

113 FERC ¶ 61,060  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company

Docket Nos. RP98-39-000  
RP98-39-029

ORDER ON MOTION TO INTERVENE AND REOPEN ORDER APPROVING  
SETTLEMENT AND RELATED SUBSEQUENT DECISION

(Issued October 20, 2005)

1. On July 15, 2005, Zenith Drilling Corporation (Zenith) filed, pursuant to Rule 716 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.716, a Motion to Intervene and Reopen Order Approving Settlement and Related Subsequent Decision Insofar as they Relate to Zenith. Zenith moves to reopen both the record underlying the Commission's order in Docket No. RP98-39-000<sup>1</sup> approving the November 20, 2000 Stipulation and Agreement of Settlement (Settlement) submitted by Northern Natural Gas Company (Northern) and the record underlying the Commission's Notice of Finality<sup>2</sup> making final, without review, the April 7, 2004 Initial Decision in Docket No. RP98-39-029.<sup>3</sup> Zenith requests that it be fully discharged from the liability to refund Kansas *ad valorem* tax reimbursements to Northern under the terms of the Settlement approved by the Commission. For the reasons discussed below, the Commission denies Zenith's request.

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<sup>1</sup> *Northern Natural Gas Co.*, 93 FERC ¶ 61,311 (2000).

<sup>2</sup> *Northern Natural Gas Co.*, 107 FERC ¶ 61,170 (2004).

<sup>3</sup> *Northern Natural Gas Co.*, 107 FERC ¶ 63,004 (2004).

## **Background**

2. In *Public Service Company of Colorado v. FERC (Public Service)*,<sup>4</sup> the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's decision that Kansas *ad valorem* taxes were improperly added to the maximum lawful prices (MLP) under the Natural Gas Policy Act of 1978 and ordered first sellers/producers to make refunds of reimbursements for certain *ad valorem* taxes that caused the producer to receive a price in excess of the MLP in first sales of natural gas. The Commission had required refunds commencing in June 1988. The court's decision extended the refund requirement to the period from October 1983 through June 1988. On September 10, 1997, the Commission issued an order implementing the *Public Service* decision.<sup>5</sup> The Court affirmed the Commission, except on a limited issue not pertinent here, in *Anadarko Petroleum Co. v. FERC*.<sup>6</sup>

3. In compliance with the Commission's order implementing the *Public Service* decision, in November 1997 Northern sent Statements of Refunds Due (SRD) to producers from whom it had purchased gas during the refund period. Those statements set forth the amount of the refund that Northern claimed the producer owed from the sales to Northern during the refund period. The Commission established Docket No. RP98-39-000 as the lead docket to resolve Northern's refund claims. Many producers disputed that they were liable for the amount claimed by Northern. After extensive settlement discussions, on November 20, 2000, Northern filed the 2000 Settlement. The 2000 Settlement applied only to producers that chose to be a party to it. The Settlement specified a "Settlement Amount" that each producer subject to a refund claim from Northern could refund to Northern in order to resolve all refund claims against it. The Settlement also provided that producers owing less than \$50,000 would be relieved of any refund obligation. The Settlement stated that any producer who failed to pay its Settlement amount by the date of a Commission order approving the Settlement would be deemed to have opted out of the Settlement. Exhibit No. 4 listed producers who owed less than \$50,000, and who would have no liability under the terms of the Settlement. Zenith was not listed on Exhibit No. 4. Zenith was listed on Exhibit No. 6 as a producer that had not responded to the SRD that Northern had sent to it, and Exhibit No. 6 showed

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<sup>4</sup> 91 F.3d 1478 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997).

<sup>5</sup> *Public Service Co. of Colorado*, 80 FERC ¶ 61, 264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998).

<sup>6</sup> 196 F.3d 1264, *reh'g* 200 F.3d 864 (D.C. Cir.), *cert. denied*, 530 U.S. 1213 (2000).

Northern's refund claim against Zenith to be \$135,332.26 and its Settlement Amount to be \$68,265.81. The Commission approved the Settlement on December 27, 2000, *supra* n.1. Zenith did not pay its Settlement Amount by that date.

4. On January 2, 2003, the Commission issued an order offering to extend the terms of the 2000 Settlement to entities that Northern asserted still owed refunds to Northern, including Zenith. *Northern Natural Gas Co.*, 102 FERC ¶ 61,007 (2003). Specifically, the Commission stated it would extend the Settlement refund reduction provision to any producer listed in the appendix of the order which, within 30 days, either paid its Settlement Amount or made arrangement to do so. Zenith was listed in the appendix. The Commission further ordered Northern to seek recovery of its full refund claim from any producer that did not take either action and, within 120 days, report the steps it had taken to recover the claimed refunds. On May 8, 2003, in Docket No. RP98-39-029, the Commission set for hearing before an Administrative Law Judge (ALJ) the matters which were not resolved by the 2000 Settlement, and the claim against Zenith was specifically included. *Northern Natural Gas Co.*, 103 FERC ¶ 61,152, *clarification granted*, 104 FERC ¶ 61,064 (2003). At the hearing Northern presented evidence as to the claim against Zenith.

5. On April 7, 2004, the ALJ issued an Initial Decision in Docket No. RP98-39-029 finding that Zenith was obligated to Northern in the amount of \$160,725.12 with interest, as of September 30, 2003, and that the claim against Zenith was not contested.<sup>7</sup> No party filed any Briefs on Exceptions to that decision. On May 17, 2004, the Commission issued a Notice of Finality, making final, without review, the April 7, 2004 Initial Decision, and ordered Zenith to make payment within 30 days.<sup>8</sup>

6. On November 29, 2004, Northern filed a suit against Zenith in the United States Court for the District of Kansas claiming that Zenith is liable to Northern for the refund of Kansas *ad valorem* taxes reimbursed by Northern for the period October 3, 1983 through June 28, 1988, plus interest, in the amount of \$160,725.12, including interest through September 30, 2003. In the suit Northern states that the refund is due and owing under the terms of the April 7, 2004 Initial Decision and the Commission's May 17, 2004 Notice of Finality.<sup>9</sup>

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<sup>7</sup> *Northern Natural Gas Co.*, 107 FERC ¶ 63,004 (2004).

<sup>8</sup> *Northern Natural Gas Co.*, 107 FERC ¶ 61,170 (2004).

<sup>9</sup> Exhibit 7 to Zenith's July 15, 2005 motion at P 10-11.

**Description Of Filing**

7. Zenith states that during 1983-1988, Zenith was the operator of three Kansas gas producing properties for which Northern reimbursed Zenith for Kansas *ad valorem* taxes attributable to all the working interests and royalty interests in those properties. Zenith contends that under the terms of the Settlement Zenith should owe no refunds to Northern because, as Northern knew or should have known based on its own records, the amount of *ad valorem* taxes relating to Zenith's working interest ownership was substantially less than the \$50,000 minimum threshold for liability established in the Settlement. Zenith argues that the Commission stated that, "the producer who operates a well is responsible only for the refunds attributable to its working interest, and other working interest owners are responsible for refunds related to their working interests."<sup>10</sup> Zenith asserts that Settlement, Art. IV.B provides that, "the refund liability of any Small Producer whose Refund Claim is \$50,000 or less is eliminated and discharged." Zenith further asserts that Settlement, Art. II.F provides that all claims against royalty owners would be waived and released. Zenith submits that its refund liability under the Settlement should be \$0 because it had less than a one-quarter working interest ownership in the three gas producing properties at issue, no royalty interest in the properties, and the Kansas *ad valorem* taxes attributable to Zenith's working interest were substantially less than \$50,000. Zenith objects that despite its small working interest ownership in the subject gas properties, Northern subsequently represented to the Commission that Zenith owed refunds to Northern of the full amount of *ad valorem* taxes relating to the properties plus interest, for a total refund amount of \$135,332.26 at the time of the Settlement,<sup>11</sup> or \$160,725.12 as of September 30, 2003.<sup>12</sup>

8. Zenith asserts that Northern knew, or should have known, that Zenith's working interest ownership in the three properties at issue was a small fraction of the total. Zenith further asserts that the royalty interests owners' names, addresses, and shares of the Kansas *ad valorem* taxes were submitted to Northern as part of Zenith's invoice for reimbursement of the *ad valorem* taxes paid by the royalty interest owners. Zenith claims that Northern also commissioned a study which showed that there were several other working interest owners for each of the properties throughout the relevant period, and Northern paid working interest owners with 50 percent of the working interest in the

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<sup>10</sup> Citing 93 FERC ¶ 61,311 at 62,073 (2000), citing, *Williams Gas Pipelines Central, Inc.*, 83 FERC ¶ 61,351 at 62,402 (1998).

<sup>11</sup> Citing Settlement, Exhibit 6.

<sup>12</sup> Citing 107 FERC ¶ 63,004 at P 37 (2004).

Fisher lease, one of the properties involved here, directly for the gas produced from the property. Zenith contends that Northern listed two of the other working interest owners of the properties separately on Exhibit 4 of the Settlement as small producers whose refund liability was less than \$50,000. Zenith maintains that Northern cannot now collect refunds for those same working interest from Zenith. Zenith insists that Northern's failure to reveal to the Commission the results of its investigation of the working interest ownership of the properties operated by Zenith contrasts sharply with the fact that after further investigation Northern released another operator/producer listed in the "No Response" category in Exhibit 6 of the Settlement from its refund obligation.

9. Zenith contends that Northern listed Zenith as owing the full amount of the Kansas *ad valorem* taxes on the three properties under the heading "No Response" in Exhibit No. 6 of the Settlement, when Northern should have listed Zenith in Exhibit No. 4 as a small producer who owed no refund under the terms of the Settlement. Zenith complains that it was unable to correct that error because it was not a party to the Settlement and it received no notice from Northern regarding the Settlement or the Commission proceedings that approved the Settlement. Zenith also complains that it received no notice of the subsequent proceeding before the ALJ, where the ALJ decided that Zenith was obligated to pay Northern the full amount of the *ad valorem* taxes reimbursed to Zenith as operator of the three properties. Zenith claims that it was only after the Commission issued its Notice of Finality on May 17, 2004, that Northern notified Zenith about the proceeding and the Commission's decision. Zenith states that the Settlement provides that any producer whose refund liability was less than \$50,000 would be deemed to have accepted the terms of the Settlement unless such producer "affirmatively opts out of" the Settlement.<sup>13</sup> Zenith states that at no time did Zenith affirmatively opt out of the Settlement. Zenith explains that in the Kinder Morgan Pipeline case involving refund liability for Kansas *ad valorem* tax reimbursements, where Zenith received adequate notice of the proceeding, Zenith actively participated in the settlement discussion in that proceeding, and provided requested working interest information.

10. Zenith requests that the Commission: (1) grant its motion to intervene and reopen the record underlying the order approving the Settlement; (2) remove Zenith from the "No Response list on Exhibit 6 of the Settlement; (3) add Zenith to the list in Exhibit 4 of the Settlement of small producers having refund liabilities less than \$50,000 whose obligations were fully discharged in the Settlement; and (4) reopen the record and modify its order making final the Initial Decision in Docket No. RP98-39-029 insofar as it applies to Zenith.

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<sup>13</sup> Citing Settlement, Art. IV.B.

### Answers

11. On August 12, 2005, Northern filed an answer to Zenith's motion.<sup>14</sup> On September 1, 2005, Zenith filed a motion for leave to file a reply and a reply to Northern's August 12, 2005 answer. On September 16, 2005, Northern filed a motion for extension of time until September 30, 2005 to file an answer to Zenith's motion to file a reply and reply. On September 21, 2005, the Commission granted Northern an extension of time to file an answer to Zenith's motion for leave to file a reply to and including September 30, 2005. On September 30, 2005, Northern filed an answer to Zenith's September 1, 2005 motion. Zenith filed a further answer on October 14, 2005. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer unless otherwise permitted by the decisional authority. We will accept Zenith's September 1 and October 14, 2005 answers and Northern's September 30, 2005 answer since they assist the Commission in understanding the issues in this proceeding.

12. In its August 12, 2005 answer, Northern states that no briefs on exception to the April 7, 2004 Initial Decision requiring Zenith to make refunds to Northern were filed. Further, Northern states that no requests for rehearing of the Commission's May 17, 2004 Notice of Finality deciding that the Initial Decision is a final Commission decision were filed. Therefore, Northern contends that the Commission's decision became final and non-appealable on June 17, 2004, and that decision cannot be reopened. Northern argues that in promulgating Rule 716 of the Commission's regulations permitting the reopening of the record, the Commission stated that it "does not contemplate reopening records after decisions are final."<sup>15</sup> Northern argues further that the Commission has expressly held that Rule 716 does not apply where a final, non-appealable order has issued.<sup>16</sup>

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<sup>14</sup> On August 1, 2005, Northern filed a motion for extension of time until August 12, 2005 to answer Zenith's motion. On August 3, 2005, the Commission granted Northern an extension of time to answer Zenith's motion to and including August 12, 2005.

<sup>15</sup> *Citing Revisions of Rules of Practice and Procedure to Expedite Trial-Type Hearings*, FERC Stats. & Regs., Regulation Preambles ¶ 30,358 at 30,181 (1982) (Order No. 225).

<sup>16</sup> *Citing Old Dominion Electric Cooperative v. Public Service Electric and Gas Company*, 105 FERC ¶ 61,094 (2003), *reh'g denied*, 108 FERC ¶ 61,055 (2004).

13. Northern asserts, that in matters that have not become final and non-appealable, the Commission requires a showing of extraordinary circumstances that outweigh the need for finality in the administrative process for the Commission to reopen the record.<sup>17</sup> Northern submits that, even if Zenith's requests were considered, there are no extraordinary circumstances that would justify reopening this case. Northern contends first that Zenith received numerous notices of this proceeding since 1988, but until this motion never filed any response to counter Northern's claim as to the amount of the refund that it owed. Second, Northern asserts that it did not have adequate information regarding other working interest owners besides Zenith in these properties.

14. As to the first contention Northern states that in Zenith's motion (at 6, fn.2), Zenith concedes that it received the original SRD due sent by Northern. Northern claims that on November 21, 2000, it sent Zenith a copy of the Settlement which showed Zenith owed more than \$50,000. This was confirmed by the fact that in discovery in the lawsuit filed by Northern in Kansas federal district court Zenith provided Northern with a copy of the Settlement from Zenith's files. Northern also claims that, during the deposition of Zenith employee Russell Brigs in that suit, Mr. Brigs admitted that he recalled seeing the Settlement.<sup>18</sup> Northern states that Zenith also admits in its motion (at 11, fn.4) that it received Northern's April 18, 2001 letter requesting Zenith to provide working interest percentages for the affected properties operated by Zenith.

15. Northern filed 16 attachments to its answer which Northern asserts demonstrate that Zenith received multiple notices of this proceeding. Among these attachments were, Attachment 12, a letter dated May 16, 2003, which informed Zenith of the Commission's May 8, 2003 hearing order, and the ALJ's May 13, 2003 prehearing scheduling order, Attachment 14, which shows Zenith as a party on the service list in the hearing so that it would have received a copy of every Northern filing in the hearing, in addition to notices or orders issued by the Commission.

16. Northern insists that it did not have adequate information as to the working interest ownerships in the three wells operated by Zenith. Northern maintains that the working interest percentages that a land service organization provided to it on the three wells in April 2003, were the then-current working interest percentages, not the

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<sup>17</sup> *Citing East Texas Electric Coop. Inc. v. Central and South West Services Inc.*, 94 FERC ¶ 61,218, *reh'g denied*, 95 FERC ¶ 61,066 (2001).

<sup>18</sup> *Citing Northern Attachment 16, Briggs Deposition at 37.*

percentages for the 1983-1988 refund period. Northern contends that Zenith had the relevant working interest data but, despite repeated requests from the Commission and Northern, Zenith chose not to provide the information as was Zenith's responsibility.<sup>19</sup>

17. Northern states that the reason two working interest owners with interest in the Zenith wells are listed on Exhibit No. 4 of the Settlement has absolutely nothing to do with the Zenith operated wells that are at issue here. Northern submits that the two individuals had working interests in entirely different wells unrelated to Zenith. Northern states that it did reimburse other working interest owners with 50 percent interest in one of the wells at issue here directly for gas Northern purchased from the well. However, Northern says it paid all of the *ad valorem* tax reimbursement for the three wells to Zenith, and Zenith ignored requests to provide information showing how the tax reimbursement Zenith received was distributed to the working interest owners as required. Further, Northern submits that the *de minimus* amount of refunds owed that Zenith identified as attributable to the royalty owners, \$846.22, does not change the fact that Zenith, despite its responsibility, failed to provide any information regarding working interest information on a timely basis in this proceeding.

18. Northern states that the Settlement provides if small producers listed on Exhibit 4 did not affirmatively opt out of the Settlement, they were deemed to have accepted the terms of the Settlement. Northern argues that since Zenith was not listed on Exhibit No. 4 of the Settlement its claim that since it did not opt-out it has no liability cannot have any merit

19. Northern states that, since Zenith did receive repeated notice of the proceedings, Zenith has failed to show good cause for its failure to timely participate in this proceeding. Zenith insists that Zenith's late participation would disrupt a proceeding that is now final and non-appealable and that Northern, other parties, and Commission staff expended significant time, effort, and expense to achieve a final resolution in this proceeding. Northern submits that this proceeding has placed substantial burdens on Northern and other parties, including Commission staff, over a long period of time. Northern objects that requiring parties to address again an issue that is now final would be highly prejudicial, unfair, and impose additional burdens on parties that have acted in good faith and in compliance with all of the Commission's rules and procedures. Northern states that Rule 214(d)(3)(ii) provides that "[e]xcept as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to

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<sup>19</sup> Citing *Colorado Interstate Gas Co.*, 88 FERC ¶ 61,162 at 61,546-47 (1999).

the late intervention.”<sup>20</sup> Northern asserts that Zenith does not propose to accept the existing record and, since Zenith is responsible for the current state of the record, there is no basis for Zenith to request rejection of the existing record.

20. In its September 1, 2005 reply, Zenith repeats many of its earlier arguments. In addition, Zenith adds that Northern does not dispute that Zenith had less than a one-quarter working interest ownership in the three properties at issue during the relevant period or that Northern knew or should have known that Zenith had no royalty interest in any of the three properties. Zenith contends that the takeoff runsheets that the land service organization provided to Northern show all of the historical working interest ownership information for the three properties. However, as discussed further below, Zenith admits receiving four letters from Northern relating to Kansas *ad valorem* taxes. These include: (1) a November 10, 1997 letter with a SRD and referring to the Commission’s order in response to *Public Service*;<sup>21</sup> (2) a May 17, 2000 letter with a statement of additional refunds due pursuant to an attached Commission order issued April 12, 2000;<sup>22</sup> (3) an April 18, 2001 letter with an updated SRD asking Zenith for working interest ownership information; and (4) a January 9, 2003 letter extending the terms of the Settlement to Zenith pursuant to the Commission’s January 2, 2003 Order requiring Northern to extend the terms of the Settlement to Zenith and Zenith to pay or make arrangements to pay the tax refund to Northern within 30 days. *Northern Natural Gas Co.*, 102 FERC ¶ 61,007 (2003).

21. In its September 30, 2005 answer, Northern argues that Zenith has provided no basis for the Commission to reopen its orders because, among other things: (1) there is uncontroverted evidence that Zenith received notices from Northern; (2) Zenith was an informed, knowledgeable, and experienced operator that knew its obligation to provide working interest information; and (3) Zenith lacks the “clean hands” required for equitable relief. Zenith’s October 14 answer reiterates its earlier contentions. Zenith admits that its receptionist signed for four of Northern’s letters to it, including Northern’s original November 1997 Statement of Refunds Due and Northern’s January 9, 2003 letter extending to Zenith the terms of the Settlement pursuant to the Commission’s January 2,

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<sup>20</sup> 18 C.F.R. § 385.214(d)(3)(ii) (2005).

<sup>21</sup> *Public Service Co. of Colorado*, 80 FERC ¶ 61, 264 (1997), *reh’g denied*, 82 FERC ¶ 61,058 (1998).

<sup>22</sup> *Public Service Co. of Colorado*, 91 FERC 61,025 (2000).

2003 Order. However, it asserts that none of those letters provided it notice of its right to participate in a Commission proceeding reviewing the Settlement or that a hearing had been established before an ALJ concerning its refund liability.

### Discussion

22. The Commission denies Zenith's motion to intervene and reopen the record underlying the order approving the Settlement and reopen the record and modify its order making final the Initial Decision in Docket No. RP98-39-029, insofar as it applies to Zenith. There were no briefs on exception to the April 7, 2004 Initial Decision filed. No requests for rehearing of the Commission's May 17, 2004 Notice of Finality were filed. Therefore the decision is final and non-appealable. Rule 716 of the Commission's regulations which permits reopening where "changes in conditions of fact or law" warrant such reopening, does not apply (and cannot apply) in a case in which a final non-appealable order has issued.<sup>23</sup> The courts have construed section 19 of the Natural Gas Act, 15 U.S.C. § 717r (2000), regarding rehearing and court review of Commission orders as conferring upon the Commission the authority to reconsider and correct its orders until the time for judicial review has expired.<sup>24</sup> Here, the Commission's final order issued on May 17, 2004, and the time for court review terminated 60 days later, namely, July 16, 2004, so Zenith's motion was filed well beyond that date. Further, as stated in a recent Commission order, "Litigation before the Commission cannot be allowed to drag on indefinitely. . . ."<sup>25</sup> In fact, Zenith never explained why it delayed until now in bringing this motion, when it admits that it received a July 14, 2004 letter from Northern advising it of the Commission's May 17, 2004 notice that the ALJ's April 4, 2004 Initial Decision had become final.<sup>26</sup> Thus, even assuming that Zenith had not received any notice of the Docket No. RP98-39-000 refund proceeding, we would not countenance Zenith's failure to promptly act when it received the July 14, 2004 letter.

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<sup>23</sup> *Old Dominion Electric Cooperative v. Public Service Electric and Gas Company*, 105 FERC ¶ 61,094 at P 15 (2003), *reh'g denied*, 108 FERC ¶ 61,055 (2004).

<sup>24</sup> *See Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1108 (D.C. Cir. 1989). *See also Valero Interstate Transmission Co. v. FERC*, 903 F.2d 364, 368 (5<sup>th</sup> Cir. 1990).

<sup>25</sup> *KeySpan-Ravenwood, LLC v. New York Independent System Operator, Inc.*, 112 FERC ¶ 61,153 at P 6 (2005).

<sup>26</sup> See exhibit 6 to the motion.

23. Assuming for the sake of argument that Rule 716 did apply here as argued by Zenith, Zenith's requested reopening of the records is not warranted by changes in conditions of fact or of law or by the public interest. The Settlement resolved difficult issues after lengthy proceedings and extensive negotiations. The December 27, 2000 order approving the Settlement<sup>27</sup> cites *Williams Gas Pipelines Central, Inc. (Williams)* regarding the refund obligation of the well operator. In *Williams* the Commission's followed its policy that a producer who is the operator of the well is responsible for only the refunds attributable to its own working interest, and other working interest owners are responsible for refunds related to their working interests. However, in *Williams*, the Commission also stated that the operator "must furnish the Commission and Williams with the names and addresses of the other working interest owners and the percentage of their working interest ownership."<sup>28</sup> Zenith acknowledges that it received Northern's April 18, 2001 request for that information.<sup>29</sup>

24. The Commission also requested the working interest information from Zenith. In a letter sent between October 5 and October 7, 1998, the Commission requested working interest ownership information from Zenith.<sup>30</sup> In an August 19, 1999 Commission letter to first sellers named by Northern in Docket No. RP98-39-000, including Zenith, the Commission asked the first sellers for information about the working interest owners and stated that, "if an operator fails to adequately respond to this data request, the Commission may hold the well operator liable for any portion of the refund obligation not reported as attributable to another working interest owner."<sup>31</sup> Zenith was listed as a producer with Kansas *ad valorem* tax refund obligation in Northern's May 1998, 1999, 2000, 2001, 2002, and 2003 refund reports in this proceeding. In an order issued January 2, 2003 in this proceeding, the Commission directed persons listed in the appendix of the order, including Zenith, to pay Kansas *ad valorem* tax refunds to Northern.<sup>32</sup> In an order issued May 8, 2003 in this proceeding, the Commission ordered that Zenith be included in a hearing to examine factual disputes for entities that owe refunds for Kansas *ad*

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<sup>27</sup> *Northern Natural Gas Co.*, 93 FERC ¶ 61,311 at 62,073 (2000)

<sup>28</sup> *Williams Gas Pipelines Central, Inc.*, 83 FERC ¶ 61,351 at 62,402 (1998).

<sup>29</sup> Zenith's motion at 11, fn. 4.

<sup>30</sup> Attachment 3 to Northern's August 12, 2005 answer.

<sup>31</sup> The letter cites *Colorado Interstate Gas Co.*, 88 FERC ¶ 61,162 (1999).

<sup>32</sup> *Northern Natural Gas Co.*, 102 FERC ¶ 61,007 (2003).

*valorem* tax reimbursements but have not taken any action to resolve those claims.<sup>33</sup> Zenith does not make any claim that it has furnished Northern or the Commission with the names and addresses of the other working interest in the subject wells and the percentage of their working interest despite the requests and Zenith's obligation to do so.

25. Zenith argues that Northern knew, or should have known, that the *ad valorem* taxes relating to Zenith's working interest ownership was less than the \$50,000 minimum threshold for liability set forth in the Settlement. Northern disputes this contention. In any case, Zenith had an affirmative obligation to provide Northern and the Commission with working interest ownership information and was warned by the Commission that, if it did not provide the information, it could be held liable for the refund obligations of the other working interest owners. Article II, Paragraph B of the Settlement provides that, small producers, with a refund liability of \$50,000 or less, listed on Exhibit 4 of the Settlement will have their liability discharged and be deemed to accept the terms of the Settlement unless they affirmatively opted-out. Zenith was listed on Exhibit 6 of the Settlement not Exhibit 4 and Zenith did not contest that fact or provide Northern or the Commission sufficient information to determine that Zenith should be listed on Exhibit 4. Therefore, Article II, paragraph B is not applicable to Zenith. Further, in its answer, Northern adequately explains that it did not collect refunds related to the wells operated by Zenith from other working interests in the wells. Zenith states that Northern had the royalty interest ownership information related to the wells operated by Zenith, and in its answer Northern admits that \$846.22 of the refund liability was attributable to royalty owners. However, this small amount is insufficient to justify reopening the record in this proceeding which dragged on for a very long time and where the decision is final and non-appealable.

26. Zenith's claim that it did not receive notice of the Settlement or the Commission proceedings from Northern does not withstand scrutiny. Indeed, Zenith does not make a claim that it did not receive notice of the Settlement or the Commission proceedings from the Commission. As indicated above, the Commission notified Zenith of its obligations as operator of the wells. Zenith has acknowledged receiving communication from Northern, dated November 10, 1997, regarding its refund obligation prior to the approval of the Settlement<sup>34</sup> as well as Northern's April 18, 2001 request for working interest ownership information. Northern has provided a copy of Northern's April 18, 2000 letter giving notice of a settlement conference and a portion of the mailing list which includes

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<sup>33</sup> *Northern Natural Gas Co.*, 103 FERC ¶ 61,152 at P 29 (2003).

<sup>34</sup> Zenith's motion at 6, fn. 2.

Zenith.<sup>35</sup> Northern has provided evidence that Zenith produced a copy of the Settlement from its own files and that Zenith employee Russell Briggs recalled seeing the Settlement.<sup>36</sup>

27. Moreover, Northern has included with its August 12, 2005 answer a copy of its January 9, 2003 letter to Zenith stating that the Commission in its January 2, 2003 Order required Northern to extend the terms of the Settlement to Zenith. The letter expressly stated, "This Settlement offer is made on condition that you pay, or make arrangements to pay, the 'Settlement Amount owed' to Northern by February 1, 2003. After that date, Northern will seek full recovery of the full amount of your . . . refund obligation consistent with the enclosed order." Northern attached a copy of the Commission's January 2, 2003 Order to the letter. Northern also included a copy of the return receipt signed by a Zenith employee on January 13, 2003.<sup>37</sup> In its September 1, 2005 answer to Northern's answer, Zenith admits that it received this letter from Northern. Thus, there can be no doubt that Zenith had actual notice of the opportunity the Commission gave it in 2003 to join the Settlement, and the Commission's directive to Northern to seek full recovery of the refund claim if Zenith failed to do so. Yet Zenith did nothing to resolve the refund claim.

28. Northern has also provided a copy of the list of participants, including Zenith, reflecting the service list Northern used to serve filings in the hearing proceedings the Commission established in May 2003 in Docket No. RP98-39-029. The address for Zenith is the same address used in the January 9, 2003 letter which Zenith did receive. While Zenith suggests that Northern could have telephoned it or sent a fax, Zenith does not allege that Northern violated any of the Commission's service requirements. The fact that Zenith participated in a different *ad valorem* refund proceeding is not relevant to this proceeding. Nevertheless, this fact can be viewed as an indication that Zenith was aware of the obligations of Kansas well operators regarding the furnishing of working interest ownership information, but for whatever reason, chose not to participate in this proceeding and furnish that information to the pipeline or the Commission.

29. The Commission concludes that Zenith has provided no basis for the Commission to take the extraordinary action of reopening the record in the Docket No. RP98-39-000 proceeding in order to modify the Settlement or otherwise revise the Commission's final

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<sup>35</sup> Attachment 6 to Northern's August 12, 2005 answer.

<sup>36</sup> See Attachments 8 and 16 to Northern's August 12, 2005 answer.

<sup>37</sup> Attachment 11 to Northern's August 12, 2005 answer.

determination of Zenith's refund obligation with respect to the Kansas *ad valorem* tax reimbursements it collected from Northern. As discussed above, well before the final resolution of the Docket No. RP98-39-000 proceeding, Zenith had actual notice of that proceeding and Northern's refund claim. Yet Zenith failed to seek intervention in that proceeding or take any other action to present its views to the Commission. When a company fails to participate in a Commission proceeding and then does not like the outcome, it cannot expect the Commission to modify the final order to the detriment of those who did participate.

The Commission orders:

Zenith's motion is denied as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.