

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

102 FERC ¶ 61,003

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

Burlington Resources Oil and Gas Co.	Docket Nos. GP99-15-000
Northern Natural Gas Co.	RP98-39-000
Continental Energy	SA98-101-000

ORDER SETTING MATTERS FOR HEARING

(Issued January 2, 2003)

1. These matters are being set for hearing to resolve disputes regarding the proper refund amounts that are due and payable by producer first sellers of natural gas Burlington Resources Oil and Gas Co. (Burlington Resources) and Continental Energy to Northern Natural Gas Co. (Northern) for pass through to Northern's customers. The Commission has previously ordered that each producer must reimburse Northern for Kansas ad valorem taxes collected during 1983-1988 that resulted in the producers' collection of amounts in excess of the Maximum Lawful Price (MLP) established pursuant to the Natural Gas Policy Act (NGPA) of 1978.¹

¹Although the 1989 Wellhead Decontrol Act deregulated the price for all first sales of natural gas, in accordance with the intent of Congress, any first sale of natural gas occurring prior to decontrol is subject to the Commission's wellhead pricing regulations as they were in effect at the time of the sale. The Senate Report on the 1989 Wellhead Decontrol Act states, "The Committee intends the usual 'savings clause' interpretations, such as those in 1 U.S.C. 109, to be applied to this legislation." S. Rept. No. 39, 101st Cong., 1st Sess. (1989).

Similarly, the House report on the 1989 Wellhead Decontrol Act states, "the gradual expiration of controls after enactment and before January 1, 1993, and their complete expiration on and after that date, will not affect civil or criminal proceedings pending at the time of decontrol, nor any action or proceeding based on pre-decontrol acts or conduct." H. Rept. No. 29, 101st Cong., 1st Sess. (1989).

Background

2. Under the NGPA, producers could legally collect a reimbursement from their pipeline purchasers of natural gas for state severance taxes the producers paid on the gas they sold to the pipelines, if the gas purchase contracts so provided. Under section 110 of the NGPA, such reimbursements could be collected in addition to the applicable MLP without violating the MLP. At the time, the Commission viewed Kansas' ad valorem tax as a state severance tax. Each pipeline could then pass these severance tax reimbursement costs along to its customers as part of the pipeline's purchased gas costs.

3. In 1993, following a court remand in 1988,² the Commission ruled that Kansas' ad valorem tax did not qualify as a reimbursable severance tax under section 110 of the NGPA.³ The Commission ordered producers, for the period commencing in 1988, to refund (to the pipelines) those ad valorem tax reimbursements collected by producers that resulted in payments (by the pipelines) that were in excess of the applicable MLP. The pipelines were then required to flow the refunds through to their customers. In 1996, the Court of Appeals affirmed the Commission, but held that the producers must also make refunds for the period from 1983, the year the reimbursement was first challenged at the Commission, to 1988.⁴

4. On September 10, 1997, the Commission, as directed by the court, issued an order requiring producers to refund amounts, with interest, that unlawfully exceeded the applicable MLP, for the period from October 3, 1983 through June 28, 1988.⁵ Northern is one of the pipelines that is owed refunds. A number of producers filed various pleadings with the Commission, asserting that the refund amounts claimed by Northern were incorrect or seeking relief from the refunds for various other reasons. With the assistance of the Commission's Office of Alternative Dispute Resolution, the parties

²Colorado Interstate Gas Co. v. FERC, 850 F. 2d 769 (D.C. Cir. 1988).

³Colorado Interstate Gas Co., 65 FERC ¶ 61,292 (1993), reh'g denied, 67 FERC ¶ 61,209 (1994).

⁴Public Service Company v. FERC, 91 F. 3d 1478 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997).

⁵Public Service Company of Colorado, 80 FERC ¶ 61,264 (1997).

Docket Nos. GP99-15-000, et at.

- 3 -

participated in extensive settlement discussions. Those discussions led to the Commission's approval of a settlement on December 27, 2000.⁶

5. The settlement provided, among other things, that producers could elect not to be bound by the settlement. Northern's refund report of May 20, 2002, indicates the following first sellers' refund amounts remain unsettled: (1) Burlington Resources- \$914,751.42; and (2) Continental Energy- \$260,726.94.

Discussion

6. The Commission is establishing a hearing to resolve all issues concerning the ad valorem tax refunds owed to Northern that have not yet been resolved by settlement. These producers have argued that during the refund period they may have sold gas to Northern at prices less than the applicable MLP. If so, the producers would have been entitled to collect Kansas ad valorem taxes equal to the difference between the MLP and the prices charged Northern. This issue should be addressed at the hearing established by this order. The data necessary to resolve this issue may be in the possession of the producer, rather than Northern. Therefore, the producers have the burden of producing all evidence in their possession necessary to support their claims that some ad valorem taxes were properly collected without exceeding the MLPs.

7. The hearing may also address whether the amount of the producers' refund obligations should be reduced because of an inability to collect: a) the royalty interest portion; and/or b) the working interest net of royalty. The hearing should also address any other issues that are necessary to resolve the exact refund amounts owed by the subject producers.

The Commission orders:

(A) The Commission directs Northern, within seven (7) days of the date of this order, to serve a copy of the order upon each of the above-named producers, so that each producer will have actual notice of the order.

(B) Pursuant to the Commission's authority under the Natural Gas Policy Act, particularly Section 504(a), the Department of Energy Organization Act, particularly Section 401(g), and the Commission's rules and regulations, a public hearing shall be held in the above-captioned dockets concerning the disputes regarding the proper refund

⁶Northern Natural Gas Company, 93 FERC ¶ 61,311 (2000).

Docket Nos. GP99-15-000, et at.

- 4 -

amount that is due and payable by each producer to Northern as discussed in the body of this order.

(C) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in the proceeding to be held within thirty (30) days of the date of this order, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NW, Washington, D.C. 20426. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.