

104 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Northern Natural Gas Company

Docket No. RP02-365-001

ORDER ON REHEARING AND GRANTING CLARIFICATION

(Issued July 29, 2003)

1. This order addresses the motion by Northern Natural Gas Company (Northern) for clarification or request for rehearing of the Commission's December 26, 2002 order in this proceeding, 101 FERC ¶ 61,382 (2002) (the December 26 order). On June 5, 2002, Northern filed a petition for a declaratory order with the Commission because of its concern that the Iowa Utilities Board (IUB)¹ had directed it to flow through certain Kansas ad valorem tax refunds to non-jurisdictional customers in Iowa. Northern requested the Commission to find that: (1) the Commission did not direct Northern to make Kansas ad valorem tax refunds to non-jurisdictional customers; and (2) Northern is not in violation of any Commission order regarding Kansas ad valorem taxes. The December 26 order stated that the Commission has not directed that Northern should flow through ad valorem tax refunds to its non-jurisdictional customers, but the order stated that it did not follow from that finding that the IUB cannot order such refunds, or that the IUB's action was contrary to Commission precedent, and denied Northern's request. For the reasons set forth the Commission grants clarification, as discussed in the body of this order.

Northern's Petition

2. Under the Natural Gas Act (the NGA) producers could recover the ad valorem tax in the State of Kansas as a recoverable production tax. This changed under the Natural Gas Policy Act of 1978 (NGPA), and producers were required to refund, from 1983 on, any amounts they had collected in excess of the maximum lawful price as a result of this

¹IUB is the regulatory agency of the State of Iowa with jurisdiction to regulate the rates and charges for the sale of natural gas to retail customers.

add-on. The pipelines, in turn, were required to flow the refunds to the customers who had been overcharged.²

3. During the refund period at issue (1983-85), Northern, an interstate natural gas pipeline, and Peoples Natural Gas company (Peoples), a local distribution company, were separate operating divisions of InterNorth, Inc. (InterNorth). Northern purchased gas from producers and transferred the gas to Peoples, which then sold gas to its retail customers in a number of states, including Iowa. On December 20, 1985, InterNorth sold the assets of Peoples to UtiliCorp United, Inc. (UtiliCorp), and Peoples became a jurisdictional customer of Northern, and Northern obtained the necessary NGA certificate to cover the sales to Peoples.

4. Pursuant to the Commission's order, Northern, an interstate pipeline, received refunds from producers, and in turn Northern flowed refunds to its jurisdictional customers. However, it allocated \$3.15 million of the refunds it had received to Peoples for the 1983-1985 period, \$825,000 of which related to sales by Peoples to customers in Iowa. Northern did not flow these refunds through to Peoples. The stated reason for not paying them was that the transactions between Northern and Peoples in that period were intra-company transactions and Peoples was considered a non-jurisdictional customer of Northern,³ and the Commission's order on flowing the refunds through to customers was limited to jurisdictional customers.

5. Northern stated that on May 10, 2002, the IUB issued an order directing Northern to refund the \$825,000 of Kansas ad valorem tax refunds it had received from producers to Peoples for distribution to Iowa customers. The IUB refund order related to sales in the period prior to December 20, 1985 when Peoples was a non-jurisdictional customer of Northern.

6. Northern asserted that the disposition of refunds allocated to non-jurisdictional customers such as Peoples is governed by the contracts between Northern and its non-jurisdictional customers. As such, Northern contended, the IUB had no jurisdiction to order Northern how to treat the refunds in question.

7. Northern stated that it filed the petition with the Commission because in its May 10 Order the IUB had erroneously stated what the Commission had ordered with

²Public Service Co. Of Colorado, 80 FERC ¶ 61,264 (1997), reh'g denied, 82 FERC ¶ 61,058 (1998) (Public Service).

³Northern Natural Gas Co., 33 FERC ¶ 61,394 at 61,759 (1985).

respect to the ad valorem tax refund--specifically, the IUB claimed that the Commission required interstate pipelines, including Northern, to refund all Kansas ad valorem tax overcharges to their customers, "whether jurisdictional or non-jurisdictional." Further, Northern argues, the IUB erroneously asserted that Northern's retention of non-jurisdictional refunds is "a violation of FERC orders."

8. Northern stated that it was merely seeking a declaratory order restating what the Commission has already stated in other rulings, which is "that the Commission has not ordered Northern to make refunds to its non-jurisdictional customers."⁴

The December 26 Order

9. The order noted that Northern's petition had been protested by a number of parties, who argued that the purpose of the Commission's orders, as approved by the court, was that the pipelines were "mere conduits" of the refunds from producers to the overcharged ultimate customers, and the refunds were not to be retained by the pipeline.

10. The order stated that the Commission has directed producers to refund Kansas ad valorem tax reimbursements to pipelines, in order to correct the Commission's legal error in allowing producers to treat the ad valorem taxes as a severance tax entitled to be added onto to the NGPA maximum lawful prices. To correct this, the Commission, under its NGA authority, has ordered interstate pipelines to flow through the refunds to customers who were overcharged during the period at issue. However, since the Commission's NGA authority is limited to sales for resale, the Commission has required pipelines receiving refunds, including Northern, to allocate the ad valorem refunds between their jurisdictional sale for resale customers, and their non-jurisdictional direct customers. The Commission has required pipelines to flow through the jurisdictional portion of the refunds to the jurisdictional customers.⁵ As to non-jurisdictional direct sales, which the Commission noted would ordinarily be to an industrial customer, the Commission stated, if the direct customer questions how the pipeline was treating the refund attributable to the sales to direct customers, it "must pursue refunds in a different forum."⁶ The Commission has not, nor could it, rule on how the pipelines must handle the refunds to direct sales customers.

⁴Petition at 11, underlining in original.

⁵Public Service at 61,954, and Appendix E at 61,957 (1997).

⁶Williams Gas Pipelines Central, Inc., 95 FERC ¶ 61,055 at 61,138 (2001).

11. Given this review of the applicable precedent, the order stated that Northern was correct in asserting that the Commission has not ordered pipelines to flow through the refunds to non-jurisdictional customers. However, the order stated that this did not mean that the IUB cannot order Northern to flow through the ad valorem refunds it receives related to the 1983-1985 period to Peoples.⁷ The order explained that this case presents a unique situation not addressed by the Commission's prior orders. In this case, during the refund period of 1983 to December 1985, InterNorth's pipeline division, Northern, purchased the gas from producers, and as intracorporate transfers these transactions were not considered sales under the NGA, so the Commission did not have jurisdiction over them under the NGA. As a result, neither was there jurisdiction over the intracorporate transfer under the NGPA, since the Commission has explained that under § 270.203 (c) of the Commission's regulations the term sale "does not include any transactions between an interstate pipeline and an affiliate thereof if such transaction would not have been treated as a sale for purposes of the NGA."⁸

12. The order stated there was no bar to state regulation of such transactions, under that state's regulatory scheme. Thus, with respect to the refunds at issue, if the state can show that under its rate-setting methodology during the period at issue, 1983-1985, Peoples' rates improperly reflected the add-on of the ad valorem taxes, then there was nothing in the federal regulatory scheme why the state could not order Northern, as a successor to InterNorth to refund the relevant ad valorem tax amounts to Peoples, for flow through to the Iowa consumers who had been overcharged.

13. The order explained that if the refunds had occurred before the December 1985 reorganization of InterNorth, the state could have required Peoples to flow through the refunds to its customers in the state. The reorganization in 1985, whereby Peoples became an independent company, should not result in Northern being able to retain refunds it could not have retained absent that reorganization. The order found that Commission precedent did not bar IUB's action, so nothing that IUB had done with respect to the refunds at issue was contrary to Commission precedent, and denied Northern's request.

⁷Peoples is now a division of Utilicorp United, d/b/a/ Aquila Network (Aquila).

⁸Final Rule Governing the Maximum Lawful Price for Pipeline, Distributor or Affiliate Production, FERC Statutes & Regulations, Regulations Preambles 1977-1981 § 30,101 at 30,722 (November 20, 1979).

Northern's Request for Rehearing

14. Northern asserts the Commission erroneously offered its views regarding state law issues that are beyond its jurisdiction, and beyond the two limited issues raised by Northern's petition. It contends that it was not seeking any Commission ruling on any state law issues, but was concerned about the IUB's findings in the May 10 order that Northern was in violation of the Commission's orders because, in the IUB's opinion, this Commission had directed Northern to make refunds to its non-jurisdictional customers.⁹

15. Moreover, Northern argues, even though the only two issues presented by its Petition were answered as it had requested, the December 26 Order inexplicably stated that "we deny Northern's request." Accordingly, Northern stated that it seeks clarification or, in the alternative, rehearing, with respect to the Commission "denying" the request that it in fact it granted, since such a ruling is arbitrary and capricious and does not reflect reasoned decisionmaking.

16. Northern also contends that in the December 26 order, the Commission expressed opinions on state law issues over which the Commission has no jurisdiction. Northern asserts that the state law issues includes statements (1) suggesting the Commission believed that the IUB has jurisdiction over Northern for the purpose of ordering refunds, and (2) what authority the IUB has under Iowa law to order refunds.¹⁰

17. Northern also takes issue with certain statements in the December 26 Order such as, "The reorganization in 1985, whereby Peoples became an independent company, should not result in Northern being able to retain refunds it could not have retained absent that reorganization." (101 FERC at 62,591, P 28.) Northern asserts this comment directly implicates the non-jurisdictional state law issue regarding the meaning of the 1985 Purchase Agreement between InterNorth and UtiliCorp United, Inc. relating to the sale of Peoples.

18. Similarly, Northern states that it has concern with the statement "The Commission's legal error that was corrected in 1993 in CIG should not result in a regulatory gap so that Northern is subject to any regulatory authority with respect to the refunds at issue, and lead to a windfall for Northern" because the Commission has

⁹Northern states that the Iowa District Court affirmed the IUB's May 10, 2002 order, and Northern has filed an appeal with the Iowa Supreme Court.

¹⁰Northern also argues that the Commission was wrong in asserting that Northern was the successor to InterNorth.

absolutely no statutory authority to consider or decide whether the IUB lacks jurisdiction over Northern, and whether Iowa state law has created a regulatory gap. Moreover, the Commission's opinion as to whether there is a "windfall to Northern" is gratuitous and beyond its jurisdiction to consider or decide.¹¹

19. Northern argues that when the Commission stated that "Here, the issue Northern seeks an answer to must be resolved in a different forum" (Order, p.8, P 29) the Commission erred because Northern was only seeking an answer to two limited questions, both of which related to the Commission's interpretation of its own order.

20. Finally it argues that the statement "Thus, nothing that IUB has done with respect to the refunds at issue, when there were only intra-division transfers, is contrary to Commission precedent," is erroneous because it suggests that the IUB's finding in its May 10, 2002 Order that the Commission directed Northern to make refunds to its non-jurisdictional customers is an accurate characterization of the Commission's orders. Since the December 26 Order expressly stated that the Commission "has not directed that Northern should flow through ad valorem tax refunds to its non-jurisdictional customers," it is wholly irrational for the Commission to agree with Northern that the IUB is wrong in its characterization of Commission orders and then declare that "nothing that IUB has done ... is contrary to Commission precedent."

21. Northern's motion also references two pending state court actions relevant to this matter. The first is in Iowa where Northern raised the issue of the IUB's jurisdiction over Northern, as well as the correctness of the IUB's May 10, 2002 order. The second is in the Nebraska courts, where Aquila, successor to Utilicorp, filed suit against Northern, and Northern states the issue is whether Northern or Aquila is responsible for the Kansas ad valorem tax refund under the 1985 Purchase Agreement between InterNorth and Utilicorp relating to the sale of Peoples to Utilicorp.

22. Northern argues that statements in the December 26 Order improperly interfere with these pending state court actions.

¹¹The Minnesota Department of Commerce (MDOC) had intervened and requested the Commission to take action with respect to refunds due customers in Minnesota. Northern expressed concern over the Commission's statement that: "We will also deny MDOC's request to order Northern to distribute the 'Minnesota' refunds to Minnesota retail customers, without prejudice to Minnesota taking actions similar to those of Iowa" because it infers Minnesota can take certain action.

23. Northern requests that the Commission clarify its December 26 Order, or, in the alternative, grant rehearing as requested. With respect to the clarification it asks that the Commission clarify that the Commission does not express any Commission opinion on the merits of any state law issues pending in the state courts.

Response to Northern's Motion

24. The IUB, the Iowa Office of Consumer Advocate, and Aquila, Inc. filed motions to answer and answers to Northern's motion,¹² urging denial of the motion.

25. The IUB asserts that contrary to Northern's motion, the December 26 Order avoided making any findings as to any state issues, nor did it interfere with any pending state court action. Aquila, and the IUB, argue that Northern is attempting to elicit answers that will aid Northern in keeping the refunds that belong to Iowa customers, and the Commission must deny the request.

26. Aquila states that it disputes a number of factual allegations that Northern made in its motion regarding the September 13, 1985 Purchase Agreement relating to the sale of Peoples between the predecessors in interest to Northern and Aquila.

Discussion

27. The Commission grants clarification of its December 26 order. As the December 26 order stated, Northern is correct in asserting that the Commission has not ordered pipelines to flow through ad valorem tax refunds to non-jurisdictional customers. Therefore, to the extent that the IUB's decision includes statements that this Commission has ordered interstate pipelines to make refunds to their non-jurisdictional customers and that Northern's failure to flow through the refunds at issue here to Aquila (formerly Peoples) violates an order of this Commission, those statements overstate the Commission's rulings.

28. The Commission further clarifies that it has only addressed issues of Federal law, and did not intend to address any issues of Iowa state law. The parties responding to Northern's request for a declaratory order raised a concern that a Commission declaration that it had not ordered Northern to flow through the refunds at issue here could lead to Northern retaining the refunds. This concern arises from the fact that while the ad valorem taxes at issue were originally passed through by Northern to Peoples in non-

¹²We grant the motions to file answers since they assist in completing the record.

jurisdictional intracorporate transfers, the subsequent corporate reorganizations have led to Northern's current service to Peoples' successor Aquila being subject to the Commission's NGA jurisdiction. The Commission clarifies that the December 26 order's discussion concerning IUB's ability to order Northern to flow through the subject refunds is intended only as a narrow holding that the NGA does not preempt the State of Iowa and its regulatory agencies, such as the IUB, from ordering Northern to flow through refunds related to the 1983-85 non-jurisdictional intracorporate transfers. We further grant clarification that whether the state of Iowa has given the IUB jurisdiction over these intracorporate transactions and the authority to order the refund is a matter of state law on which we express no opinion.

29. In sum, the Commission's December 26 order did not order the IUB to take any action, or approve the action it took, nor did the Commission decide whether the IUB's action was consistent with any contract that might be relevant, such as the 1985 Purchase Agreement between InterNorth and Utilicorp relating to the sale of Peoples to Utilicorp. Those are matters for resolution in the appropriate state forum, as the Commission stated in the December 26 Order that "the issue Northern seeks an answer to must be resolved in a different forum."¹³ As noted above, Northern has raised these issues in pending state court actions, and the Commission's decision does not interfere in any way with those proceedings.

30. Accordingly, we clarify that the answers to the questions posed by Northern in its Petition are both in the negative, and that we express no opinion on any state law matter, but adhere to the analysis in the December 26 order concerning whether Federal law preempts state action as to these intracorporate transactions.

The Commission orders:

The December 26 Order is clarified as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹³101 FERC at 62,591, P 29.