ORAL ARGUMENT IS SCHEDULED FOR NOVEMBER 19, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1252

NORTHERN NATURAL GAS COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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July 29, 2010
FINAL BRIEF: October 4, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties and amici before this Court are identified in the Petitioner's brief.

B. Rulings Under Review

1. *Burlington Res. Oil & Gas Co., et al.*, 123 F.E.R.C. ¶ 61,151 (2008) ("Remand Order"), JA 1-3; and

2. *Burlington Res. Oil & Gas Co., et al.* 128 F.E.R.C. ¶ 61,151 (2009) ("Rehearing Order"), JA 4-15.

C. Related Cases

The Commission issued the orders under review in response to this Court's remand in *Burlington Res. Inc. v. FERC*, 513 F.3d 242 (D.C. Cir. 2008), which itself considered orders issued in response to an earlier remand in *Burlington Res. Oil & Gas Co. v. FERC*, 396 F.3d 405 (D.C. Cir. 2005). Counsel is not aware of any related case pending in this Court or any other court.

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

October 4, 2010

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Burlington Settlement or Settlement Agreement	Take-or-Pay Settlement Agreement between Southland Royalty Co. and Northern Natural Gas Co., dated Feb. 28, 1989, JA 51
Commission or FERC	Federal Energy Regulatory Commission
Northern	Northern Natural Gas Company
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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") complied with the Court's remand in *Burlington Res. Inc. v. FERC*, 513 F.3d 242 (D.C. Cir. 2008), when it determined that enforcement of a settlement agreement between Northern Natural Gas Co. ("Northern"), a natural gas pipeline company, and Burlington Resources Inc. ("Burlington"), a natural gas producer, made Northern responsible for the payment of *ad valorem* tax refund obligations arising from certain sales of natural gas by Burlington to Northern, and barred Northern from recouping those refunds from its customers.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this brief.

INTRODUCTION

The issue in this proceeding is who should be responsible for the consequences of a settlement agreement in which Northern agreed to assume Burlington's obligation to refund *ad valorem* tax reimbursement charges assessed by Burlington in connection with natural gas sales between 1983 and 1988. The charges were assessed on sales by Burlington under take-or-pay contracts with Northern, which then passed the charges through to its own customers. Earlier litigation established that (1) natural gas producers, such as Burlington, must refund the *ad valorem* tax reimbursements paid by their customers to the extent that such reimbursements caused the prices they received to exceed the maximum lawful prices established by the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301, *et seq*. (1988) (amended effective 1993, as part of Congress's repeal of the Natural Gas Policy Act's price ceilings)), and (2) pipelines must pass through those refunds to their own customers. *See, e.g., Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1492-93 (D.C. Cir. 1996) (discussing the recoverability of *ad valorem* tax obligations under the Natural Gas Policy Act).

Burlington refunded the tax reimbursements under protest to Northern,

which then passed the refunds through to its customers. Burlington argued that a prior settlement regarding the take-or-pay contracts had shifted responsibility for paying any *ad valorem* tax refunds to Northern. The Commission ruled that the Natural Gas Policy Act barred the enforcement of any such agreement. The Commission reasoned that, if Northern were required to make the refunds, Burlington would effectively be permitted to retain charges it had collected in excess of the maximum lawful prices established by the Act.

In *Burlington Res. Oil & Gas Co. v. FERC*, 396 F.3d 405 (D.C. 2005) ("*Burlington I*"), this Court remanded the Commission's orders for a more adequate explanation of its refusal to enforce the settlement agreement, particularly in light of the Commission's enforcement of a similar settlement agreement regarding *ad valorem* tax refunds between Northern and a group of gas producers. On remand, the Commission reaffirmed its findings and provided additional explanation regarding its refusal to enforce the terms of a release and indemnity provision in the settlement agreement between Burlington and Northern.

The Court rejected the Commission's rationale in *Burlington Res. Inc. v. FERC*, 513 F.3d 242 (D.C. Cir. 2008) ("*Burlington II*"). The Court found that the *ad valorem* tax liabilities plainly fell within the terms of the parties' release and indemnity agreement, and that the Natural Gas Policy Act did not prevent purchasers, such as Northern, from relinquishing their right to refunds, in exchange

for other valuable consideration. *Id*. at 246. The Court further explained that the settlement was reached in good faith "and with no apparent detriments to third parties." *Id*. at 249. The Court therefore vacated the Commission's orders, "and remanded the case to the Commission for it to proceed with the adjudication in accordance with this opinion." *Id*. at 251.

In the orders under review, the Commission enforced the parties' settlement as interpreted by the Court. The Commission (1) directed Northern to repay to Burlington the *ad valorem* tax refunds that Burlington had paid under protest, and (2) held that Northern may not seek to recoup those refunds from its customers through a rate increase. *Burlington Res. Oil & Gas Co., et al*., 123 F.E.R.C. ¶ 61,151 (May 15, 2008) ("Remand Order") (R. 1), JA 1, *reh'g denied*, 128 F.E.R.C. ¶ 61,151 (Aug. 11, 2009) ("Rehearing Order") (R. 5), JA 4.[1] It is only this latter ruling that Northern challenges in this appeal.

[1] "R" refers to the items numbered in the certified index to the record. Citations to "Br." refer to Petitioner's opening brief. "P" refers to the internal paragraph number within a FERC order, and "JA" refers to the joint appendix.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Kansas *Ad Valorem* Tax

Title I of the Natural Gas Policy Act, enacted effective December 1, 1978, imposed maximum lawful prices on "first sales"[2] of natural gas production. 15 U.S.C. § 3431.[3] Section 110 of the Act, however, permitted producers to recover from their customers charges in excess of the maximum limits "to the extent necessary to recover . . . State severance taxes attributable to the production of natural gas." 15 U.S.C. § 3320(a) (1988). Such taxes were defined as "any severance, production or similar tax, fee or other levy imposed on the production of natural gas" by a state or Indian tribe. *Id*. § 3320(c).

The Commission first interpreted this provision to allow the recoupment of an *ad valorem* tax assessed by Kansas upon natural gas producers, though not

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[2] Section 2(21)(A) of the Natural Gas Policy Act defines the term "first sale." 15 U.S.C. § 3301(21). In general, all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or local distribution company. *See Amendments to Blanket Sales Certificates*, Order No. 644, FERC Stats. & Regs., Regulations Preambles ¶ 31,153, at P 14 (2003). As the Court recognized in *Burlington II*, "first seller" is a technical term, but for present purposes here is "equivalent to gas producers." 513 F.3d at 245.

[3] On January 1, 1993, the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157, came into effect, eliminating the price limitations imposed by Title I of the Natural Gas Policy Act.

certain other state taxes. *See Sun Exploration and Production, et al.*, 36 F.E.R.C. ¶ 61,093 (1986); *Northern Natural Gas Co.,* 38 F.E.R.C. ¶ 61,062 (1987). In a 1988 decision, the Court ordered the Commission to justify this differential treatment. *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769, 770, 774-75 (D.C. Cir. 1988).

On remand, the Commission determined that the Kansas *ad valorem* tax was not the equivalent of a severance tax attributable to production, and therefore, producers already charging the maximum price could not recover the tax from their customers. The Commission ordered producers to refund to pipelines all overcharges made after June 28, 1988 (the date of the Court's *Colorado Interstate* opinion), and for the pipelines to flow those refunds through to their customers. *Colorado Interstate Gas Co.*, 65 F.E.R.C. ¶ 61,292, at 62,373-74 (1993), *reh'g denied*, 67 F.E.R.C. ¶ 61,209 (1994). On appeal, this Court upheld the reasonableness of the Commission's determination, but held that the refunds accrued as of October 1983, when the reimbursement was first challenged. *Public Serv. Co. of Colo.*, 91 F.3d at 1488-91.

On September 10, 1997, the Commission ordered producers to refund any amounts collected in excess of the Natural Gas Policy Act's ceiling prices as a result of reimbursement of Kansas *ad valorem* taxes. *Public Serv. Co. of Colo.*, 80 F.E.R.C. ¶ 61,264, at 61,955 (1997). Pipelines were required to serve producers

with a statement of refunds due for the period October 4, 1983 through June 28, 1988, and, within 30 days of receipt of refunds from the producers, to flow through the refunds in lump-sum cash payments to those pipeline customers who had actually been overcharged. *Id.*

B. The Take-Or-Pay Settlement Agreements

1. The Omnibus Settlement

In response to the Commission's order, Northern sent refund statements to 790 producers that had included the Kansas *ad valorem* tax recoupment in their sales to Northern. Rehearing Order at P 3, JA 4. Many producers disputed the amounts of the claimed refunds. *Id*., JA 4-5. In an effort to resolve these disputes, the Commission facilitated settlement discussions among the producers, the pipeline, downstream customers, and state public service commissions. *Id*.

Those discussions led to the filing of an Omnibus Settlement, which the Commission approved in 2000. *Northern Natural Gas Co*., 93 F.E.R.C. ¶ 61,311, at 62,075 (2000). Under the agreement, settling producers paid only a portion of their refund liabilities, and the pipeline waived any claim to further refunds. The settlements did not bind any producer, state regulatory commission, or pipeline customer who opted out. *Id*. at 62,074.

2. The Burlington Settlement

Burlington opted out of the Omnibus Settlement. The producer asserted that

a release and indemnification clause contained in a 1989 settlement with Northern relieved it of any obligation to make the *ad valorem* tax refunds. *See* Burlington's Request for Resolution, filed May 12, 1999, (R. 204) at 5, JA 38. That earlier settlement had primarily focused on certain "take-or-pay" contracts entered into by Northern and Burlington's predecessor, Southland Royalty Company.[4] Under such contracts, Northern agreed to either take or pay for a specified quantity of gas from Burlington, in order to maintain inventories for the pipeline's sales customers. *See, e.g.*, *Baltimore Gas & Elec. Co. v. FERC*, 26 F.3d 1129, 1132 (D.C. Cir. 1994) (describing take-or-pay contracts). In the 1980s, as the demand for natural gas fell, pipelines reduced their takes from producers, thus incurring huge liabilities under the take-or-pay contracts. *See Associated Gas Distribs. v. FERC*, 893 F.2d 349, 353 (D.C. Cir. 1989) (discussing general background to take-or-pay controversy). After much litigation, many pipelines and producers entered into settlements to resolve their take-or-pay problems.

Burlington entered into such a settlement with Northern regarding, *inter alia*, the contracts upon which Burlington had collected the Kansas *ad valorem* tax reimbursements at issue here. The agreement contained a broad release and indemnity provision in which the parties agreed to "release and discharge" each

[4] For the sake of clarity, the brief will use the term "Burlington" to refer to both Burlington and Southland.

other from "any and all liabilities [and] claims" in order to "resolve[] all disputes between" them with respect to the relevant contracts:

> Northern and [Burlington] each hereby fully, completely, and finally releases and discharges the other . . . and their respective successors and assigns from any and all liabilities, claims, and causes of action, whether at law or in equity, and whether now known and asserted or hereafter discovered, arising out of, or in conjunction with, or relating to [the] said Contracts . . . ."

Take-or-Pay Settlement Agreement, dated Feb. 28, 1989 ("Burlington Settlement" or "Settlement Agreement"), at ¶ 5, attached as Ex. A to Burlington's Request for Resolution (R. 204), JA 53.

According to Burlington, this provision released it from any responsibility with respect to the *ad valorem* tax refunds and required "Northern . . . to indemnify Burlington . . . with respect to any claims, including the *ad valorem* tax claims, pertaining to the Kansas Contracts." Request for Resolution at 5, JA 38. Thus, "[t]o the extent that Northern's customers are entitled to refunds of amounts paid by Northern in excess of the maximum lawful price, Northern has assumed that responsibility." *Id*. at 9, JA 42. *See also Burlington Res. Oil & Gas Co*., 103 F.E.R.C. ¶ 61,005, at P 26 (2003) ("Burlington argues that under the settlement, the pipeline purchaser, not Burlington, must pay the [*ad valorem*] refund") (R. 439), JA 96.

C. *Burlington I*

The Commission found that, even if the Burlington Settlement "could be

read" as imposing the *ad valorem* tax liability upon Northern, such an agreement could not be enforced. *Burlington Res.*, 103 F.E.R.C. ¶ 61,005, at P 25 ("Burlington cannot prevail on its request to be relieved of the *ad valorem* refund liability."), JA 96. Because the Natural Gas Policy Act forbids a producer from collecting more than the maximum price for a first sale of gas, the Commission reasoned that it also barred a settlement agreement that had the effect of permitting the producer to retain the excess over the maximum price ceiling. *Id*. at PP 26-30, JA 96-97. The Commission therefore ordered Burlington to refund the excess revenues that it had collected. *Id*. at Ordering Para. (C), JA 97.

On rehearing, the Commission rejected the assertion that this interpretation of the Natural Gas Policy Act was inconsistent with the Commission's approval of the Omnibus Settlement, which had permitted some producers to retain *ad valorem* tax reimbursements. The Commission stated that it possessed "a degree of prosecutorial discretion in determining how to expend its resources in the enforcement of [the] ceiling prices," and the circumstances of the Omnibus Settlement differed from those of the Burlington Settlement. *Burlington Res. Oil & Gas Co.*, 104 F.E.R.C. ¶ 61,317, at P 26 (2003), JA 102. Burlington subsequently paid the refund claims under protest to Northern (which flowed the refunds through to its customers), and sought review in this Court. Remand Order at P 4, JA 1.

On appeal, Burlington argued that the language of the release and indemnity clause in the Burlington Settlement encompassed the *ad valorem* tax refund claims, and that the Commission's refusal to enforce that language was "inconsistent with the Commission['s] approval of the Omnibus Settlement Agreements." *Burlington I*, 396 F.3d at 410. The Court found that the language of the release provision did "not reasonably permit exclusion of any claim that relates to payments under the [take-or-pay] contracts," including those pertaining to the *ad valorem* tax refunds. *Id*. at 411. The Court further held that the Commission had "fail[ed] to explain why, in light of the substantial consideration paid by Burlington, in part for release and indemnification by Northern . . . for all claims arising from the take-or-pay contracts, it refused to exercise its prosecutorial discretion to give effect to the release and indemnity clause[]." *Id*. Accordingly, the Court remanded the orders for further explanation. *Id.* at 412.

D. *Burlington II*

On remand, the Commission identified a number of significant differences between the Omnibus Settlement and the Burlington Settlement, and explained that "requiring Northern . . . to make refunds of *ad valorem* tax reimbursements that would otherwise be owed by Burlington, while Burlington is allowed to retain those amounts, is the equivalent of requiring the purchasers to pay the first seller in excess of the applicable maximum lawful price." *Burlington Res. Oil & Gas*, 112

F.E.R.C. ¶ 61,053, at P 47 (2005), JA 111. The Commission therefore reaffirmed its decision "to require Burlington to refund to [Northern] the *ad valorem* tax reimbursements it collected from [Northern] and to not enforce the release and indemnity clause in Burlington's take-or-pay 1989 . . . settlement agreement[]." *Id.* at P 11, JA 105. Burlington sought rehearing, which the Commission denied, and subsequently appealed to this Court. *Burlington Res. Oil & Gas*, 113 F.E.R.C. ¶ 61,256 (2005), JA 185.

Before addressing the Commission's refusal to enforce the release and indemnity provision, the Court first "consider[ed] the actual meaning" of that clause in response to Northern's request that "the Commission, with the benefit of extrinsic evidence, be allowed to construe its settlement language first." *Burlington II*, 513 F.3d at 246. The Court explained that it had examined the provision at issue and ruled that, "[w]hether or not the *ad valorem* liabilities were within the main purpose of the settlement[], they were within [its] language." *Id*. This construction was the "law of the case" and not subject to challenge. *Id*.

The Court went on to reject the Commission's rationale for deeming the Burlington Settlement to be unlawful, while at the same time approving the ostensibly similar Omnibus Settlement. The Court found that the Commission's invocation of its prosecutorial discretion was inappropriate, given that approval of a settlement reflects an exercise of "authority beyond that of a prosecutor and more

akin to that of a court." *Id*. at 247. The Court further held that the Natural Gas Policy Act did "not prevent purchasers from . . . exchanging [their] accrued [refund] rights for other valuable consideration" during "conditions of [legal] uncertainty" regarding the nature of those accrued rights. *Id*. at 249. This is particularly true where "Burlington and the pipelines appear to have negotiated in good faith and at arm's length . . . with no apparent detriments to third parties." *Id*. at 250.

Accordingly, the Court vacated the orders under review and "remand[ed] the case to the Commission for it to proceed with the adjudication in accordance with this opinion." *Id*. at 251.

II. THE ORDERS ON REVIEW

A. The Remand Order

In its order on remand, as directed by the Court, the Commission enforced the Burlington Settlement. The Commission explained that, "[a]s interpreted by the Court, under the release and indemnity clauses, Burlington is released from any obligation to make refunds to the pipelines,[5] and the pipelines must pay their customers any *ad valorem* tax refunds which would otherwise be due from

[5] The remand proceedings (like *Burlington I* and *Burlington II*) involved Burlington's take-or-pay settlements with both Northern and Panhandle Eastern Pipe Line Company. Panhandle has not petitioned for review of the Commission's interpretation of the effect of its settlement with Burlington, which is substantially similar to that between Burlington and Northern.

Burlington." Remand Order at P 12, JA 3. As a result, "the two pipelines may not seek to recover from their customers the amounts of those refunds." *Id*. at P 11, JA 3. Since the pipelines had "already flowed through the amount of the refunds to their customers, and thus have complied with the Settlements' requirement that they pay the amount of the refunds to their customers . . . the only further action required . . . is for the two pipelines to return the amounts of the refunds to Burlington, with interest." *Id*. at P 12, JA 3.

B. The Rehearing Order

Northern sought rehearing with respect to the Commission's ruling that it could not recoup the *ad valorem* tax payments from its customers, which the Commission denied by order dated August 11, 2009. In the Rehearing Order, the Commission explained that the issue throughout this lengthy proceeding has been "whether the Burlington Settlements should be enforced." Rehearing Order at P 47, JA 11. If they were, "the Pipelines would be responsible for the *ad valorem* tax refund because, as the court stated, enforcing this would not have any detrimental effect upon third parties, namely the pipeline's customers." *Id*.

The challenged orders simply carried out the Court's directive by enforcing the Burlington Settlement. *Id*. Pursuant to that agreement, Northern "must allow [its] customers to retain the *ad valorem* tax refunds [it] previously flowed through to them, because [Northern] bound [itself] in the Burlington settlement[] to pay

those refunds on behalf of Burlington." *Id*. at P 19, JA 7.

This appeal followed.

SUMMARY OF ARGUMENT

Under the terms of the Burlington Settlement, Northern assumed Burlington's liability to make *ad valorem* tax refunds. The only issue is whether the Commission properly found that the Settlement Agreement barred Northern from attempting to shift that liability to its customers. The Commission determined that this limitation was required after a close examination of the Court's *Burlington* opinions.

If the Settlement Agreement were interpreted as permitting, or providing a basis for, Northern to recoup the *ad valorem* tax refunds from its customers, a number of the Court's observations regarding that settlement would be invalidated. For instance, the Court found that Burlington Settlement did not have any "adverse effects" upon, and had "no apparent detriments to," third parties. *Burlington II*, 513 F.3d at 249-50. But the Burlington Settlement would have an adverse impact upon Northern's customers – third parties to the Settlement Agreement – if it could serve as a basis for Northern to take back their *ad valorem* tax refunds.

The Court similarly found that the Burlington Settlement was a "private agreement" that "did not involve customers," *Burlington I*, 396 F.3d at 409, or implicate the Commission's "responsibility to protect customers." *Burlington II*,

513 F.3d at 249. But if Northern were able to use the Settlement Agreement as a basis to recoup the *ad valorem* tax refunds, then the agreement would have effectively waived the rights of the pipeline's customers and insulated Northern from any responsibility for the *ad valorem* taxes regardless of the outcome of the protracted litigation over the Settlement Agreement's meaning and effect.

The Commission's interpretation of the Settlement Agreement is also consistent with that advanced by Burlington before the Court (successfully) and throughout these proceedings. Burlington has repeatedly asserted that the release and indemnity clause shifted the *ad valorem* tax refund responsibility to Northern and did not "reduce by a single cent the amount of refund due to consumers." Rehearing Order at P 35 (quoting Initial Brief of Petitioner in *Burlington I*), JA 10. The Commission's limitation on Northern's ability to seek recoupment of the *ad valorem* tax refunds effectuates this intent.

Northern's primary response to the challenged orders is to state that its proposed rate filing under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, was not before the Court in *Burlington II*. While that is true, Northern overlooks the import of the Court's directive to enforce the Burlington Settlement. In the Settlement Agreement, Northern agreed to stand in the shoes of Burlington with respect to the *ad valorem* tax refunds. In the challenged orders, the Commission

acted to carry out the Court's directive to enforce the Burlington Settlement, by ensuring that Northern – not its customers – lives up to its end of the deal.

ARGUMENT

I. STANDARD OF REVIEW

In proceedings on remand, the Commission's determinations are reviewed to ensure that they are responsive to the Court's mandate. *See, e.g., Process Gas Consumers Group v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). Where the Court has ruled on an issue, an agency is bound by that ruling. *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003). While it is for the Court, of course, to construe its own mandate, *see FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940), "the court's opinion may be consulted to ascertain the intent of the mandate." *City of Cleveland v. FPC*, 561 F.2d 344, 347 n.25 (D.C. Cir. 1977) (citing cases).

In addition to the requirement that it comply with the Court's mandate in *Burlington II*, the Commission's determination that Northern may not recoup the *ad valorem* refunds from its customers is subject to the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under this deferential standard, the Commission's decisions must be upheld if they are reasoned and responsive. *East Tex. Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000). So long as the Court can "discern a reasoned path" to the

decision, the challenged orders will be upheld. *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008).

II. THE COMMISSION CORRECTLY FOUND THAT ENFORCEMENT OF THE BURLINGTON SETTLEMENT REQUIRED NORTHERN TO BEAR THE *AD VALOREM* REFUND OBLIGATION.

The task before the Commission on remand was to enforce the Burlington Settlement, as interpreted by the Court in *Burlington I* and *Burlington II*. The Commission found that, as interpreted by the Court, the Settlement shifted Burlington's *ad valorem* refund liability to Northern, and did so in a manner that did not impose any adverse consequences upon third parties, particularly the pipeline's customers. *See, e.g.*, Rehearing Order at P 24, JA 8.

In order to effectuate the bargain struck by the parties, the Commission ordered Northern to assume Burlington's obligation, which "was to pay the refunds to the pipelines for pass through to their customers, whose rates reflected the excess over the [maximum lawful price]." *Id*. at P 60, JA 13. This bargain would be significantly altered if Northern were permitted to shift this refund obligation to its customers. Accordingly, the Commission concluded that "the customer could not be forced to return the *ad valorem* tax refund it had received from Northern when Northern flowed through Burlington's payment." *Id*. at P 55, JA 13. That conclusion was consistent with the Court's construction of the Settlement Agreement and should be upheld.

A. The Burlington Settlement Shifted The *Ad Valorem* Tax Refund Obligation To Northern.

A fundamental issue throughout these proceedings has been the meaning and effect of the release and indemnity provision in the Burlington Settlement. In Paragraph 5 of that agreement, the parties agreed to release each other "from any and all liabilities, claims, and causes of action . . . arising out of, or in connection with, or relating to" the identified take-or-pay contracts. Burlington Settlement, ¶ 5, JA 53. The Commission held that this language, "[a]s interpreted by the Court," released Burlington "from any obligation to make refunds to" Northern, and placed upon the pipeline the obligation to "pay [its] customers any *ad valorem* tax refunds that would otherwise be due from Burlington." Remand Order at P 12, JA 6.

Northern does not dispute this interpretation. It acknowledges that "*Burlington II* found that the Burlington Settlements shifted Burlington's refund responsibility to the pipelines." Br. at 30. *See also id*. at 23-24 ("the Burlington Settlements shifted the refund obligation to the pipelines"), *id*. at 32 (acknowledging that "the *ad valorem* refund liability has been shifted to Northern pursuant to the Burlington Settlement"). The only dispute now is whether Northern may attempt to shift that liability to its customers. The Commission properly found that this possibility was foreclosed by the Court's opinions in *Burlington I* and *II*.

B. As Interpreted By The Court, The Burlington Settlement Does Not Impact Third Parties.

In reaching this conclusion, the Commission first noted that the Court's directive to enforce the Burlington Settlement was premised on the understanding that the agreement had no adverse impact on third parties. Rehearing Order at P 20, JA 7-8. Specifically, the Court found that "Burlington and the pipelines appear to have negotiated in good faith and at arm's length, with every incentive to enforce their legal rights and with *no apparent detriments to third parties*." *Burlington II*, 513 F.3d at 250 (emphasis added). The Burlington Settlement would result in an obvious detriment to Northern's customers – *i.e.*, "third parties" to the Settlement Agreement – if it were interpreted to permit, or serve as a basis for, Northern to recover from them the *ad valorem* tax refunds. Such a result "would deprive the customers of all, or at least some, of the *ad valorem* tax refunds attributable to Burlington." Rehearing Order at P 20, JA 8.

Second, in *Burlington II*, the Court rejected the Commission's reliance upon *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544 (D.C. Cir. 1993), which upheld the Commission's refusal to permit a pipeline to recoup a lump sum settlement payment from its customers unless the agreement identified what portion of the payment was attributable to costs that legally could be passed on to customers. *Id.* at 1551-53. The Commission had cited *Williams* as support for its holding that the Burlington Settlement could not be treated as satisfying Burlington's refund

obligation because it did not identify what consideration was provided for that purpose. *See Burlington Res.*, 113 F.E.R.C. at PP 52-54, JA 192-93; Rehearing Order at P 21 n.29, JA 8. The Court explained that *Williams* was inapplicable here since it "involved FERC's responsibility to protect customers, non-parties to the settlements, from the adverse effects of transactions between pipelines and producers." *Burlington II*, 513 F.3d at 249. No such concerns were implicated by a dispute regarding the "enforceability of the[] agreed-upon settlement" between Northern and Burlington. *Id*. at 250.

The Court's observation would be invalidated if the Burlington Settlement were read as permitting, or providing a basis for, Northern to recoup the *ad valorem* tax refunds from its customers. Enforcing such an agreement "would very definitely involve the Commission's 'responsibility to protect customers,' who were not parties to the Burlington Settlements, 'from the adverse effects of transactions between pipelines and producers.'" Rehearing Order at P 21 (*quoting Burlington II*, 513 F.3d 249-50), JA 8.

Third, the Court observed that the Burlington Settlement "was a private agreement" between Northern and Burlington that "did not involve customers." *Burlington I*, 396 F.3d at 409. The interpretation now advanced by Northern – *i.e.*, that the agreement can serve as a basis for requiring its customers to effectively waive their right to the *ad valorem* tax refunds – transforms the settlement into one

that most certainly "involves customers." Under such an interpretation, the "Burlington Settlement[] would deprive [Northern's] customers of their refunds." Rehearing Order at P 22, JA 8.

Fourth, the Court's decision regarding the validity of the Burlington Settlement was premised on the fact that the agreement reflected a retrospective "settlement[] negotiated under conditions of uncertainty," rather than an agreement permitting Burlington to keep amounts in excess of the maximum lawful prices set by the Natural Gas Policy Act. *Burlington II*, 513 F.3d at 249. In order to resolve this uncertainty, Northern agreed to exchange its "accrued right" to *ad valorem* tax refunds for "other valuable consideration" from Burlington. *Id*. But if Northern were now permitted to recoup the *ad valorem* tax refunds from its customers, then that aspect of the pipeline's consideration would become illusory. Indeed, such an arrangement – where the parties agree that one will "give up" a right to a refund with the understanding that it will ultimately be recouped from third parties – raises the specter of a "collusive settlement" with readily "apparent detriments to third parties." *Burlington II*, 513 F.3d at 250. *See also* Rehearing Order at P 22 (noting that, "to the extent the Burlington Settlements would deprive the Pipelines' customers of their refunds, those settlements would be contested by customers"), JA 8.

Finally, the Court noted that Northern contested the Settlement Agreement's

"meaning and legality" and "with the advantage of hindsight . . . now wants out." *Burlington II*, 513 F.3d at 250. The parties' competing interpretations thus were before the Court. *See* Rehearing Order at PP 42-44 (discussing interpretations raised by Burlington and Northern before the Court in *Burlington II*), JA 11. After considering those interpretations, the Court ordered that the release and indemnity provision be enforced because, *inter alia*, it would not have any adverse affect upon third parties. *Burlington II*, 513 F.3d at 250. "That is because the settlements, as Burlington repeatedly urged and the court agreed, simply shifted Burlington's refund obligation to the Pipelines." Rehearing Order at P 47, JA 11. To now permit Northern to recover the refund payments from pipeline customers "would be contrary to the Court's holding that enforcement of the Burlington settlements would not adversely affect third parties." *Id*. at P 23, JA 8.

Northern's primary response to the Commission's close analysis of the *Burlington II* opinion is to note that the pipeline's recoupment of refunds from pipeline customers was not before the Court. *See, e.g.*, Br. at 22 ("recoupment of refunds flowed through to its customers, like other pipeline rate issues, arises under [the rate filing provisions of] Section 4 of the [Natural Gas Act]"). While certainly true, that does not change the fact that the issue before the Court was whether the Burlington Settlement should be enforced. If it were to be enforced, then Northern alone would be responsible for the *ad valorem* tax refund because the Court based

its decision, at least in part, on the understanding that enforcement of the parties' bargain would not have an adverse impact upon third parties. *See* Rehearing Order at P 47, JA 11. The Court directed the Commission to enforce the Settlement Agreement in accordance with the *Burlington II* opinion, and that is precisely what the Commission has done.

C. Precluding Northern From Recovering The *Ad Valorem* Tax Refunds From Its Customers Enforces The Refund Obligation That The Pipeline Assumed In The Burlington Settlement.

Northern contends that the Commission acted unlawfully when it refused to permit Northern to seek recoupment of the *ad valorem* tax refunds from its customers. *See, e.g.*, Br. at 24, 27-36. But in doing so, the Commission is simply requiring Northern to honor the contractual undertaking it voluntarily assumed in the Burlington Settlement – a settlement the Court directed the Commission to enforce. *See, e.g.*, Rehearing Order at P 47 ("[t]he court held that the Burlington Settlements must be enforced, and that is what the [challenged orders] did"), JA 11.

In releasing and indemnifying Burlington for all claims relating to the contracts addressed in the Settlement Agreement, Northern agreed to stand in Burlington's shoes with respect to the *ad valorem* tax refunds. *See* Br. at 32 (acknowledging that "the *ad valorem* refund liability has been shifted to Northern pursuant to the Burlington Settlement"). It was Burlington's responsibility to pay

the refunds to the pipeline for subsequent pass through to the pipeline's customers. Burlington has no right to recover the costs associated with the refunds for amounts collected in excess of the maximum lawful prices established by the National Gas Policy Act. Rehearing Order at PP 60, 65, JA 13-14, 15.[6] Nor does Northern, as the successor-by-contract to Burlington's obligations.

In refusing to permit Northern to seek recoupment of these sums from its customers, the Commission simply ensured that the refund obligation stayed where it had been placed by the Burlington Settlement. Such a result follows from the Court's directive in *Burlington II* to enforce the terms of the parties' bargain.

III. NORTHERN'S ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.

Northern contends that, in refusing to allow it to recoup the *ad valorem* refund payments from its customers, the Commission: (1) adopted a novel interpretation of the Burlington Settlement (Br. at 30-33); (2) improperly ignored Burlington's purported "defenses" to liability (*id*. at 37-44); and (3) shirked its obligations under the Natural Gas Act (*id*.). None of these contentions supports the pipeline's effort to shift its contractual refund obligation to its customers.

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[6] *See also Public Serv. Co. of Colo*., 91 F.3d at 1492 ("Producers are liable to refund all Kansas *ad valorem* taxes"); *Burlington II*, 513 F.3d at 248 ("It is common ground that, by imposing a price ceiling on first sales of natural gas, the [Natural Gas Policy Act] in a general sense invalidated any private agreement to pay more than the maximum lawful price.").

A. The Challenged Orders Effectuate Burlington's Interpretation Of The Settlement Agreement.

Northern contends that, in precluding the pipeline from shifting the *ad valorem* tax refund liability to its customers, the Commission overreached and adopted an interpretation of the Settlement Agreement that neither party advanced. Br. at 30-33. Pointing to two sentences in Burlington's brief to this Court in *Burlington II*, Northern claims that Burlington "agrees" that the Settlement Agreement "'do[es] not require' the pipelines to pay the *ad valorem* refund." *Id*. at 23. *See also id*. at 31-37.

But the snippet relied upon by Northern is taken out of context and contradicted by all other documents submitted by Burlington in these proceedings. Rehearing Order at P 28, JA 9. Burlington has consistently asserted that, under the Settlement Agreement, Northern assumed responsibility for all *ad valorem* tax refunds, and did so in a manner that does not impact – "by a single cent" – the rights of the pipeline's customers to those refunds:

- "Northern is contractually obligated to pay any and all . . . claims with respect to any *ad valorem* tax issues pursuant to the Settlement." Request for Resolution at 5, JA 38. "*To the extent that Northern's customers are entitled to refunds of the amount paid by Northern in excess of the maximum lawful price, Northern has assumed that responsibility*." *Id*. at 9 (emphasis added), JA 42. *See also* Rehearing Order at PP 29-31, JA 9.
- "Burlington does not claim that the *ad valorem* tax amounts should not be reimbursed to the ultimate consumers . . . . *To the extent that Northern's customers are entitled to refunds of amounts paid by*

Northern in excess of the maximum lawful price, Northern has assumed that responsibility in return for valuable consideration under the Settlement." Request for Rehearing (R. 400) at 16 (emphasis added), JA 89. *See also* Rehearing Order at PP 32-34, JA 9-10.

- "*[T]he Burlington 'Settlement does not reduce by a single cent the amount of refunds due to consumers*. Under the settlement, the *ad valorem* tax refund obligation is simply shifted to the Pipelines in return for valuable consideration.'" Rehearing Order at P 35 (quoting Initial Brief of Petitioner in *Burlington I* at 16) (emphasis added), JA 10.

- "*[T]he Burlington Settlements do not deprive consumers of the right to refunds of any payments they made in excess of [Natural Gas Policy Act] ceiling prices*. The Settlements simply shift Burlington's refund obligation to the pipelines." Request for Rehearing (R. 571) at 56 (emphasis added), JA 175. *See also* Rehearing Order at P 39, JA 10.

- "*[T]he Burlington Settlements do not deprive consumers of the right to refunds of any payments they made in excess of [Natural Gas Policy Act] ceiling prices*. The Settlements simply shift Burlington's obligation to the Pipelines. In contrast, the Omnibus Settlements reduce the refunds payable to the Pipeline's customers." Initial Brief of Petitioner in *Burlington II* at 36 (emphasis added). *See also* Rehearing Order at PP 42-43, JA 11.[7]

Burlington's contention in the passage relied upon by Northern was simply that the Commission could exercise "prosecutorial discretion" and not require Northern to make the refunds to its customers. *See* Rehearing Order at P 40 (explaining Burlington's contention), JA 10. But as the Court explained in *Burlington II*, the Commission does not enjoy "prosecutorial discretion" when

[7] *See also Burlington Res.*, 112 F.E.R.C. at P 49 (noting that "accepting Burlington's position would require the Commission to order the pipelines to pay the refunds"), JA 111.

enforcing settlements. 513 F.3d at 247.

The Commission's discretion is particularly limited in this case where the Court has ordered that: (1) "[p]roducers are liable to refund all Kansas *ad valorem* taxes," *Public Serv. Co. of Colo*., 91 F.3d at 1492; (2) those refunds should be directed to pipeline customers, *id*.; (3) the Settlement Agreement shifted Burlington's liability to Northern, *Burlington II*, 513 F.3d at 246; and (4) the Commission must enforce that agreement, *id*. at 249-50. Even if it were writing upon a blank slate, the Commission has made clear that it would order Northern to make the refund payments to its customers. Rehearing Order at P 66 ("had the Commission found for Burlington, as it must do under *Burlington II*, the Commission would have then ordered the pipelines to pay the *ad valorem* refund to their customers"), JA 15.

B. The Commission Did Not Improperly Ignore Northern's "Defenses."

Northern further claims that the Commission arbitrarily ignored the pipeline's purported defenses to liability, and abdicated its rate review responsibilities under the Natural Gas Act. Br. at 37. Northern is wrong.

Initially, Northern has not identified any "defense" that would discharge its acknowledged liability under the Settlement Agreement. Unlike the cases cited by Northern (Br. at 33) where pipeline customers had expressly waived their right to

ad valorem tax refunds,[8] Northern does not point to any agreement in which its customers agreed to waive the pipeline's liability under the Burlington Settlement. And the Commission has refused "to stand in the customer's shoes and agree to waive Northern's obligations under the settlement." Rehearing Order at P 55, JA 13.

Northern's "defense" is simply the contention that its liability should be shifted to its customers as a matter of equity. *See, e.g.*, Br. at 40-42. But even assuming that Northern engaged in "selfless" litigation entirely on behalf of its customers – without significant savings redounding to the pipeline's benefit – these equitable factors were irrelevant to the remaining issue on remand before the Commission. Rehearing Order at P 55, JA 13. The orders reviewed by the *Burlington II* Court considered whether "the Commission should grant specific performance of the release and indemnity clauses [in the Burlington Settlement] and order the purchasing pipeline[] to be responsible for the refunds on behalf of Burlington." *Burlington Res. Oil & Gas Co.*, 112 F.E.R.C. at P 44, JA 110. The Court – which had already found that the *ad valorem* tax refunds should be flowed

[8] *See, e.g., El Paso Natural Gas Co.*, 85 F.E.R.C. ¶ 61,003, at 61,009 (1998) ("In Paragraphs 6.7 and 6.8 of the global settlement, El Paso's customers waived any potential claim for refunds"); *ANR Pipeline Co.*, 85 F.E.R.C. ¶ 61,005, at 61,017 (1998) ("[h]ere, ANR and its customers entered into . . . a settlement intended in part to finally resolve the customer's responsibility for gas costs incurred on their behalf by ANR").

through to pipeline customers, *Public Serv. Co. of Colo.*, 91 F.3d at 1492 – directed the Commission to enforce the Burlington Settlement, noting that doing so would have "no apparent detriment[] to third parties." *Burlington II*, 513 F.3d at 250. The Commission complied with this directive by enforcing the Settlement Agreement and barring Northern from acting to the detriment of its customers by attempting to take back their *ad valorem* tax refunds. That is precisely what was required by the Court's remand in *Burlington II*.

CONCLUSION

For the reasons stated, the petition for review should be denied, and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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October 4, 2010

Northern Natural Gas Co. v. FERC **D.C. Cir. No. 09-1252**

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 6,878 words, not including the (i) cover page, (ii) certificate of counsel, (iii) table of contents and authorities, (iv) glossary, (v) certificate of compliance, and (vi) addendum.

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October 4, 2010

ADDENDUM

STATUTES AND REGULATIONS

TABLE OF CONTENTS

Section 706 of the Administrative Procedure Act, 15 U.S.C. § 706, provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

> **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
>
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > **(B)** contrary to constitutional right, power, privilege, or immunity;
> >
> > **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > **(D)** without observance of procedure required by law;
> >
> > **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 2 of the Natural Gas Policy Act, 15 U.S.C. § 3301(21), provides:

Definitions

For purposes of this chapter –

* * *

(21) First sale

(A) General rule

The term "first sale" means any sale of any volume of natural gas—

(i) to any interstate pipeline or intrastate pipeline;

(ii) to any local distribution company;

(iii) to any person for use by such person;

(iv) which precedes any sale described in clauses (i), (ii), or (iii); and

(v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this chapter.

(B) Certain sales not included

Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

Section 110 of the Natural Gas Policy Act, 15 U.S.C. § 3320 (1988), provided:

Treatment Of State Severance Taxes And Certain Production-Related Costs

(a) Allowance for State Severance Taxes and Certain Production-Related Costs

Except as provided in subsection (b), a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the irst sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover –

(1) State severance taxes attributable to the production of such natural gas and borned by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b); and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) Limitation on State Severance Taxes.

The State severance tax allowable under subsection (a)(1) with rpesect to the production of any natural gas may not include any amount of State severance taxes borne by seller which results form a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) Definition of State Severance Tax.

For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas –

(1) by any State or Indian tribe (as defined in section 106)(b)(2)(B)(ii)); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law.

Section 601 of the Natural Gas Policy Act, 15 U.S.C. § 3431, provides:

(a) Jurisdiction of the Commission under the Natural Gas Act

(1) Sales

(A) Application to first sales

For purposes of section 1(b) of the Natural Gas Act [15 U.S.C. 717 (b)], the provisions of the Natural Gas Act [15 U.S.C. 717 et seq.], and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas.

(B) Authorized sales or assignments

For purposes of section 1(b) of the Natural Gas Act [15 U.S.C. 717 (b)], the provisions of the Natural Gas Act [15 U.S.C. 717 et seq.] and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas—

(i) authorized under section 3362 (a) or 3371 (b) of this title; or

(ii) pursuant to any assigned authorized under section 3372 (a) of this title.

(C) Natural-gas company

For purposes of the Natural Gas Act [15 U.S.C. 717 et seq.], the term "natural-gas company" (as defined in section 2(6) of such Act [15 U.S.C. 717a (6) et seq.]) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A) or (B) of this paragraph.

(2) Transportation

(A) Jurisdiction of the Commission

For purposes of section 1(b) of the Natural Gas Act [15 U.S.C. 717 (b)] the provisions of such Act [15 U.S.C. 717 et seq.] and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is—

(i) pursuant to any order under section 3362 (c) or section 3363 (b), (c), (d), or (h) of this title; or

(ii) authorized by the Commission under section 3371 (a) of this title.

(B) Natural-gas company

For purposes of the Natural Gas Act [15 U.S.C. 717 et seq.], the term "natural-gas company" (as defined in section 2(6) of such Act [15 U.S.C. 717a (6)]) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the

jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) Charges deemed just and reasonable

(1) Sales

(A) First sales

Except as otherwise provided in this subsection, for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable.

(B) Emergency sales

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d], any amount paid in any sale authorized under section 3362 (a) of this title shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established under such section and applicable to such sale.

(C) Sales by intrastate pipelines

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d] any amount paid in any sale authorized by the Commission under section 3371 (b) of this title shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) Assignments

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d], any amount paid pursuant to the terms of any contract with respect to that portion of which the Commission has authorized an assignment authorized under section 3372 (a) of this title shall be deemed to be just and reasonable.

(E) Affiliated entities limitation

For purposes of paragraph (1), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of such paragraph, such amount does not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline.

(2) Other charges

(A) Allocation

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d], any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 3363

(b), (c), or (d) of this title shall be deemed to be just and reasonable if such amount is prescribed by the President under section 3363 (h)(1) of this title.

(B) Transportation

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d], any amount paid by any interstate pipeline for any transportation authorized by the Commission under section 3371 (a) of this title shall be deemed to be just and reasonable if such amount does not exceed that approved by the Commission under such section.

(c) Guaranteed passthrough

(1) Certificate may not be denied based upon price

The Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act [15 U.S.C. 717f] based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) Recovery of just and reasonable prices paid

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d], the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if, under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

Northern Natural Gas Co. v. FERC **D.C. Cir. No. 09-1252**

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 4th day of October 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:.

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October 4, 2010