UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Star Central Gas Pipeline, Inc.	Docket Nos. RP98-52-051
Amoco Production Co.	GP98-4-006
Pioneer Natural Resources USA, Inc.	SA98-33-003
OXY USA, Inc.	GP98-3-006
ExxonMobil	GP98-13-006
Union Pacific Resources Inc.	GP98-16-006

ORDER ON INITIAL DECISION

(Issued March 30, 2004)

1. This case is before the Commission on review of an Initial Decision (I.D.) issued on December 1, 2003.[1] At issue was the amount of Kansas ad valorem tax refunds that were owing to Southern Star Central Gas Pipeline, Inc.(Southern Star)[2] by named producers/first sellers of natural gas, one being Pioneer Natural Resources USA, Inc. (Pioneer). The Administrative Law Judge (ALJ) found that all the producers must make refunds in the amounts Southern Star claimed they owed, and that Pioneer must make refunds at the Commission's interest rate. This order affirms the Initial Decision except as to the rate of interest applicable to the refunds that Pioneer placed in an escrow account, as to which the escrow interest rate will apply.

[1] 105 FERC ¶63,031 (2003).

[2] Southern Star was previously named Williams Gas Pipelines Central, Inc. (Williams), and that name may appear in this order as well.

BACKGROUND

I. The Kansas Ad Valorem Tax Under the NGPA

2. Under the Natural Gas Act (NGA) producers could exceed the otherwise applicable NGA just and reasonable rates for wholesale sales for the recovery of production, severance, or similar taxes, and the Kansas ad valorem tax was considered such a tax.[3] In 1978 Congress enacted the Natural Gas Policy Act of 1978 (NGPA), and under Section 110 the NGPA, producers could legally collect in addition to the maximum lawful price (MLP), a reimbursement from their customers for state severance taxes the producers paid on the gas they sold. In 1983 several parties requested the Commission to reverse the ruling that permitted the Kansas ad valorem tax reimbursement to be treated as an add-on to the MLP under the NGPA, arguing that it was not a tax attributable to production within the meaning of NGPA Section 110. The Commission denied the request finding that NGPA Section 110 was a continuation of the prior NGA ruling on the Kansas ad valorem tax, and therefore Kansas producers could continue to collect from their customers their ad valorem tax costs in addition to the MLP.[4]

3. In 1988 the court remanded the Commission's denial of those challenges, Colorado Interstate Gas Co. v. FERC, 850 F.2d 769 (D.C. Cir. 1988) (Colorado I). In 1993, following the court remand, the Commission ruled that the Kansas ad valorem tax did not qualify as a reimbursable severance tax under NGPA Section 110, and that producers owed refunds for reimbursements based upon tax bills rendered after June 28, 1988, the date Colorado I issued. Colorado Interstate Gas Co., 65 FERC ¶ 61,292 (1993); reh'g denied, 67 FERC ¶ 61,209 (1994) (CIG). In 1996, the Court of Appeals affirmed the Commission's ruling that the Kansas ad valorem tax did not qualify under the NGPA as an add-on to the MLP, but concluded that producers must "refund all Kansas ad valorem taxes collected with respect to production since October 1983," the date when parties were given Federal Register notice that the recoverability of the tax under the NGPA was at issue. Public Service Company v. FERC, 91 F. 3d 1478 at 1492 (D.C. Cir. 1996) cert. denied, 520 U.S. 1224 (1997) (Public Service).

4. On September 10, 1997, the Commission issued an order implementing the court's ruling, and required producers to refund overcharges associated with the improper collection of Kansas ad valorem taxes, together with interest, based upon tax bills received after October 3, 1983. Public Service Company of Colorado, 80 FERC ¶ 61,264

[3] See Opinion No. 699-D, 52 FPC 915 at 916 (1974).

[4] Sun Exploration and Production Co., 36 FERC ¶ 61,093 (1986).

(1997) (PSC).[5] A number of producers appealed PSC. The Court, in Anadarko Petroleum Corp. v. FERC, 196 F.3d 1264 (Anadarko I) affirmed the Commission's rulings except as to the refund effective date. The Court concluded that all parties had erroneously focused on the tax transaction between the producers and Kansas, rather than the sales transactions after the October 1983 date.

5. The court reasoned that during the period in question, Kansas would send a tax bill to the producers near the end of the year assessing a well's raw value during the previous year. After receiving the tax bill for a given year, the producers would raise their prices in individual transactions to reflect their individual tax liability. 196 F.3d at 1270. Thus, the transaction that caused the harm was the producer's sales transaction with the pipeline, and the Court directed that it was the overcharges made in those individual transactions (plus interest) that the producers must refund.

6. The Commission petitioned for rehearing stating that information presented in other proceedings indicated that, contrary to the Court's assumptions underlying Anadarko I, producers sought lump-sum reimbursement of the tax from the pipeline without reference to any particular sale. There was nothing to indicate that producers used the Kansas ad valorem tax as an add-on to the MLP to raise prices in subsequent individual transactions.

7. The Court granted rehearing in Anadarko II, 200 F.3d 867 at 868 (cert. denied, 530 U.S. 1213 (2000)). The Court stated:

> Whatever the nature of these transactions, the principle embodied in our decision remains unchanged…. If the producers collected tax reimbursements from their customers after [October 4, 1983], whether by lumpsum transactions or by any other means, they did so unlawfully and must refund the amounts collected with interest, provided that the tax reimbursements caused their sales to exceed the maximum lawful price. We leave to the Commission the unenviable task of apply this principle to the facts of ancient transactions.

[5] Although Public Service had referred to taxes "with respect to production" in ordering refunds, it had not taken issue with the Commission's earlier analysis that had based refunds on tax bills rendered after the refund effective date. 80 FERC ¶ 61, 264 at 61,953 n.25 (1997). Thus, the Commission concluded that there was no reason to change that analysis.

The Court withdrew the portions of its prior decision that were inconsistent with Anadarko II, vacated the orders under review as to refund dates, and remanded to the Commission for further proceedings.

8. Thereafter, the Commission issued an order implementing Anadarko II. Public Service Company of Colorado, et al., 91 FERC ¶ 61,025 (2000) (Remand Order), reh'g denied, 93 FERC ¶ 61,264 (2000) (Rehearing Order). The Commission stated:

> Producers must refund any tax reimbursement collected from their customers after October 4, 1983, that caused the proceeds from the sale to exceed the maximum lawful price. Thus, a producer who was collecting the maximum lawful price from its pipeline customers on the sale of regulated gas, must refund in full, plus interest, any lump-sum payment received by that producer from the pipeline after October 4, 1983, that was made to reimburse the producer for the ad valorem tax. Any dispute whether collecting the tax reimbursement caused the maximum lawful price to be exceeded will be resolved in proceedings with the producer making such assertion. 91 FERC at 61,084.

9. On rehearing the Commission reiterated that "the refund obligation applies to tax reimbursements producers collected after October 4, 1983 regardless of whether the related sales occurred before or after that date." 93 FERC at 61,840. The Commission added that since Anadarko II clarified the refund effective date, any conflicting language in court rulings or Commission orders in other proceedings is no longer controlling. Id.

10. The Commission stated that where a producer claimed that individual sales during the period were priced at less than the MLP, that claim would be resolved in a specific proceeding with that producer where all the relevant data would be considered to determine whether, and by how much, the tax reimbursement exceeded the MLP. Rehearing Order, 93 FERC at 61,840-41.

11. Review of the Commission's orders was sought in the D.C. Circuit, Atlantic Richfield Co. v. FERC, No. 01-1065 (D.C. Cir. 2001). Subsequent to issuance of the Initial Decision here, the D.C. Circuit dismissed that appeal upon petitioners' motion for voluntary dismissal. Thus, the Commission's order in the Anadarko remand proceeding is controlling precedent.

II. The Instant Proceeding

12. Southern Star is one of the pipelines that is owed refunds related to the improper collection of Kansas ad valorem taxes, and it sent Statements of Refunds Due (SRD) to

the producers it claimed owed it refunds. A number of producers filed various pleadings with the Commission asserting that the refund amounts claimed by Southern Star were incorrect, or seeking relief from the refunds for various other reasons.

13. The Commission issued an order on January 3, 2003, Williams Gas Pipelines Central, Inc., et al., 102 FERC ¶ 61,001 (2003) (the Hearing Order) which set for hearing Southern Star's refund claims that had not been resolved through settlements previously approved by the Commission. Those settlements provided, among other things, that state commissions could elect not to be bound by the settlement, and if a state commission did so, its election would also be binding on all parties whose rates are regulated by that state commission. The Missouri Public Service Commission (MoPSC) so elected. As a result, the settlement did not resolve that portion of the refund obligations of the relevant working interest owners that Southern Star has allocated for flow through to its Missouri customers -- slightly more than 40 percent of the total refunds owed by each producer. The Hearing Order stated that Pioneer owed $10,019,806.96 for these unsettled Missouri refund claims.

14. The Hearing Order listed a number of other producers whose claims were to be litigated. However, certain producers thereafter entered into settlements that would resolve their claims and the Initial Decision did not discuss those producers.[6] Other producers named in the Hearing Order did not appear at the hearing and the Initial Decision found them in default and ordered them to pay the listed refund amount.

15. As a result, the Initial Decision only addressed the issues relating to Pioneer. Pioneer is the successor to Mesa Operating Limited Partnership (Mesa), and Tenneco Oil Co. (Tenneco). The Kansas ad valorem tax reimbursements relate to gas sales made by Mesa and Tenneco to Williams when the NGPA was in effect until the applicable sales contracts were terminated. Mesa's sales contract was terminated on December 27, 1987, and the Tenneco contract was terminated on March 24, 1988. The issues to be determined were did Pioneer receive more than the MLP for sales to Southern Star as a result of the reimbursement of the Kansas ad valorem taxes? If so, is waiver of the refund obligation justified?

16. The ALJ stated that Pioneer argued (a) that it should not have to refund reimbursements connected with production that occurred before the October 4, 1983, start date since some of those reimbursements that were received after the start date are derived from production that took place before that date; (b) that it should not have to

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[6] The Commission subsequently approved those settlements. See 106 FERC ¶ 61,046 and ¶ 61,068 (2004).

make refunds for reimbursements made after the June 28, 1988, end date; (c) that it should be excused from refunding reimbursements that it has distributed to its royalty owners, since those amounts may be uncollectible; (d) that Southern Star may have mismeasured the Btu content of the gas it purchased from Pioneer; and (e) that a December 1, 1989, Gas Purchase Agreement (the 1989 Settlement) between its predecessor, Mesa Operating Limited Partnership (Mesa) and Williams relieves it of obligation to pay any ad valorem tax refunds.

17. The ALJ rejected all of Pioneer's arguments finding that Commission rulings were contrary to Pioneer's position on each, and that Pioneer must refund the Kansas ad valorem taxes it collected in violation of the MLP. Since Pioneer had placed in escrow the full amount of the Kansas ad valorem tax that Southern Star claimed it owed, the ALJ addressed the issue of what interest rate applied to the refund, the Commission's interest rate, or the lower rate reflected in Pioneer's escrow agreement? The ALJ ruled that Pioneer should be held to the Commission's higher interest rate, "because the amounts put into escrow were amounts over which there was no dispute…"[7] and Pioneer must pay the Commission interest rate "for the amounts that were not in dispute at the time of the escrow…."[8]

18. Pioneer filed a Brief on Exceptions (Exceptions) to the I.D. Commission Staff, Southern Star, MoPSC, and City Utilities of Springfield, Missouri, filed Briefs Opposing Exceptions.[9]

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[7] I.D. at P 27.

[8] Id. P 29. The ALJ also directed the producers in default to pay the amounts set forth in the I.D at P 28 consisting of Clark Exploration: $311,405.78, Andover Oil: $238,167.24, Steve Smith: $135,574.10, and Williams Brothers Engineering: $140,258.16. We affirm the ALJ's ruling as to these parties.

[9] By letter to the Commission, counsel for Pioneer referenced an Initial Decision by another ALJ involving the Kansas ad valorem tax issue, that was issued on February 18, 2004, after the Initial Decision in this proceeding was issued, Panhandle Eastern Pipe Line Co., 106 FERC ¶ 63,018 (2004). The Commission will address that Initial Decision in an order after all pleadings have been filed therein, and the Commission will not consider any ruling by the ALJ in that case in this order.

III. Discussion

A. Were Pioneer's Revenues In Excess of the MLP as Claimed By Southern Star?

19. Pioneer first argues that the I.D. failed to acknowledge that the Commission has the burden of proof, and the Commission Staff's witness provided no evidence in support of the claimed violation. This argument misses the point. The question is whether record evidence supports the finding of a violation, regardless of which entity introduced that evidence.

20. The I.D. concluded that the record supports a finding that the amount of Kansas ad valorem tax refunds that Southern Star claimed that Pioneer owed was accurate. I.D. at P 15. The ALJ stated that "All sales by Pioneer or its predecessor were made at the MLP." As a result any ad valorem tax reimbursement would have been in violation of the MLP, citing testimony by Southern Star's witness. I.D. at P 15. This finding was based on the record evidence that established that for the entire period the gas sales contracts between Southern Star and Pioneer's predecessors were in effect "all purchases … were at the MLP." (Tr. at 32.) Pioneer's witness also acknowledged that Pioneer's predecessors received the MLP under their gas contracts with Williams. (Tr. at 85).

21. In its exceptions Pioneer does not challenge the ALJ's finding that Southern Star's contracts with Pioneer's predecessors required that it pay the MLP for gas sold under those contracts, nor could it in light of the record evidence cited by the ALJ. However, Pioneer argues that there is no basis to include reimbursements that Southern Star paid to Pioneer after June 28, 1988 in the refund amount because the hearing order referenced the Commission's September 1997 order which required refunds for MLP violations for the period "…through June 28, 1988."

22. Pioneer also contends that the receipt of tax reimbursements by Pioneer's predecessors after January 1988 could not result in a violation because at that time Pioneer's predecessors were selling the gas from these properties to others for less than the MLP. It is not disputed that the two underlying gas contracts between Pioneer's predecessors and Southern Star were terminated in late 1987 and early 1988. The Mesa portion (Williams Contract No. 0606), was terminated December 27, 1987, and the Tenneco portion (Williams Contract No. 3337) was terminated effective March 24, 1988. After those contracts were terminated and sales of the gas from that property were made to others at market rates, Southern Star paid ad valorem tax reimbursements to Pioneer in February 1988 and April 1988 (for gas previously subject to Contract No. 0606), and in October 1988 (for gas previously subject to both contracts). The Missouri PSC opt-out portion of all of those reimbursements with interest equals approximately $2,574,078 (as of March 31, 2003).

23. Pioneer argues that there was no violation as to Southern Star's post-January 1988 reimbursements because when Southern Star paid those reimbursements, Pioneer's predecessors were selling the gas that had been dedicated to Southern Star to others at less than the MLP. Since the Commission has stated that the violation occurs when the tax reimbursement is received, Pioneer argues there could not be a violation when the 1988 reimbursements were received, since at that time the gas was being sold for less than the MLP.

24. Before addressing Pioneer's arguments, it is appropriate to restate the governing principles applicable to the Kansas ad valorem tax refund as a result of the latest court and Commission rulings. In its 1997 Public Service ruling the Commission required producers to "refund reimbursement revenues collected in excess of the MLP based upon tax bills that the producers received after October 4, 1983." In Anadarko II, the court stated that:

> … if the producers collected tax reimbursements from their customers after [October 4, 1983], whether by lump-sum transactions or by any other means, they did so unlawfully and must refund the amounts collected with interest, provided that the tax reimbursements caused their sales to exceed the maximum lawful price." 200 F.2d at 868.

25. To implement the court's order the Commission ordered that:

> Producers must refund any tax reimbursement collected from their customers after October 4, 1983, that caused the proceeds from their sale to exceed the maximum lawful price. Thus, a producer who was collecting the maximum lawful price from its pipeline customers on the sale of regulated gas, must refund in full, plus interest, any lump-sum payment received by that producer from the pipeline after October 4, 1983, that was made to reimburse the producer for the ad valorem tax.[10]

26. Whatever statement that may have been made as to the scope of the refund in prior Commission orders, it is these last rulings that govern and we now turn to Pioneer's contention.

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[10] 91 FERC at 61,084.

27. Pioneer's argument that the Initial Decision expanded the scope of the proceeding to include reimbursement after June 28, 1988 is rejected. The Commission requires that any reimbursement after October 4, 1983 that resulted in MLP violations must be refunded. The fact that before the Court, in 1999, expanded the period of the refund back from 1988 to 1983 (Anadarko I), the Commission used the June 28, 1988 date does not limit the scope of these proceedings to refunds prior to that date. Pioneer's reliance on the hearing order's reference to the period October 4, 1983 through June 28, 1988, is misplaced since the order merely implemented the Court's expansion of the period of the refund. The hearing order stated that previously the Commission had ordered refunds for MLP violations for the period commencing in 1988 and as a result of the Court's ruling the period would cover 1983 through 1988 as well. In no way did the hearing order exclude MLP violations after June 28, 1988.

28. The basic thrust of Pioneer's exceptions revolve around the reimbursements Southern Star paid after January in 1988 since Pioneer does not challenge the finding that all sales of gas to Southern Star under Pioneer's gas sales contracts were at the MLP. It nevertheless argues that there was "headroom" with respect to the tax reimbursements Southern Star paid in 1988. In this context "headroom" refers to the extent to which the total sales price remains lower than the MLP, notwithstanding the collection of Kansas ad valorem tax reimbursements. If, for instance, a sale was made at less than the MLP, the difference between the sales price and the MLP may have left "headroom" for the producer to collect all, or a portion of the Kansas ad valorem tax reimbursements without exceeding the MLP.

29. The Initial Decision rejected the Pioneer's "headroom" argument as to these reimbursements, stating that since all sales by Pioneer to Southern Star were at the MLP, "any ad valorem tax reimbursements [paid by Southern Star to Pioneer] would have been violations of the MLP." (I.D. at P 15, citing Tr. at 32 lines, 4-13).

30. Pioneer argues that the Initial Decision ignored the fact that for reimbursements Southern Star paid to Pioneer in 1988, the gas sales contracts with Southern Star had already been terminated, and sales of gas from those properties were being made to others at less than the MLP. Pioneer argues that there is an issue of how to attribute the reimbursements to sales, and how to determine if there was any headroom as to these reimbursements.

31. Resolution of the issue seems clear. There is no dispute that all sales by Pioneer to Southern Star were at the MLP. Following termination of the contracts, the gas that had previously been under contract with Southern Star was sold by Pioneer's predecessors to a marketer. (Tr. At 87, 105.) However, subsequent to termination of the contracts, Pioneer invoiced Southern Star for reimbursement of the ad valorem taxes (Tr. at 91), and Southern Star paid those invoices.

32. Southern Star's witness stated that the tax reimbursement that Southern Star paid to Pioneer in October 1988 "was for the tax year 1987 when we were purchasing gas under the contract." (Tr. at 33) That in 1988 after termination of the contracts, the gas that had been dedicated to Southern Star under those contracts was sold to third parties for less than the MLP, is not relevant to the issue of whether the producer received more than the MLP from the purchaser of the gas, Southern Star, for sales Pioneer made to Southern Star before the contracts were terminated.

33. It is true that until the producer receives the Kansas ad valorem tax reimbursement, there is no MLP violation. Thus, if the 1988 tax reimbursements paid by Southern Star to Pioneer were somehow related to the sales after the sales contracts between Southern Star and Pioneer were terminated, the headroom argument might have validity. Here, however, the gas that was sold for less than the MLP was sold to a different entity than Southern Star. There is no basis to attribute that lower price to any tax reimbursement paid by Southern Star, because the reimbursement was paid when gas from the property was sold for less than the MLP. The simple fact is that in 1988 Pioneer received an ad valorem tax reimbursement from Southern Star when it was no longer selling gas to Southern Star. That reimbursement must relate to the gas that had previously been sold to Southern Star by Pioneer. Otherwise Pioneer should have returned the tax reimbursement to Southern Star. It did not. Accordingly, we affirm the Initial Decision finding that there was no headroom as to the 1988 tax reimbursements, and that Pioneer was liable for the refunds claimed by Southern Star, including the 1988 tax reimbursements.

B. Does the 1989 Settlement Relieve Pioneer of the Kansas Ad Valorem Tax Liability?

34. Pioneer argued that a December 1, 1989, Gas Purchase Agreement (The Mesa Settlement) between its predecessor, Mesa Operating Limited Partnership (Mesa) and Williams, relieves it of any obligation to pay the Kansas ad valorem tax refunds.

35. The ALJ rejected the argument stating that that was a settlement of private take-or-pay and related contractual issues that were litigated at that time. He held that it did not cover matters separate from the specific contractual issues between Williams and Mesa at that time, and that the Commission has rejected this defense in other cases, citing Panhandle Eastern Pipe Line Co., et al., 103 FERC ¶ 61,007, at p. 61,023 (2003), and Burlington Resources Oil and Gas Co., et al., 103 FERC ¶ 61,005 (2003); reh'g denied 104 FERC ¶ 61,317 (2003) (Burlington).[11] These cases, the ALJ held, establish that no

[11] Appeals in the D.C. Circuit Court are pending for both cases, Burlington Resources v. FERC, Nos. 03-1340 and 03-1432.

contractual agreement can negate a producer's obligation to refund taxes in excess of the MLP, and there was nothing in this record that would justify a departure from that ruling. P 16 of the I.D.

36. In its exceptions, Pioneer argued that the I.D. failed to recognize the differences between the Mesa settlement with Williams, and the settlements in the Burlington cases cited by the ALJ. Pioneer states that on December 1, 1989, Pioneer's predecessor entered into a settlement with Williams relating to prior sales under the 1984 contract. The settlement resolved all pending issues and liabilities between the parties under the March 1984 Contract, which contract is the basis of Williams' refund claim against Pioneer in these proceedings, except for those claims that were specifically excluded.

37. Pioneer states that the only matter specifically excluded under the settlement related to possible claims if the Commission's Order No. 451 was reversed,[12] but Kansas ad valorem tax claims were not specifically excluded from the settlement. Pioneer asserts that Williams' witness admitted that when the settlement was executed, Williams was well aware of the pending of the Kansas ad valorem tax proceedings in 1989. Since the Kansas ad valorem tax proceedings were not specifically excluded from the settlement's coverage, Pioneer argues that those claims would have been included among the issues resolved by the settlement, and thus Pioneer should not be obligated for any Kansas ad valorem tax refunds.

38. Pioneer also contends that the settlement here is different from the settlement in the Burlington cases. The difference, Pioneer asserts, is that Burlington did not dispute the amount of the refund, only its liability to make the refund, where here Pioneer has disputed the amount of the claim.[13] Moreover, here the settlement was not merely a take-or-pay settlement, but "resolved all pending issues including potential Kansas ad valorem tax liability" because Williams was aware of the Kansas ad valorem tax refund claims and did not expressly exclude them from the settlements.[14] Finally, Pioneer argues that the settlement supports the grant of an equitable adjustment.

[12] That order increased the MLP's applicable to certain categories of gas under the NGPA.

[13] Exception at 40.

[14] Exception at 41.

39. We find no merit in Pioneer's arguments. The "exclusionary" clause Pioneer relies upon,[15] seems to be related to specific litigation between the parties at the time of the 1989 settlement, and was not intended to cover any other claims. However, even accepting Pioneer's interpretation of the clause, the Commission in Burlington has held that such a clause cannot relieve Pioneer of its obligation to make refunds for MLP violations attributable to Kansas ad valorem tax reimbursements.

40. In Burlington, cited by the ALJ, the Commission rejected the very same argument that Pioneer advances here. The Commission clearly held that any such release cannot relieve a producer of the obligation to refund amounts collected in excess of the NGPA statutory MLPs because that in effect would allow the producer to retain the excess over the MLP in violation of the NGPA.

41. Finally, Pioneer's attempt to distinguish Burlington on the grounds that there the producer did not contest that there was an MLP violation, while here Pioneer has, is logically inconsistent. Disputing whether there was an MLP violation does not have any relevance as to whether if there was such a violation, a private settlement between the producer and the pipeline which the Commission never approved, could relieve that party of its obligation to refund amounts collected in excess of a statutory MLP, which excess

[15] The clause Pioneer relies upon provides as follows:

> WNG hereby agrees to dismiss with prejudice the litigation currently styled as Williams Natural Gas Co. v. Mesa Operating Limited Partnership and Mesa Midcontinent Limited Partnership, Case No. 11122 in the Chancery Court for the State of Delaware. Both parties hereby forever release and discharge each other from any and all claims, demands, and causes of action, arising out of or relating to the March 12, 1948; May 12, 1982; and May 19, 1982 Gas Purchase Contracts or any other gas purchase contracts listed in the litigation which were raised or could have been raised in the above mentioned lawsuit. However, notwithstanding the above, WNG does not waive, release, or discharge any claims against Mesa, including but not limited to claims for refunds, which may result from the modification, reversal, or vacation of FERC Order No. 451 et seq., as amended or modified, or any order on remand.

had been passed on to the pipeline's customers. Thus, we find no error in the ALJ's ruling that the Mesa Settlement does not relieve Pioneer of its Kansas ad valorem tax refund liability.[16]

C. The Royalty Issue

42. Pioneer argued that it should be excused from refunding the amounts distributed to the royalty interest owners since those amounts were uncollectible by it from those royalty owners.

43. The ALJ held that Pioneer had not met the Commission's standard for waiving producer refunds due to the uncollectability of the royalty interest owners' share of the refund, as set forth in Wylee Petroleum Corporation v. FERC, 33 FERC ¶ 61,014 (1985). That standard is that where producers and royalty owners "do not have an ongoing contractual relationship," refunds will be found uncollectible if (a) the royalty owner is deceased; (b) the royalty owner is bankrupt and bankruptcy proceedings are closed; (c) the royalty owner cannot be located, assuming there have been reasonable steps to locate him; (d) or if statutes of limitations prohibit producers from taking legal action against the royalty owner.

44. The ALJ found that Pioneer has done little to locate royalty owners, even though it had ample notice. He stated that the record contains no evidence of any attempts by Pioneer to locate and contact royalty owners, so a determination of those owners' status under the Wylee standard is impossible. Similarly, he held that Pioneer's statute of limitations argument had no merit. Moreover, Pioneer had not shown with whom it had no existing contractual relationship. For these reasons there was no basis on which to grant adjustment relief because of uncollectibility.

45. In its exceptions, Pioneer argues that the ALJ's rejection of the royalty owner issue consisted of "a summary statement that Pioneer did 'little' to locate royalty owners and based on a cursory interpretation of the Kansas SOL [Statute of Limitations]" but "the Commission's standards for waiver of royalty refunds require a greater analysis and support a refund adjustment under the circumstances presented here."[17]

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[16] We will address Pioneer's equity argument based upon the settlement infra, Part E.

[17] Exception at 43.

46. Pioneer seems to argue that given the large number of producing wells involved and the fact that it is a successor to the producers who had collected the tax reimbursement, and lacked the underlying documents relating to the royalty interest ownership, there was no way it could seek to recover from the royalty owners. Pioneer asserts that it understood that its predecessors operated over 400 wells whose production gives rise to the Kansas ad valorem tax, and that there were thousands of royalty interest owners for these wells. Given those factors, Pioneer contends that it was not in a position that would allow it to determine who the royalty owners were, so the Wylee conditions should be considered as having been met.

47. While we recognize that this was not an enviable task, the party seeking relief on this ground must demonstrate that it attempted to determine who the royalty interest owners were. There is nothing in the record to show that these wells in question are not operating. Moreover, to argue, as Pioneer does, that it does not have the records relevant to ownership interest is not a valid defense since the Kansas ad valorem tax issue has been apparent for these many years and Pioneer could, and should have, taken steps to ensure the necessary records were retained. Pioneer admits that its efforts to locate the royalty owners consisted of contacting the association representing royalty owners but nothing more. In short, it argues that it had satisfied the Wylee standard because of the difficulty in trying to actually meet them. We reject that as a basis for granting relief.

48. Pioneer's contention that it met Wylee's Statute of Limitations exclusion is also unavailing. Pioneer cites to Kansas House Bill 2419 ("HB 2419"), which Pioneer asserts provides that producers could not collect Kansas ad valorem tax reimbursement refunds from royalty owners – either directly or by setoffs. However, in Public Service, 85 FERC ¶ 61,176 at 61,703 the Commission held that it will not consider HB 2419 to satisfy the Wylee standards because "[w]hen the Commission adopted the Wylee standard for determining whether to grant adjustment relief due to uncollectibility of the royalty interest owner's share of the refund, the Commission did not contemplate a specially created ad hoc statute of limitations such as Kansas House Bill No. 2419."

49. The Commission has recognized that "there may be other Kansas statutes of limitations … which might satisfy the Wylee uncollectibility test." Id. The Commission subsequently clarified:

> If, in a suit by a producer against the royalty owner where no ongoing contractual relationship exists, a court were to hold [the Kansas general contract statute of limitations] bars the claim, the producer would be in a position to seek relief under Wylee. Since the statute of limitations is not case specific like the other parts of the Wylee test, other similarly situated producers could rely on that decision in

> their petition for adjustment relief. Public Service, 86 FERC ¶ 61,163 at p. 61,576 (1999).

Thus, the Commission noted that Kansas' five-year general contract statute of limitations, K.S.A. § 60 511, might bar royalty claims. Id.

50. However, there has been no such ruling by a Kansas court, and Pioneer's argument that the 5-year statute of limitations clearly applies to the refund claim is mere speculation. Accordingly, we affirm the ruling that no waiver of the royalty interest owner portion of the refund is warranted.

D. The Interest Rate Issue

51. In March 1998, just before producers were required to pay the amount of the Kansas ad valorem tax refund that the pipelines claimed were due, Pioneer offered, in a letter to Southern Star, to make partial payment to Southern Star of the amount that Southern Star claimed upon the condition that Southern Star guarantee the return of any amount that was ultimately determined Pioneer did not owe. Pioneer also filed a Petition for Adjustment Relief, Docket No. SA99-33-000. When Southern Star rejected its proposal, Pioneer placed the amount claimed by Southern Star in an escrow account.

52. The Commission has held that the party owing the Kansas ad valorem tax refund could satisfy its refund obligation by payment into an escrow account, and the escrow interest rate would apply, but the amount paid into the escrow account was limited to the "amount in dispute,"[18] pending resolution of the amount of the refund. The ALJ held that since Pioneer had originally disputed only a portion of the refund claim, it should not have placed the entire amount in escrow. Accordingly, he held that only the disputed amount, basically the royalty interest owner and interest portion of the claimed refund, should have been paid into the escrow account and would be subject to the escrow interest rate, and the higher FERC interest rate would be applicable on the balance.[19]

53. In its exceptions Pioneer argues that the Initial Decision erred because it failed to recognize that limiting the interest rate to the escrow account interest rate would be consistent with Commission policy. Moreover, it argues that to limit what should be considered the amount in dispute to Pioneer's understanding of what it owed in 1998, is a too narrow a reading of what the Commission intended by that phrase.

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[18] Northern Natural Gas Co., 82 FERC ¶ 61,059 at 61,221 (1998).

[19] The difference is a significant amount, approximately $1.5 million.

54. We believe that Pioneer should not be required to pay the higher FERC interest rate on any amount that it had paid into the escrow account. At issue here is not whether interest should apply to the refund amount, but what interest rate. Moreover, the issue relates only to the period after Pioneer had paid the claimed refund into the escrow account. The FERC interest rate was applicable in calculating the claimed refund until that time, which amount Pioneer paid into the escrow account. While it is true that in 1998 Pioneer seemed to dispute only a portion of the claimed refund, subsequently its position was that it had no Kansas ad valorem tax refund liability because the 1989 Mesa settlement relieved it of any liability. Moreover, even if it were liable for some Kansas ad valorem tax refunds, the amount was less than what Southern Star claimed because of the "headroom" amount, and other arguments noted above.

55. Once Pioneer paid the amount of the claimed Kansas ad valorem tax refund into the escrow account it could no longer use those funds, and it lost use of the money. This lost opportunity, the Commission's justification for adding interest to the refund,[20] applied to Pioneer, as well as to the overcharged customer.[21] The refund will have an interest element, but limited to the interest earned in the escrow account. The reasons advanced why interest is to be included in calculating the refund are satisfied by applying the escrow rate to the refund. Clearly, when Pioneer paid the refund amount into the escrow account it no longer had "the benefits which were available to the companies which collected excessive rates."[22] Similarly, once having paid the refund into the escrow account, there was no longer an incentive to Pioneer to prolong the litigation, which is another reason advanced to justify imposition of interest.[23] In fact, since Pioneer

[20] See 82 FERC at 61,215-6.

[21] In another context the Commission stated:

> The Commission agrees that the only interest which should be refunded on escrowed amounts should be the accrued interest in the escrow account, since first sellers did not have the use of this money and since an escrow procedure protects the interests of both the consumer and the seller. The Commission believes these are valid reasons for limiting the interest obligation for money paid into escrow to that interest which accrued in the escrow account on the money required to be refunded. FERC Stats. & Regs., Regs. Preambles (1982-1985) ¶ 30,597 at 31,148 (1984) (citation omitted).

[22] 82 FERC at 61,215.

[23] Anadarko I, 196 F.3d at 1267.

claimed it did not owe the amount claimed by Southern Star as owing, there was an incentive to Pioneer to finalize the amount so it could recover the amount that it did not owe.

56. Our action here is not inconsistent with the ruling in Panhandle Eastern Pipeline Company, 103 FERC ¶ 61,099 (2003), cited by the ALJ. In that case the Commission had issued an order directing the producer to pay the refund, rejecting the producer's argument that it had no refund liability. The amount of the refund was not disputed by the producer. The producer, in asking to be allowed to pay the refund obligation into an escrow account pending rehearing or judicial review of the Commission's order directing that it pay the refund, was in effect was seeking a stay of the Commission's order. Here, Pioneer placed the funds in escrow pending a Commission order determining its refund obligation since at that time there was only the Statement of Refunds Due that Southern Star had sent to it. It should be noted that Pioneer placed other Kansas ad valorem tax refund claims in that escrow account, and that when the amount of a claim became finalized, the amount was released from the escrow account.[24] The issue as to the amount owing has not been an easy one to resolve, and as the Court stated, "We leave to the Commission the unenviable task of apply this principle to the facts of ancient transactions."[25] To limit Pioneer to use of the escrow account interest rate only to what was "in dispute" in 1998 is not justified under all the circumstances present here.[26] Accordingly, we will not require Pioneer to pay the higher FERC interest rate, and the amount Pioneer paid into the escrow account in March 1998, plus the interest earned in that account, satisfies its refund obligation.

E. The Equity Adjustment Issue

57. We reject Pioneer's argument that the Initial Decision erred because it did not consider or discuss the "equitable factor presented in the record and provides no analysis of the elements of an equitable adjustment in Section 502(c)."[27] Pioneer contends that

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[24] Exceptions at 16.

[25] 200 F.3d at 868.

[26] We need not address Pioneer's argument that all parties were on notice that it had paid the claimed refund in an escrow account, but no action was taken to require Pioneer to pay the "undisputed amount" to Southern Star.

[27] Exceptions at 50.

even if the Commission rejects its defenses on their merits, the Commission should nonetheless consider these defenses as a basis for providing Pioneer with equitable relief.

58. In support of its argument, Pioneer refers to certain elements, as well as the issues previously discussed in this order, as a basis for equitable relief. These consist of (a) possible mismeasurement of the Btu content of the gas so there was no actual receipt in excess of the MLP by Pioneer; (b) insufficient real notice in 1983 that refunds may be required; (c) small producers had their claims waived in settlements; and (d) the customers who had paid for the reimbursements may not get the refunds.

59. To the extent that Pioneer seeks equitable relief based upon the various arguments why it should not be found liable for the refund, (i.e., settlement, starting date), the Commission has held that if it finds no merit in arguments to relieve the producer of the refund obligation, they cannot be a basis for relief under NGPA Section 502(c).[28] Relief under Section 502(c) requires a showing that payment of the refund would be a hardship or an inequity. None of the factors urged by Pioneer satisfy that requirement.

60. Moreover, none of the elements have merit on their own. Pioneer's mismeasurement contention relies upon some cases pending in the courts where that was urged by the plaintiff. The Initial Decision correctly characterized this as speculative (I.D. at P 25) since there have been no decisions in favor of plaintiff in any case, and those cases clearly are not a basis for relief under Section 502(c). The "notice" issue was rejected by the Court in Public Service. There the court held that once the status of the ad valorem tax was questioned in 1983, all were on notice that these reimbursements might not qualify as an add-on to the MLP.

61. Whether other parties have received relief under settlements with Southern Star is not a basis for granting relief to Pioneer since a settlement is limited to those covered by it based upon the circumstances present in that proceeding. As the Commission has stated: "The fact that a different settlement with a different pipeline has different provisions does not require that the Commission impose those terms in this proceeding."[29]

62. Finally, to whom the refund ultimately flows is not a basis for granting relief from the producer's refund obligation. The NGPA violation is the receipt by the producer in

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[28] See Burlington, 103 FERC ¶ 61,005 at P32, 104 FERC ¶ 61,317 P32, and Panhandle, 103 FERC ¶ 61,007 at P 33.

[29] Colorado Interstate Gas Co., 93 FERC ¶ 61,185 at 61,614 (2000).

excess of the MLP. The remedy for the violation is payment of the refund to the party that paid the excess amount. How that refund is handled by the recipient has no bearing on the producer's obligation to make that refund. Thus, whether or not Southern Star's customers who originally paid the excess amount receive the refund from Southern Star has no bearing on Pioneer's refund obligation since "The Court never required that the Commission mandate that the refunds go to the ultimate consumer."[30] Accordingly, we reject Pioneer's request for adjustment relief under NGPA Section 502(c).

F. Other Producers

63. For the other producers ordered to pay refunds in the Initial Decision, we affirm the finding in the Initial Decision that these producers are in default and subject to summary disposition. We also note that the hearing record indicates Southern Star was unsuccessful in making contact with four of the producers, Clark Exploration, Northern Pump, Steve Smith and Williams Bros. Engineering.[31] Accordingly, we cease efforts on these entities, noting that our action here does not waive or extinguish these first sellers' refund obligations.[32]

64. With respect to the Andover Oil obligation, the hearing record indicates GlobalSantaFe Corporation (GlobalSantaFe) may be the successor in interest to Andover Oil, and therefore liable for refund obligation.[33] To the extent that Southern Star determines GlobalSantaFe or another producer is liable, we order Southern Star to provide a report on the refund liability and notification of liabilities of these entities, for further action by this Commission.

65. We also note that the hearing record indicates Southern Star had identified another producer, Mr. Grant or Grant Oil, may have a refund liability originally attributed to Mr. Osborn.[34] To clarify the status of this potential liability, we order Southern Star to provide a report on the refund liability and its notification of Mr. Grant or Grant Oil, for further action by this Commission.

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[30] Williams Gas Pipeline, Inc., 95 FERC ¶ 61,366 at 61,384 (2001).

[31] See Exhibit SSC-4 at 116.

[32] See Northern Natural Gas Co., 102 FERC ¶ 61,015 (2003).

[33] Exhibit SSC-3 at 10.

[34] See Exhibit SSC-3 at 9-10; Exhibit SSC-4 at 138.

The Commission orders:

(A) The Initial Decision is affirmed in part, and reversed in part, as discussed in the body of this order.

(B) Pioneer must pay Southern Star the ad valorem tax refund required under this order within 30 days of the issuance of this order.

(C) Southern Star is to provide a report to the Commission detailing either the status of payment by Andover Oil or the liability associated with potential successors-in-interest to Andover Oil as well as the liability of Mr. Grant or Grant Oil within 30 days of the issuance of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.