennessee Gas Pipeline Co.*,[37] where the Commission ordered the pipeline to compensate customers for its misuse of storage capacity in connection with the sale of former gas inventory regardless of whether or not the use impacted any firm interruptible service on the system.

45. Staff asserts the Presiding Judge erred in ruling the excess gas was operational and not merchant gas because there is record evidence introduced by Staff that the excess gas was merchant gas. Indeed, that evidence, Staff maintains, contradicts the Presiding Judge's statement "that the 2.6 Bcf is not merchant gas … stands unrebutted on the record as made."[38] Staff asserts that because the 2.6 Bcf of gas was purchased by ANR during ANR's merchant business period, was offered for sale at the time of restructuring, and was not needed for ANR's operations, the 2.6 Bcf of gas must be considered merchant gas.

46. Staff excepts to the Presiding Judge's finding that the sales in question here were operational sales on an unbundled basis, citing testimony by ANR that the purchasers transported the gas away from ANR's storage point using their own transportation arrangements, since Staff views *Starks* as denying the pipeline permission to do what ANR did here. By storing the 2.6 Bcf of excess gas over the years and then selling the gas, Staff maintains ANR engaged in a type of bundling activity that *Starks* held was prohibited by Order No. 636.

47. Indeed, Staff asserts, ANR's own witness Pollard established the gas was sold on a bundled basis, since he testified that purchasers of the excess gas had to use ANR's transportation facilities to get delivery of the gas from ANR's storage complex.[39] Thus, the only delivery option available to purchasers was a transportation contract with ANR.

48. WDG asserts the I.D. erred in failing to address the gravamen of the WDG's claim regarding the requirements of Order No. 636, which was that ANR engaged in the unauthorized storage of excess gas in violation of Order No. 636 for over twelve years, by using, for its own benefit reserved (withheld) storage capacity that was supposed to be

[37] 69 FERC ¶ 61,207, at 61,820-21 (1994), *order on reh'g*, 72 FERC ¶ 61,173 (1995)

[38] I.D. at P 95.

[39] Staff cites Tr. 357, 359, 362-63.

maintained exclusively for system balancing and no-notice service. WDG argues this resulted in ANR's unjust enrichment at the expense of its customers, and that ANR failed to meet its obligation to maintain adequate assets to support system balancing and no-notice service. WDG states that the I.D. did not address this argument. Rather the Presiding Judge merely "assumed for the sake of argument that ANR violated Order No. 636 by storing the 2.6 Bcf of headroom without Commission authorization," but nevertheless concluded that equitable relief for ANR's customers is not appropriate because "there is no evidence that customers paid for the headroom or were actually harmed in the first place."[40]

49. WDG argues this conclusion is flawed because ANR's violation of Order No. 636 is the very harm the customers experienced. This violation resulted in the customers' improper subsidization of ANR's storage of excess gas, as well as ANR's inability to maintain the full level of storage capacity that it was required to maintain for system balancing and no-notice service, distinct from other generally available unsubscribed capacity.

50. In addition to being legally incorrect, WDG argues the Presiding Judge's position that harm should be confined to service failures must be rejected as a policy matter. Limiting the scope of harm in that manner, WDG maintains, would create an incentive for perverse behavior by pipelines. WDG suggests this would encourage the pipelines to use reserved assets as they please, so long as they are fortunate enough not to come up short in providing firm service to their customers.

51. The Presiding Judge found that requiring ANR to compensate its customers would retroactively lower ANR's rates, undo the settlement in Docket No. RP94-43, and provide a disincentive to the settlement of rate disputes. Both Staff and WDG argue that the Presiding Judge erred in finding that the settlement in Docket No. RP94-43-000, and the rule against retroactive ratemaking, bars the imposition of restitution.

52. Staff argues that if the Commission finds that ANR violated Commission regulations or orders, it has ample authority to remedy those violations and the previous settlement is no barrier to the Commission's ordering ANR to disgorge any unjust profits to its customers.

53. Staff asserts that the Presiding Judge erred in rejecting Staff's contention that customers' lack of knowledge of the existence and storage of the excess gas makes the 1998 settlement voidable because there was a mistake as to a basic assumption underlying the agreement. Staff contends that had the parties known at the time of

[40] I.D. at P 100.

settlement that 2.6 Bcf of excess gas existed, and that it would be stored in the 25 Bcf of capacity included in rates (and paid for by customers), they would likely have either insisted on ANR's picking up the capacity costs attributable to the excess gas or insisted that ANR remove the excess gas from the 25 Bcf of capacity reserved for system balancing and no-notice service. Thus, Staff considers the settlement no bar to granting compensation to ANR's customers for ANR's unauthorized storage of excess gas at no charge to ANR.

54. Staff asserts that compensation to ANR's customers here does not constitute prohibited retroactive ratemaking. It is well established, Staff argues, that the retroactive ratemaking prohibition does not apply in situations where the Commission's regulations have been violated, citing *Williston Basin Interstate Pipeline Co. v. FERC*.[41]

55. WDG argues that granting the equitable relief the WDG requests for ANR's customers would neither affect the rate case settlement, nor run afoul of the rule against retroactive ratemaking. WDG asserts that the claim for compensation from ANR addresses ANR's conduct, not ANR's rates. The Commission, it contends, is fully empowered to order equitable relief in cases such as this where a pipeline failed to carry out its lawful obligations, because such relief addresses the pipeline's *conduct*, not its rates, citing *Tennessee Gas Pipeline Co.*[42] WDG merely seeks rectification of inappropriate and unjust conduct by ANR, without in any way impacting or addressing the appropriateness of ANR's rates.

56. The Presiding Judge determined that the issue of how ANR should compensate its customers for the use of its storage capacity is moot because he determined that ANR should not be required to do so.[43] Both WDG and Staff contend ANR should be required to compensate its customers because ANR stored the excess gas in capacity ANR's customers paid for from November 1993 until February 2006 with no contribution from ANR, and thus the calculation of equitable compensation is not moot, in their view.

D. ANR's Brief Opposing Exceptions

57. ANR notes that the WDG and Staff did not challenge ANR's testimony concerning the source of the excess gas, but that CE contended that ANR had not shown

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[41] 215 F.3d 875, 879 (8^{th} Cir. 2000).

[42] 72 FERC at 61,915.

[43] I.D. at P 105.

that it had purchased the excess gas and that the source of the gas might instead be excess fuel volumes, and therefore, that ANR was not entitled to the proceeds from the sale.

58. ANR argues that CE, as it did at the hearing, proffers impossible standards by which to determine ownership, and then CE concludes that ANR did not meet those standards.

59. ANR argues that the Presiding Judge correctly found that ANR purchased the gas in October 1993, and maintained the gas on its books as pipeline-owned gas until the gas was sold in 2006. The finding that ANR purchased the gas is supported by journal vouchers showing purchases of 8.4 Bcf in October 1993. Because ANR used the first-in, first-out (FIFO) accounting method, ANR contends the Presiding Judge correctly concluded that the 2.6 Bcf of excess gas, which ANR held in storage as of November 1, 1993, was purchased last.[44]

60. In its Brief on Exceptions, CE does not directly challenge the Judge's findings that ANR owned the excess gas, nor does it contend that ANR's customers owned the gas but it sets forth a number of arguments to suggest either that ANR failed to establish the source of the excess gas or that ANR's accounting records are unreliable. ANR asserts there is no basis to these contentions since the record clearly supports the Judge's finding that ANR owned the gas.

61. With respect to CE's contention,[45] that the issue is not whether ANR could trace the gas from purchase to sale, but whether ANR established that it "purchased and paid for" the gas, ANR submits that the issue in this case is who owned the gas, not whether it purchased the gas and tracked it. If ANR owned the gas it sold, it bore the risk of loss incident to such ownership and is entitled to the proceeds from the sale.

62. With respect to CE's claim that ANR's internal document contradicts the Presiding Judge's conclusion, ANR asserts the Presiding Judge addressed these documents, citing I.D. at P 38 and I.D. at P 40, 46.

63. ANR reviews the Presiding Judge's recitation of how ANR reflected the gas in its records. Thus, while CE argues that ANR should not have recorded the gas in Account No. 117.2 at a certain period of time, ANR responds that the gas was recorded in Account No. 117 which covers only pipeline-owned gas. The bottom line ANR argues is that the

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[44] I.D. at PP 18-20.

[45] CE Brief on Exceptions at 22.

Presiding Judge correctly concluded that the history of ANR's accounting treatment of this gas is consistent with its ownership of the gas.[46]

64. Moreover, notwithstanding that the primary issue CE raised was ownership of the excess gas, ANR argues that CE in its Brief on Exceptions, now claims that ownership is irrelevant. In the exceptions CE contends, that by paying for the excess gas in the rates charged to ANR's customers, the customers obtained an equitable interest in the gas entitling them to the proceeds from the sale of gas. This argument, ANR contends, fails both factually and legally. The evidence does not support the conclusion that the cost of this gas was included in ANR's rates, and even if the cost were included in rates, ANR would nonetheless be entitled to the proceeds because it bore the risk of loss incident to its ownership.

65. ANR notes that CE, in its Brief on Exceptions, relying on *Democratic Central Committee v. Washington Metropolitan Area Transit Comm'n*,[47] argues that although ANR owned the gas, ANR's customers have an equitable interest in the gas as a result of their payment for the gas through rates. This is similar to Staff and WDG's position, and is addressed below. As to the *Democratic Central* case, ANR asserts it is inapposite and does not support the sharing of proceeds from the sale of this gas with customers. ANR states that in Opinion No. 144, the Commission noted that the accounting system at issue in *Democratic Central* was different from FERC's Uniform System of Accounts, under which the investor bears the risk of loss as well as the possibility of gain, as did ANR here.[48]

66. In its Brief on Exceptions, CE cites several cases that arose during restructuring where the Commission required pipelines to sell their storage gas at cost.[49] ANR points

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[46] I.D. at P 26.

[47] 485 F.2d 786 (D.C. Cir. 1973) (*Democratic Central*).

[48] *Florida Gas Transmission Co.*, 20 FERC ¶ 61,298, at 61,581 (1982).

[49] *Citing Williston Basin Interstate Pipeline Co.*, 64 FERC ¶ 61,297, *reh'g denied*, 65 FERC ¶ 61,224 (1993), *appeal denied*, 115 F.3d 1042 (D.C. Cir. 1997); *National Fuel Gas Supply Corp.*, 62 FERC ¶ 61,200, *order on compliance and reh'g*, 63 FERC ¶ 61,291, *order on compliance and reh'g*, 64 FERC ¶ 61,276 (1993), *order on compliance and reh'g*, 65 FERC ¶ 61,131 (1993); *Columbia Gas Transmission Corp.*, 64 FERC ¶ 61,060 (1993), *petition denied*, 144 F.3d 868 (D.C. Cir. 1998).

out that in all of these cases, the cost of the gas held in storage was lower than the market price at the time of restructuring. The circumstances in ANR's restructuring proceeding were precisely the opposite. ANR asserts that because ANR used the FIFO storage valuation method, the gas being sold would have been gas that was purchased in prior years when the price of gas was higher, so the then-current market price of the gas ANR held in storage at the time of restructuring was *lower* than its book cost, *citing* Exh. ANR-5, at 12 and *ANR Pipeline Co.*, 62 FERC ¶ 61,079, at 61,589 (1993).

67. Moreover, as it did in the above cited cases, the Commission in ANR's restructuring proceeding required ANR to transfer storage gas to converting customers at book cost.[50] ANR states that because the Commission required the converting customers to pay ANR the higher cost for this gas, only some small customers did so.

68. ANR disputes Staff's assertion that ANR has the burden to show it should not be required to pay compensation to its customers, because a claim that ANR should compensate its customers for using its own capacity must proceed under NGA section 5, where the burden is not on the pipeline.

69. With respect to WDG and Staff's position that ANR's customers are entitled to some, if not all of the proceeds from the sale, the predicate is that ANR's customers paid for the capacity used to store the 2.6 Bcf of excess gas. They contend that because the customers paid for capacity used by ANR, they are entitled to be compensated for such use. ANR's response is that the Presiding Judge correctly held that the evidence does not support this factual contention in the first place.[51] The rates in effect since May 1, 1994, were agreed to in a 1997 black-box settlement of ANR's Docket No. RP94-43 rate case. Thus, it cannot be concluded that ANR's customers paid for all of ANR's storage capacity, including the 25 Bcf of ANR's storage capacity used for system balancing, or the 2.6 Bcf of storage capacity used to store the excess gas.

70. Both Staff[52] and WDG[53] argue that an ANR witness in another proceeding (Docket No. RP02-335), stated in testimony that the cost of the 25 Bcf of capacity was included in ANR's rates citing to ANR witness Richard W. Porter who stated that ANR's rates recover the "fully allocated cost" of the 25 Bcf of capacity.

[50] *ANR Pipeline Co.*, 64 FERC ¶ 61,140, at 62,080 (1993) (Item by Reference B).

[51] I.D. at P 89-91.

[52] Staff Brief on Exceptions at 19-20.

[53] WDG Brief on Exceptions at 12.

71. ANR responds that "fully allocated" does not necessarily mean these costs were fully allocated *to ANR's customers*, as the WDG and Staff seem to assume. ANR states the term means the costs were fully allocated, and does not foreclose the distinct possibility that costs were allocated to ANR. Thus, ANR concluded, Mr. Porter's testimony that ANR's rates include the "fully allocated costs" of the 25 Bcf of capacity does not demonstrate that all of the costs of that capacity were allocated to ANR's customers. ANR argues that given the "black-box" nature of the settlement, Mr. Porter could not have concluded what costs were in the rates, and to whom they were allocated.

72. ANR asserts that the Presiding Judge correctly rejected Staff and WDG's argument that ANR storing the 2.6 Bcf of excess gas in the 5 Bcf of headroom capacity, deprived ANR's customers of the assurance of capacity for system long positions.[54] In their exceptions Staff and WDG continue to contend that the excess gas was stored in the 25 Bcf of capacity because ANR conceded that it was.[55] ANR responds that the Presiding Judge found that ANR consistently maintained that it *accounted* for the excess gas with the 20 Bcf of system balancing gas and the 25 Bcf of storage capacity, not that the "excess gas" was *physically* stored in a specific 25 Bcf hole.

73. With respect to Staff and WDG's reliance on two "critical notices" that ANR issued in 1989 and 1999, ANR's answer is that while Staff contends[56] that these critical notices indicate that ANR had no available storage capacity in those two years, which is not the case since the evidence shows that ANR had ample storage capacity in those two years.[57] That exhibit, ANR states, shows that ANR always had more than 25 Bcf of unsold storage capacity, the smallest amount being 25.2 Bcf in the 2002-2003 winter season. In short, ANR concludes that there is no claim, let alone evidence, that ANR was unable to meet its firm service obligations or otherwise store its customers' imbalance gas on those days when the critical notices were issued to interruptible, but not to firm shippers.

74. ANR asserts that the cases cited by WDG in support of its contention that the Commission under NGA section 16 is empowered to grant equitable relief to cure unjust enrichments, *Borden v. FERC*, 855 F.2d 254 (5th Cir. 1988) (*Borden*) and *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) (*Columbia Gas*), are

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[54] I.D. at P 92.

[55] Staff Brief on Exceptions at 26-27; WDG Brief on Exceptions at 18.

[56] Staff Brief on Exceptions at 30.

[57] *Citing* Exh. ANR-23.

not on point. In *Columbia Gas*, the Commission merely determined the price applicable under a contractual agreement which had not specified a price. In *Borden*, the Court approved the Commission's action requiring parties receiving additional gas under a curtailment plan to compensate parties who would otherwise have received the gas. In neither case did the Commission order relief independent of a finding of an NGA violation. ANR cites to numerous cases where the courts state that NGA section 16 allows the Commission to remedy violations of other substantive sections of the NGA, but section 16 does not confer upon the Commission independent authority to act.

75. ANR states that WDG's theory, that restitution to ANR's customers is appropriate because ANR has been unjustly enriched by using capacity that the customers paid for, is based on a false premise. By paying rates for service, shippers do not obtain a property interest in the pipeline capacity used to provide that service. ANR asserts that pipelines are permitted to use whatever capacity is available on its system to provide interruptible service to other shippers provided it can meet its firm service obligations. Thus, whatever the pipeline receives from providing interruptible service is not unjustly received, and the pipeline cannot be ordered to refund these proceeds. Rather, shippers can include these proceeds in the setting of prospective rates in a new rate case.

76. ANR asserts that WDG did not cite to any passage in Order No. 636 where the Commission prohibited pipelines from using capacity retained for system balancing when not needed for system balancing. ANR argues that what Order No. 636 prohibited was pipelines retaining or holding storage capacity for use in providing their own merchant sales service, which is clearly not the situation present here.[58]

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[58] ANR cites the following from Order No. 636:

> The Commission's unbundling of pipeline sales and transportation services means that pipelines with downstream storage will need it *only* to fulfill their obligations with respect to system management (load balancing) and 'no-notice' transportation. Because storage is now defined as transportation, under section 284.1(a), which must be unbundled from sales, the pipeline itself may not retain, or hold, any storage capacity downstream of the place where it unbundles in connection with the providing of any of its own sales service.

Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,426.

77. For that reason, ANR asserts WDG's reliance on *Tennessee Gas Pipeline Co.*,[59] is misplaced. There, among other things, Tennessee had violated the unbundling requirement of Order No. 636 by using capacity downstream of the unbundling point on its system "in connection with providing its own sales services."[60] Here, ANR's sale of the excess gas were one-time sales of gas made pursuant to section 38 of its tariff, and were not part of an ongoing sales service, as was true in Tennessee's case.

78. ANR contends that *Starks*, cited by Staff, does not support Staff's position in its Brief on Exceptions that ANR's storage and sales of excess gas were no different than the situation that was present in *Starks* and the Presiding Judge erred in finding that ANR's sales of the excess gas in 2006 did not violate the prohibition in Order No. 636 against pipelines making bundled sales of merchant gas. ANR responds that ANR's one-time sale of gas that was a remnant from restructuring is hardly the type of merchant sale that the Commission was concerned about in Order No. 636 and in *Starks*.

79. The Presiding Judge found ANR's sales of the excess gas in 2006 were operational sales in compliance with Section 38 of ANR's tariff and not the sale of merchant gas. Staff argues[61] this was error because the gas was purchased prior to November 1993 when ANR still had a merchant function. ANR counters that as of November 1993, ANR was no longer in the merchant business of buying and reselling gas. Thus, regardless of when this gas was purchased, the gas should not be considered merchant gas as of the date ANR exited the merchant business. Moreover, ANR's sales here would not fall within the purpose of Order No. 636 which was to prohibit pipelines from making bundled merchant sales, and the Presiding Judge found ANR's sales of the excess gas were made on an unbundled basis as required by its tariff through in-field storage transfers.[62]

80. Staff also argues[63] that ANR should have sold the excess gas to its storage customers as the Commission directed in its restructuring proceedings. This, ANR responds, is a rewriting of the actual events because the gas was offered to customers, but

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[59] 69 FERC ¶ 61,207 (1994), *order on reh'g*, 72 FERC ¶ 61,273 (1995).

[60] *Id.* at 61,821.

[61] Staff Brief on Exceptions at 37-38.

[62] Exh. ANR-21 at 2, lines 13-15.

[63] Staff Brief on Exceptions at 34-37.

except for small customers, ANR's customers declined to purchase the gas at cost because the cost was above the existing market price.[64]

81. Even assuming *arguendo* that ANR violated Order No. 636 by retaining the 2.6 Bcf of excess gas, ANR's answer is that Staff and WDG's proposed remedy -- ANR's crediting customers with $28 or $54 million -- has no relationship to ANR's alleged violation of Order No. 636. If ANR's use of its storage capacity were found to be in violation of Order No. 636, or its sales were found to be unlawful bundled merchant sales, why would customers be entitled to $28 or $54 million, ANR asks. If ANR had charged itself for using its own storage, why would those proceeds go to ANR's customers?

82. The Presiding Judge found that Staff and WDG's claims for relief are barred by the 1997 settlement and the rule against retroactive ratemaking. The WDG insists that it is not attacking the settlement because it is not seeking to undo the rates established in that settlement on a retroactive basis. However, ANR answers that WDG is effectively seeking to compel ANR to compensate its customers for the increased rate impact resulting from ANR's inclusion in the settlement rates of the costs of the 2.6 Bcf of capacity used to store the excess gas. This would, the Presiding Judge found,[65] retroactively lower ANR's rates and undo a Commission-approved settlement. ANR asserts that WDG's request for damages or compensation based on the increase in rates it paid is no different from a request for retroactive refunds of past amounts paid in rates, which is not permissible.

83. ANR states that Staff does not deny that it is attempting to undo the settlement rates through its proposed remedy, but Staff seeks to justify that remedy by claiming there was either a mutual or unilateral mistake as to the existence of the excess gas, and thus the settlement is voidable due to this mistake.[66] According to Staff, the mistake was that neither Staff nor ANR's customers were aware that ANR owned or possessed 22.6 Bcf of gas rather than the 20 Bcf accepted in ANR's restructuring proceeding and included in ANR's rate filing in Docket No. RP94-43. Had they known, Staff asserts, they would have likely insisted that ANR pick up the capacity costs attributable to the excess gas, or require ANR to remove the excess gas.

[64] Citing Exh. ANR-10, at 12.

[65] I.D. at P 101.

[66] Staff Brief on Exceptions at 46-50.

84. ANR notes that the Presiding Judge found Staff's argument untenable since it is based on pure speculation. Moreover, ANR asserts, Staff erroneously relies on the Restatement (Second) of Contract § 152 (1981) to support its argument that there was a unilateral mistake when the settlement was entered into which permits the settlement to be undone. ANR states that the Restatement requires that the mistake (1) relate to a basic assumption on which the contract was made; and (2) has a material effect on the agreed exchange of performances. ANR asserts Staff cannot satisfy either of these elements since the existence of the excess gas was not a basic assumption of the settlement, nor that there is absolutely no evidence that ANR concealed in Docket No. RP94-43 that it owned more than 20 Bcf in gas in its storage fields when it implemented restructuring on November 1, 1993.

85. In light of his prior findings, the Presiding Judge did not reach the issue of what relief should be awarded. Staff and WDG except to this finding, as did Proliance. ANR opposes these exceptions, and asserts the Presiding Judge correctly held the issue moot because ANR's actions were permissible, and it was entitled to retain the proceeds from the sale of the excess gas. ANR also responded to Staff and WDG's calculation of the requested relief contending their proposals were flawed because both assume ANR should be charged the maximum firm storage rate for the entire period.[67]

Discussion

86. Having reviewed the Initial Decision and the Briefs on Exceptions and Briefs Opposing Exceptions, the Commission finds that the Presiding Judge correctly resolved the issues presented. Therefore, we deny the exceptions and affirm the Initial Decision. The instant case is unique and presents issues not likely to reoccur and thus any decision here will have little impact beyond this case. Thus, we see no policy implications from the rulings here that would bear on implementation of Order No. 636.

87. As set forth above, the proceeding arose when ANR in 2006 sold for more than $28 million dollars the 2.6 Bcf of gas beyond the 20 Bcf the Commission authorized it to hold when restructuring was implemented on ANR's system in 1993. The issues then joined were the source and ownership of the excess gas, and the entitlement to the proceeds from the sale of the gas.

[67] CE filed a Brief Opposing Exceptions responding to Proliance's exceptions as to how the "excess gas" proceeds should be allocated to ANR's customers, and to WDG's proposal for relief. Since no relief will be awarded, there is no need to discuss those exceptions.

88. With respect to the issue of whether it was ANR's gas to sell, the Presiding Judge held it was. Only CE challenged this conclusion to a limited extent, but it also asserted that ownership was irrelevant since ANR's customers were entitled to the proceeds regardless of whether or not it was ANR's gas. We consider that issue below.

89. In its Brief on Exceptions, CE asserts that ANR may not have purchased the "excess gas" but that it could have arisen from different sources, such as "interim fuel gas" or possibly "fuel over-recoveries."

90. However, the Presiding Judge rejected both of these as possible sources of the excess gas in great detail.[68] The Presiding Judge cited to the Commission's ruling in *ANR Pipeline Co.*,[69] that rejected WDG's claim in that proceeding that ANR had overrecovered 9.5 Bcf of fuel, pointing out that ANR was at risk for under-recovery of fuel and had the right to retain fuel over-recovery, which CE's witness acknowledged. [70]

91. To expect that ANR could show the specific gas purchases prior to November 1993, events occurring more than 15 years ago, as the source of the gas that was sold in 2006, is unreasonable, but ANR did present an accounting trail for the volumes at issue. As the Presiding Judge noted, natural gas is a fungible product, and the accounting records indicate the results of the various activities on the system. Thus, the reference to 2.6 Bcf excess gas merely reflects that ANR retained 22.6 Bcf gas rather than the 20 Bcf it was directed to retain, not that there was that specific amount at any specific location. Given the accounting records described by the Presiding Judge,[71] we find no error in the Presiding Judge's conclusion that ANR owned the gas.

92. The primary focus of the other exceptions is that the Presiding Judge erred in concluding that ANR was entitled to retain the full amount of the proceeds from the sale of the excess gas and that ANR's customers were not entitled to any credit from ANR's storage of the excess gas which was stored at no "charge" to ANR, for the period from 1993 until the sale in 2006.

93. As described above in the Third Compliance Order the Commission approved ANR's "increasing its working storage gas from 10 Bcf to 20 Bcf to be retained in the

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[68] *See* I.D. P 34-42.

[69] 82 FERC ¶ 61,248 (1998).

[70] I.D. P 42.

[71] I.D. at P 18-26.

underlying cost-of-service for system balancing and no notice service purposes,"[72] which would be reviewed in ANR's next rate case. ANR's only rate case following this Order No. 636 compliance order was resolved in a black-box settlement in Docket No. RP94-43-000, but it is undisputed that "ANR has continued to include the costs associated with the 20 Bcf in its rates for system balancing and no-notice service."[73] ANR did not retain 20 Bcf but instead retained 22.6 Bcf resulting in the 2.6 Bcf of excess gas.

94. Objectors argue that retaining the excess gas violated Order No. 636. Thus, they assert that Order No. 636 not only prohibits the bundling of storage and sales services, but also explicitly prohibits pipelines from retaining storage capacity that exceeds the amount needed to provide system balancing and no-notice service. Staff cites to *Starks, supra,* where Staff argues the Commission rejected a pipeline's application to do what ANR did here, namely, retain inventory gas that would be sold at a later time. By storing the 2.6 Bcf of excess gas over 12 years and then selling the gas, Staff argues, ANR engaged in the type of bundling activity that *Starks* confirmed was prohibited by Order No. 636.

95. Next they argue that the Judge erred in finding, I.D. at P 89-91 that there is no evidence that ANR's customers paid for the costs associated with the capacity to store the 2.6 Bcf of gas. They argue that the record clearly shows that ANR used at no cost to itself storage capacity paid by and reserved solely for its customers and therefore ANR should compensate its customers in the amount of $28.1 million, the full amount of the sale proceeds.

96. They also assert that the Presiding Judge erred in finding that ANR's customers are not entitled to equitable relief because there is allegedly no evidence that ANR's customers were harmed by ANR's use of the storage capacity. They assert ANR's customers were harmed to the extent that they were overcharged and were allocated costs for capacity they could not use because it was being used to store the "excess gas," and were also harmed because customers did not have instantaneous access to the full amount of capacity should they have a need for it.

97. We find no merit in any of the exceptions to the I.D., and find that the Presiding Judge properly determined ANR is entitled to retain the proceeds of the sale.

98. Although objectors assert that ANR's conduct here violated Order No. 636, the present situation was clearly not the focus of Order No. 636. What Order No. 636

[72] 65 FERC at 61,790.

[73] I.D. at P 13.

prohibited was pipelines' retaining or holding storage capacity for use in providing their own merchant sales service, which is clearly not the situation here. After restructuring, ANR no longer was in the merchant business, though it did retain in excess of the 20 Bcf the Commission authorized it for system balancing and no-notice service.

99. Staff's reliance on *Starks* is misplaced and has no application here. In *Starks*, the applicant, an operator of a storage facility, asked the Commission to permit bundled sales to allow it to store its own merchant gas at the storage field and make bundled sales. It asserted that permitting it to utilize unused capacity within the facility for generating revenue through sales would provide additional economic value before the facility is fully subscribed. The Commission denied the request because the reason advanced did not justify a waiver from the unbundling requirement of Order No. 636 and what *Starks* sought was to conduct its business in a way Order No. 636 was designed to end. As the Commission stated in the *Starks* rehearing order: "Order No. 636 was designed to prevent pipelines from using their transportation services to favor their own sales services…." and "the full implications of allowing bundled sales by the operator of a storage facility are too potentially wide-ranging and damaging to permit at this time."[74] Here, ANR's sale of excess gas was not in furtherance of ANR's marketing function, but a concluding transaction to the restructuring that commenced years ago.

100. With respect to WDG's assertion that violation of Order No. 636's unbundling requirement is a basis of relief even if customers did not suffer service interruption is not supported by *Tennessee Gas Pipeline Co.*[75] There, among other things, Tennessee had violated the unbundling requirement of Order No. 636 by using capacity downstream of the unbundling point on its system "in connection with providing its own sales services."[76] Here, ANR's sale of the excess gas were one-time sales of gas made pursuant to section 38 of its tariff, and were not part of an ongoing sales service, as was true in Tennessee's case.

101. Objectors assert that the Presiding Judge erred in rejecting their argument that ANR's customers are entitled to receive an equitable interest or credit in the proceeds because they paid for ANR's use of the space in the rates they paid. They contend that because the customers paid for capacity used by ANR, they are entitled to be compensated for such use.

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[74] 111 FERC ¶ 61,484 at P 5, 6.

[75] 69 FERC ¶ 61,207 (1994), *order on reh'g*, 72 FERC ¶ 61,273 (1995).

[76] *Id.* at 61,821.

102. We agree with the Presiding Judge's conclusion that the evidence does not support this factual contention in the first place.[77] The rates in effect since May 1, 1994, were agreed to in a black-box settlement of ANR's Docket No. RP94-43 rate case that was approved by the Commission in 1998.[78] There is nothing in the record that would in any way support a claim that ANR's retaining the excess gas at that time increased the rates beyond what they would have been had ANR not retained the excess gas.[79]

103. The fact that that in a later ANR proceeding, in Docket No. RP02-335, an ANR witness stated in testimony[80] that the cost of the 25 Bcf capacity was included in ANR's rates, does not require a different result. The 25 Bcf was storage capacity that the Commission authorized in the restructuring proceeding, that ANR included in the rate case it filed in Docket No. RP94-43, were costs associated with that amount of capacity embedded in the rates.

104. However, ANR should nonetheless be entitled to the proceeds because it bore the risk of loss incident to its ownership, and customers did not bear any risk of loss. In *Transcontinental Gas Pipe Line Corp*., the pipeline had excess gas after the unbundling of a storage service and sought authorization to sell the excess gas and retain the proceeds. However, after customers protested that they had borne at least some of the burden of the activity under the terminated storage service, the Commission set the matter for hearing because the record was not sufficient for "Determinations of who bore the financial burdens of the Eminence storage gas and who had the risk of capital loss…."[81] Here objectors acknowledge that ANR's customers never bore any financial risk with respect to the excess gas, and in fact, they claim customers were ignorant of the fact that it ever existed.

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[77] *See* I.D. at P 89-91.

[78] 82 FERC ¶ 61,145 (1998). The Commission approved all uncontested aspects of the settlement, including all rates, but rejected a proposal to implement a new FTS-3 short-term firm service, which was not an issue in the underlying hearing.

[79] We do not find it necessary to consider the Presiding Judge's discussion of the difference between the filed cost-of-service and the settlement's cost-of-service in reaching our conclusions.

[80] *Citing* to testimony of ANR witness Richard W. Porter who stated that ANR's rates recover the "fully allocated cost" of the 25 Bcf of capacity.

[81] 119 FERC ¶ 61,105 at P 13.

105. The record established that ANR performed all its service obligations and that firm storage customers were never denied any services they had paid for. Staff contends there was harm suffered by ANR's customers because ANR did not have in each year following 1993 the 27.6 Bcf of storage capacity needed to cover the storage of its 2.6 Bcf of excess gas and also provide 25 Bcf for system balancing and no-notice service.

106. Staff's argument that ANR actually needed 27.6 Bcf to meet its storage capacity requirements is flawed. The 27.6 Bcf was in fact not needed, as the record shows the 25 Bcf was sufficient to meet all customer demands. The fact that ANR may have issued critical notices to interruptible storage customers in no way impacted ANR's firm storage customers.

107. In a somewhat different vein Staff asserts that ANR's storing the 2.6 Bcf of excess gas in the 5 Bcf of headroom capacity deprived ANR's customers of the assurance of capacity for system long positions. In their exceptions Staff and WDG continue to contend that the excess gas was stored in the 25 Bcf of capacity,[82] and the Presiding Judge erroneously rejected this contention.[83]

108. The Presiding Judge found that ANR consistently maintained and accounted for the excess gas within the 20 Bcf of system balancing gas and the 25 Bcf of storage capacity, even though the "excess gas" was not *physically* stored or slotted into any specific location. As a physical matter, the excess gas was commingled with the other gas in ANR's system. Objectors concede that ANR met all of its service obligations. Thus, ANR's storing the excess gas in its storage complex did not deprive any of ANR's firm storage customers of the services they bought.

109. Staff argues that rather than retaining the "excess gas" as it did, ANR should have sold the excess gas to its storage customers at cost as the Commission instructed ANR to do in its restructuring proceeding, citing *ANR Pipeline Co.*,[84] or ANR should have otherwise divested itself of the excess gas. Staff relies on the fact that in the restructuring proceeding, ANR originally proposed to sell all but 10 Bcf of its storage working gas and to recover as a transition cost the difference between the gas sales price and its book value. The Commission denied the request as premature, but the Commission ordered ANR to sell the gas in storage to its customers and stated: "If ANR is unable to recover the full cost of its gas in storage, it may seek to recover the difference as a transition

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[82] Staff Brief on Exceptions at 26-27; WDG Brief on Exceptions at 18.

[83] I.D. at P 92.

[84] 62 FERC ¶ 61,079 (1993).

cost…." Staff argues that ANR ignored this directive and retained the excess gas for later sale.

110. However, the cited material did not directly deal with the situation when customers did not choose to purchase the gas because the "cost price" basis exceeded the going market price. ANR has explained why it was reluctant to retain only 20 Bcf; ANR was unable to sell the gas to customers at cost because the cost of the gas on ANR's books was above the existing market price.[85]

111. Thus, we do not find that ANR acted unreasonably. Rather, it chose to keep the gas for sale at a later date. This was clearly not designed to further its role as a marketer of gas, since it no longer had that function.

112. We agree with the Presiding Judge that no restitution to ANR's customers is appropriate. ANR has not been unjustly enriched by somehow using storage capacity that customers paid for, as this allegation is based on a false premise. By paying rates for service, shippers do not obtain a property interest in the pipeline capacity used to provide that service. Thus, where there is capacity available that firm customers have not taken, pipelines are permitted to use whatever capacity is available to provide interruptible service to other shippers provided the pipeline meets its firm service obligations. Here there is no claim that ANR did not meet all its service obligations to firm storage customers. At most ANR's customers could seek to credit the proceeds from the sale in a new rate case, as appropriate. The same would be true if ANR had charged itself for the storage. Whatever the amount of these charges, it would not inure immediately to the benefit of the customers. Whatever the pipeline receives from providing interruptible service is not unjustly received, and pipelines' customers are not entitled to a credit for those proceeds, or entitled to refunds in that amount. Rather, shippers can raise the issue of these receipts in the setting of prospective rates in a new rate case.

113. Moreover, if ANR had sold the excess gas at the time of restructuring at a loss, how would ANR's customers have been in a better position than they are now? In fact, if ANR did sell the gas at that time, it would have sold it at a loss since the market price at that time was less than the cost of the gas on ANR's books. Thus, ANR could have sought a credit for the loss as transition costs, and ANR's customers would likely have been in a worse position.

114. Finally, since we find that ANR's conduct did not violate Order No. 636, nor that it was unjustly enriched by the sale, we find that there is no basis to grant any type of relief under NGA section 16, which confers no independent authority absent some other

[85] *See* Exh. ANR-10 at 12.

substantive basis under the Act.[86] As the court recently stated in *Columbia Gas Transmission Corp. v. FERC,*[87] "Because the Commission has remedial authority under § 16 only if Columbia violated one of the NGA's substantive provisions (citation omitted) the Commission's assertion of its § 16 power necessarily implies an independent violation of the NGA." Having found no substantive violation in ANR's action, there is no basis for relying on NGA section 16 as a basis to grant equitable relief for ANR's use of the storage capacity until it sold the excess gas.

115. Accordingly, we affirm the Initial Decision. To the extent a specific exception is not discussed herein, it should be considered denied.

<u>The Commission orders</u>:

The findings and conclusions of the Initial Decision are hereby affirmed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[86] *See Public Serv. Comm'n of New York v. FERC*, 866 F.2d 487, 491 (D.C. Cir. 1989).

[87] 448 F.3d 382, 387 at n.1 (D.C. Cir. 2006).