UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

103 FERC ¶ 61,007

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

Panhandle Eastern Pipe Line Co.	Docket Nos.	RP98-40-031
Anadarko Petroleum Corp.		GP98-6-003
Anadarko Production Co.		GP98-32-002
OXY USA, Inc.		GP98-7-003
Oneok Exploration Co.		GP98-27-001
Charlotte Hill Gas Co.		SA99-7-001
Partnership Properties Co., a/k/a IMC Global, Inc.		SA98-100-001
Burlington Resources Oil and Gas Co. LP		SA99-1-001

ORDER GRANTING CLARIFICATION, DENYING REHEARING
AND REMOVING PARTY FROM HEARING

(Issued April 1, 2003)

1. On January 2, 2003, the Commission issued an order[1] (the January 2 order) which established a hearing to resolve disputes regarding the proper ad valorem tax refund amounts that are due and payable to Panhandle Natural Gas Co. (Panhandle) by a number of producer\first sellers of natural gas. Requests for rehearing or motions for clarification were filed by Burlington Resources Oil & Gas Co. (Burlington), Anadarko Petroleum Corporation, BP America Production Company, ExxonMobil Oil Corporation, OXY USA, Inc. and RME Petroleum Company (formerly Union Pacific Resources Company) (collectively, Indicated Producers), Oneok Resources Company (Oneok), and ProLiance Energy LLC (ProLiance). This order denies the requests for rehearing of the January 2 order, removes Burlington from the hearing and directs it to make payment of the refund, and grants clarification of the January 2 order.

[1] 102 FERC ¶ 61,002 (2003).

Background

2. The Commission has previously ordered that producers must reimburse Panhandle for Kansas ad valorem taxes collected after October 1983 that resulted in the producer collecting amounts in excess of the Maximum Lawful Price (MLP) established pursuant to the Natural Gas Policy Act (NGPA) of 1978.[2] In 1993, the Commission ruled that Kansas' ad valorem tax did not qualify as a reimbursable severance tax under Section 110 of the NGPA,[3] and ordered producers to refund the excess amounts over the MLP that they had collected since 1988, and flowthrough the refunds to their customers. In 1996, the Court of Appeals affirmed the Commission, but held that the producers must also make refunds from 1983, the year the reimbursement was first challenged at the Commission.[4]

3. On September 10, 1997, the Commission issued an order requiring producers to refund amounts, with interest, that unlawfully exceeded the applicable MLP, for the period commencing October 3, 1983, and directed pipelines to submit Statements of Refunds Due to first sellers/producers, and to file reports with the Commission indicating the amount of the refund owed by each producer.[5]

4. A number of producers filed various pleadings with the Commission, asserting that the refund amounts claimed by Panhandle were incorrect or seeking relief from the refunds for various other reasons. To resolve these disputes, the parties participated in extensive settlement discussions which led to the Commission's approval of a settlement on September 13, 2001.[6] However, the settlement was only applicable to persons who accepted the settlement. Thus, both producers and potential recipients of the refund

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[2]Although 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.

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

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

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

[6]Panhandle Eastern Pipe Line Co., 96 FERC¶ 61,274 (2001).

could choose not to join the settlement. In addition, if a state commission elected not to join the settlement, then the settlement would not apply to any party whose rates are regulated by that state commission. A number of producers chose not to be bound by the settlement, as did the Missouri Public Service Commission (MoPSC). Thus, the settlement did not resolve the refund claims as to producers who opted out of the settlement. Nor did it resolve that portion of the refund obligations of all the producers that Panhandle has allocated for flowthrough to its Missouri customers.

5. The January 2, 2003 Order established a hearing "to resolve all issues concerning the ad valorem tax refunds owed to Panhandle that have not yet been resolved by settlement."[7] The order stated that these refunds consist of the Missouri-related refund obligations of seven named producers.

A. ProLiance's Request

6. ProLiance asserts that clarification of the January 2 order is necessary because of seeming inconsistencies in the order as to the scope of the issues set for hearing. ProLiance requests clarification that the January 2 order was intended to resolve all outstanding issues governing the ad valorem tax refunds owed to Panhandle that had not yet been resolved by the September 2001 settlement, and was not limited to the Missouri-related refunds.

Commission Ruling

7. The Commission clarifies that the intent of the January 2 order was to set for hearing all issues relating to the ad valorem refunds that were not disposed of by the September 2001 settlement, and was not limited to only the Missouri-related refunds that were outstanding. Thus, if a producer did not join the settlement, that producer's entire refund claim is set for hearing, but as to a producer who did join the settlement, then only the amount of the Missouri-related refund is set for hearing.

B. Burlington's Request

8. On rehearing, Burlington contends that no hearing is necessary to resolve the issue of its refund obligation.[8] Burlington states that there is no factual issue as to the amount

[7]102 FERC at 61,004.

[8]Burlington opted out of the September 2001 settlement concerning ad valorem

(continued...)

of the claimed refund from it. Rather, the sole issue is whether a November 24, 1992 Settlement-Letter Agreement between Panhandle and Burlington's predecessor, Southland, (the Southland Settlement) should be found to have released and indemnified Burlington for any claims for refund of Kansas ad valorem taxes and related interest. Burlington argues that under that settlement, which covered three gas contracts, one of which was a Kansas contract as to which Panhandle is now seeking ad valorem tax refunds, Southland "gave up substantial take-or-pay claims, and agreed to reform the terms of the contracts."[9] The Settlement further provided a mutual agreement to release and indemnify the other for all claims arising from or relating to these contracts under which the ad valorem tax reimbursements were paid.

9. Burlington relies upon paragraph 7 of the Settlement, which provided as follows:

> Except for the obligations and rights specifically provided in this Letter Agreement, Buyer and Seller hereby forever release, discharge, waive and indemnify each other from and against all claims, demands, causes of action, damages, liabilities, expenses or payments known or unknown, present or future, that each party has or may have had against the other party relating to all the above referenced contracts.

10. Burlington does not claim that it received less than the MLP for gas sold to Panhandle. Burlington also does not claim that royalty or working interest owners should bear a portion of its ad valorem tax refund obligations. Burlington states that its sole defense to the ad valorem tax refund claim is that by the Settlement Panhandle agreed to indemnify and release Burlington for all claims arising from or relating to Burlington's sale of gas to Panhandle, and agreed to assume all responsibility for claims relating to those contracts. Therefore, it contends, Panhandle is the party responsible for any ad valorem tax liability that relates to the Kansas gas contract covered by the Settlement.

11. Burlington also asserts that prior Commission orders in Williams Natural Gas Co., 67 FERC ¶ 61,153 (1994) (Williams) and Anadarko Petroleum Corp. v. Pan Energy Pipe Line Co., 85 FERC ¶ 61,090 (Anadarko), do not absolve Panhandle of its contractual

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[8](...continued) tax refunds owed to Panhandle. Therefore, consistent with the discussion above, this order will apply to the entire amount of Burlington's outstanding ad valorem tax refund.

[9]Request at 7.

obligation to be responsible for Southland's future liabilities under the Southland Settlement.

12. Burlington contends that neither of these cases is applicable to the case at hand because Panhandle and Southland never agreed to have Panhandle pay more than the MLP for gas. Burlington argues that, to the contrary, without any specific contemplation of Kansas ad valorem taxes or other issues relating to the MLP, Panhandle agreed to indemnify and release Southland from all claims relating to the gas contracts in return for valuable consideration, including settlement of various contract pricing and other disputes, agreement to contract termination at dates certain, and a mutual release and indemnification of any claims relating to the contracts.

13. Burlington contends that giving effect to Southland Settlement, and requiring Panhandle to pay the ad valorem refund amount, will not cause Southland to have violated the NGPA because to the extent Southland received any "additional" value in excess of the MLP for gas under the Kansas contract, Southland already effectively reimbursed Panhandle for that value through the consideration provided to Panhandle pursuant to the Letter Agreement.

14. Burlington also requests that if the Commission determines that Panhandle can somehow be relieved of its contractual commitment to indemnify Burlington with respect to the ad valorem tax refunds, such relief should be limited solely to the tax refund principal amount, without interest. If Burlington pays the tax refund principal amount to Panhandle, it will not have received any amounts in excess of the MLP, but any interest amounts due pursuant to Commission regulations should qualify as liabilities that should be assumed by Panhandle pursuant to the contractual release set forth in the Settlement.

15. Finally, Burlington asserts that if the Commission would find that enforcing the indemnification provision in the Settlement would result in a technical violation of NGPA ceiling prices, the Commission has the authority to grant Burlington an exemption under NGPA Section 502(c), 15 U.S.C. § 3412(c), in order to avoid inequity.

16. Burlington argues that it would be "inequitable" for the Commission to absolve Panhandle of its contractual commitment under the Settlement to release Burlington from all liabilities associated with certain gas sales contracts, when Panhandle (and indirectly its sales customers) have already received and enjoyed the benefits of the Settlement.

Panhandle's Response

17. In its answer, Panhandle agrees with Burlington that there is no reason to have a hearing to decide Burlington's legal issues, and that the Commission should resolve this matter without an evidentiary hearing.[10]

18. Panhandle asserts that Burlington's defense to its liability for the refund based on the 1992 Southland Settlement has no merit since the Commission has ruled that such a settlement has no application to the ad valorem tax refund liability of the first seller/producer.

19. Panhandle relies on cases Burlington has also cited, Williams and Anadarko. It refers to Williams where the Commission stated:

> To the extent producers are required to make refunds in that case of amounts charged in excess of ceiling prices, they must make such refunds regardless of any agreement by their customers to pay amounts in excess of the ceiling price.[11]

20. Panhandle argues that again in Anadarko, the Commission reiterated that a release provision between a producer/first seller and a pipeline does not relieve the first seller of its liability to refund any NGPA overcharge. The Commission explained:

> Anadarko, as the first seller, is responsible for paying the refund. Anadarko's reliance on the release in the 1986 Spin-Off Agreement to refund the overcharge is misplaced. Whatever the parties intended by that release, it cannot relieve the first seller of the obligation to refund an NGPA overcharge, because the buyer and a first seller cannot agree to pay more than the MLP, which would be the effect that Anadarko seeks.[12] (emphasis added)

[10] The Commission accepts the answer Panhandle filed since it assists the Commission in consideration of the issues presented.

[11] 67 FERC at 61,450.

[12] 85 FERC at 61,331.

21. On rehearing, the Commission reaffirmed that ruling since such an agreement by a pipeline to be responsible for a producer's Kansas ad valorem tax refund liability would be illegal and unenforceable. The Commission stated:

> [A]n agreement by the buyer, here Panhandle, to be responsible for any refund would be in effect an illegal agreement to pay more than the MLP, and thus unenforceable.[13]

22. Panhandle also argues that Burlington mischaracterizes the 1992 settlement in asserting that the settlement released Southland from any refund obligation. Panhandle asserts that it did not agree in such settlement to allow Southland to keep amounts in excess of the MLP, or to release or indemnify Southland from its Kansas ad valorem tax refund liability for amounts received in excess of the MLP. Panhandle contends that the clause relates to liabilities associated with the subject contracts that each party may have against the other party and that may arise at any point in the future, and the clause does not obligate Panhandle to indemnify for claims of third parties such as here, the order of the Commission requiring refunds.

23. Panhandle also argues that there is no basis for Burlington's contention that it gave valuable consideration in exchange for the indemnity clause, so Panhandle already has been reimbursed for the value of any Kansas ad valorem tax refunds. Panhandle states that the Letter Agreement primarily related to the premature termination of gas purchase contracts and did not affect past gas sales, so the Letter Agreement did not change anything with respect to the gas sales giving rise to refunds at issue here.[14]

Commission Ruling

24. Both parties agree that there are no factual issues involving Burlington's ad valorem refund liability, but only whether a 1992 settlement with Panhandle relieves Burlington of that liability. In view of this agreement, the Commission will remove Burlington from the hearing established by the January 2 order and decide the issue in this order.

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[13] 86 FERC at 61,158.

[14] Burlington filed a motion for leave to answer Panhandle's answer, with the answer. This answer basically restates Burlington's arguments in its request for rehearing.

25. At the outset, the Commission questions whether the clause Burlington relies upon has the meaning Burlington attributes to it, namely that it indemnifies Burlington for any ad valorem tax refund liability and imposes that liability upon Panhandle. However, the Commission need not determine that issue, because even if the clause could be read as having that meaning, Burlington cannot prevail on its request to be relieved of the ad valorem refund liability.

26. The issue presented is whether a purported "indemnity" clause in a 1992 settlement relieves Burlington of the ad valorem refund liability, which it admits is owing. Burlington argues that under the settlement, the pipeline purchaser, not Burlington, must pay the refund. Commission precedent in Williams and Anadarko is clearly contrary to Burlington's position. The Commission stated in Anadarko that the buyer in a first sale cannot agree "to pay more than the MLP," and thus any agreement to do so "is unenforceable."[15]

27. Moreover, in Williams, the Commission expressly addressed the` issue of whether a pipeline's settlement with producers resolving take-or-pay liabilities and reforming gas sales contracts, could relieve those producers of the liability for ad valorem tax refunds relating to those contracts. In Williams the pipeline sought to recover the costs of certain take-or-pay settlements with producers. A state commission argued that it could not evaluate the prudence of the settlements because the settlements might have relieved producers of their ad valorem tax refund liability to the detriment of the pipeline's customers who would have received those refunds. The Commission rejected that argument, stating:

> To the extent producers are required to make refunds in [the ad valorem tax refund] ... case of amounts charged in excess of ceiling prices, they must make such refunds regardless of any agreement by their customers to pay amounts in excess of the ceiling price. Thus, take-or-pay or GSR settlements between pipelines and their producer/suppliers cannot interfere with refunds required by the Commission to remedy violations of NGPA ceiling prices, or with the flowthrough of such refunds by the pipelines to their customers.[16]

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[15] 86 FERC at 61,158.

[16] 67 FERC at 61,450.

Consistent with Williams, the Southland settlement at issue here could not relieve Burlington of its obligation to make ad valorem tax refunds to the pipeline.

28. Burlington also argues that the indemnity clause here did not require Panhandle to pay more than the MLP. However, giving the clause the effect that Burlington seeks, results in that very outcome because the producer will be permitted to retain the excess over the MLP.

29. Burlington claims that there is no statutory prohibition against a pipeline contractually assuming a liability of a producer. It contends that here in enforcing the indemnity clause the pipeline would be required to refund any ad valorem tax amount to the consumer on behalf of the producer, and the legislative intent of the NGPA would be fulfilled because the consumer receives the refund. Further, Burlington points out that the Commission allowed two pipelines to retain the ad valorem tax refunds paid to them, rather than flowing them through to their customers based upon settlements with the customers in which the customers had relinquished their right to any flowthrough by the pipeline of ad valorem tax refunds. Burlington argues that since the Commission has found that consumers, i.e., the intended NGPA statutory beneficiary, are bound by their contractual settlement agreements with pipelines giving up the right to receive any refund the pipeline recovered from the producers, so too the pipeline should similarly be bound by its contractual agreement with the producer regarding that refund.[17]

30. There is a bar to the first sale buyer agreeing to pay more than the MLP, since Section 504(a) of the NGPA makes it "unlawful for any person (1) to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this Act...."[18] Clearly, the El Paso and Natural cases cited by Burlington are irrelevant because the MLP applies only to the first sale, and those cases only involved the pipeline's flowthrough of the refund. The pipeline flowthrough of the refund is governed by the NGA, which does not provide any Congressionally-mandated MLPs. Therefore, whether the consumer can waive the ad valorem tax refund by settlement raises other considerations than those present here.

31. Similarly, that the Commission has approved uncontested ad valorem tax refund settlements between producers and pipelines and their customers, that waived part of the

[17]Burlington cites El Paso Natural Gas Co., 85 FERC ¶ 61,003 (1998); Natural Gas Pipeline Co. of America, 85 FERC ¶ 61,004 (1998); and ANR Pipeline Co., 85 FERC ¶ 61,005 (1998).

[18]15 U.S.C. § 3414(a).

ad valorem tax refund to resolve disputes over the claims, has no application here, since under those settlements producers agreed to immediate payment of a substantial part of the refund in dispute. Here Burlington does not dispute the amount of the refund claim, but seeks to be relieved of the entire amount of the refund, and Panhandle objects to Burlington's request.

32. We also deny Burlington's alternative request that it should be relieved of any obligation to pay interest. This is a collateral attack on the Commission's orders in Public Service, supra, which denied the producers' generic request for a waiver of interest. As the Commission has explained, interest represents the time value of the excess amount received, and we see no reason to deviate from that ruling here.

33. Finally, we deny the request for relief under Section 502(c) since Burlington has not shown that payment of the refund would be a hardship or inequity. It merely reiterates the same argument why it should not be liable for the refund, which argument we have rejected.

C. Oneok's Request

34. Oneok asserts that Panhandle is seeking refunds from Oneok which are not Oneok's responsibility and asks the Commission to resolve this issue without a hearing. The refunds Panhandle seeks from it, Oneok contends, relate to sales from certain wells which occurred before Oneok acquired any interest in those wells. Oneok states that effective July 1, 1985, it purchased certain working interests from Robert L. Williams and Imperial Chemical Company, a sole proprietorship of Robert L. Williams. Oneok contends that those are the interests which the $76,366.95 of principal claimed by Panhandle relates to. Since the principal sought by Panhandle is for transactions prior to that date, when Oneok was not the first seller and did not own any interest in the wells, Oneok argues it is not responsible for any refunds relating to those sales.

35. Oneok argues that in Docket No. GP98-27-000 it had raised this and requested a ruling that it is not responsible for refunds relating to pipeline reimbursements made for sales from these wells, and the Commission must rule on this request because it could eliminate a need for a hearing on this issue.[19]

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[19]Oneok also seeks the same clarification as ProLiance's request, as to the scope of the hearing, and the issue of burden of proof, similar to Indicated Producers' request that the language in the January 2 order concerning the obligation of the producers to provide (continued...)

Commission Ruling

36. The Commission denies Oneok's request to be removed from the hearing. Unlike the situation with respect to Burlington, the issue raised by Oneok cannot be resolved as a purely legal issue, but involves factual issues. Oneok asserts it has no connection with the sales prior to July 1, 1985, but also states that it purchased all of the issued and outstanding corporate capital stock of Imperial Oil and Gas, Inc., all of which was owned by Robert L. Williams.[20] While Oneok contends that the first sales at issue were made by a different company, Imperial Oil Company, it is not clear at this time what the relation was between the various named entities both before, and after July 1, 1985. This issue, as well as others, should be determined at the hearing where all the evidence can be presented.

D. Indicated Producers' Request for Clarification or Rehearing

37. Indicated Producers request clarification, or in the alternative rehearing, that the Commission's January 2 Order, which stated that 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, did not shift to producers the burden of establishing whether a given MLP ceiling was exceeded in a particular sale of natural gas by first sellers to Panhandle.

Commission Ruling

38. The Commission grants Indicated Producers' motion for clarification. The Commission clarifies that ultimately the Commission has the burden of persuasion to demonstrate that the producers collected amounts in excess of the MLP.[21] However, the Commission can only make such a determination with the relevant facts on hand. As the January 2 Order found, in many cases the data necessary to resolve the producers' claims

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[19](...continued)
data did nothing more than obligate producers to provide data – it did not in any way affect the burden of proof. The rulings on those two requests are applicable to Oneok's requests as well.

[20]Request at n.9.

[21]Amoco Production Company and Oryx Energy Company, 61 FERC ¶ 63,021at 65,139 (1992).

that some ad valorem taxes were properly collected without exceeding the MLPs is in the producers' possession. Therefore, the January 2 Order properly imposed on the producers the burden of producing such evidence.

The Commission orders:

(A) The requests for rehearing or alternative relief are denied.

(B) Burlington is removed as a party from the hearing established in the January 2, 2003 order.

(C) Burlington must pay the outstanding ad valorem tax refund within 30 days of this order.

(D) The January 2, 2003 order is clarified as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.