ORAL ARGUMENT HAS NOT BEEN SCHEDULED

==

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

No. 06-1042

BURLINGTON RESOURCES, INC.
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

JOHN S. MOOT
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

JUDITH A. ALBERT
SENIOR ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

MARCH 29, 2007

==

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties are as stated in Petitioner's brief.

B. Rulings Under Review:

The rulings under review are as follows:

1. *Burlington Resources Oil & Gas Company*, "Order on Remand," 112 FERC ¶ 61,053 (July 8, 2005); and

2. *Burlington Resources Oil & Gas Company*, "Order Denying Rehearing," 113 FERC ¶ 61,257 (December 12, 2005).

C. Related Cases:

The Commission issued the orders on review on remand from the Court's decision in *Burlington Resources Oil & Gas Company 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.

____
Judith A. Albert
Senior Attorney

March 29, 2007

GLOSSARY

Burlington	Burlington Resources, Inc.
FERC or Commission	Federal Energy Regulatory Commission
NGA	Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*
NGPA	Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq*.
Pipelines	Northern Natural Gas Company and Panhandle Eastern Pipe Line Company

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUES………….……………………………………………...…1

STATUTES AND REGULATIONS……………..…………..……………………………..2

STATEMENT OF THE CASE ……………………….……………………..……………..2

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW……………………….……………………………………...2

II. STATEMENT OF FACTS…………………….………………………………….……..2

A. Statutory and Regulatory Background…….……………………………………..2

B. The *Burlington* Decision………………………..……………………….………..5

C. The Orders Challenged Here……………………….……………………………6

SUMMARY OF ARGUMENT……..………………………………..……………..………7

ARGUMENT……………………..…………………………………..…………………….……9

I. THE COMMISSION'S REFUSAL TO ENFORCE THE RELEASE AND INDEMNIFICATION CLAUSES WAS AN APPROPRIATE EXERCISER OF ITS PROSECUTORIAL DISCRETION…….……………….……….9

A. Standard of Review……………………………….……………………….……….9

B. The Commission Fully Explained Why It Refused to Relieve Burlington of its *Ad Valorum* Obligations While Approving The Omnibus *Ad Valorem* Settlements……………………………………….….10

i. Private Agreements That Require First Sales Purchasers To Pay In Excess Of Statutory Ceiling Prices Are Unlawful…..11

ii. The Take-or-Pay Settlements and the Omnibus *Ad Valorem* Settlements Are Unlawful To The Extent They Permit Producers To Retain Amounts Collected In Excess Of The Ceiling Rates………………………………………15

TABLE OF CONTENTS

PAGE

iii. The Commission Has Limited Prosecutorial Discretion To Permit A Seller To Retain Amounts Collected Above The Ceiling Rates…17

iv. The Commission Exercised Its Prosecutorial Discretion Appropriately In Approving The Omnibus *Ad Valorem* Statements…19

v. The Circumstances Of The Take-or-Pay Settlements Do Not Justify Similar Treatment…21

C. Burlington Did Not Demonstrate That The Consideration It Gave To The Pipelines In The Take-or-Pay Settlements Satisfied Its *Ad Valorem* Refund Obligations…25

II. THE COMMISSION'S REFUSAL TO WAIVE BURLINGTON'S REFUND LIABILITY WAS A PROPER EXERCISE OF ITS DISCRETION UNDER NGPA § 502(c)…30

A. Standard of Review…30

B. Burlington Did Not Demonstrate That Waiver Pursuant to NGPA § 502(c) Was Warranted Here…30

CONCLUSION… 35

TABLE OF AUTHORITIES

PAGE

COURT CASES:

Arkansas Louisiana Gas Co. v. Hal.
543 U.S. 571 (1981)……………….…………………….………11, 12, 14, 16, 18, 24

Associated Gas Distributors v. FERC,
893 F.2d 349 (D.C. Cir. 1989)……………..………………………………..…...4, 32

Baltimore Gas and Electric Company v. FERC,
252 F.3d 456 (D.C. Cir. 2001)…………………..…………………………………17, 20

Burlington Resources Oil & Gas Company v. FERC,
396 F.3d 405 (D.C. Cir. 2005)………..2-6, 10, 25

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962)…………..…………………………..…………………………..9

* *Heckler v. Chaney,*
470 U.S. 821 (1895)……………..………………………………….………..18, 20, 23, 24

Motor Vehicle Mfrs. Of United States, Inc. v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983)……………………………………………………...………………9

Permian Basin Area Rate Cases,
390 U.S. 747 (1968)..……..…………………………………………………..……..9

Perlman v. FERC,
845 F.2d 529 (5th Cir. 1988)…………………………………………….…………………30

Public Service of Colorado v. FERC,
91 F.3d 1478 (D.C. Cir. 1996) (“*Public Service*”), *cert. denied,* 520 U.S.
1224 (1997)………………………..……………………………………………….3

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGE

COURT CASES: (con't)

Sithe/Independence Power Partners v. FERC,
165 F.3d 944 (D.C. Cir. 1999)……………….…………………………………………..9

* *Southern Union Gas Co. v. FERC,*
857 F.2d 812 (D.C. Cir. 1988)…..…………….……….....................11-16, 23, 24, 29

United States Postal Service v. Gregory,
534 U.S. 1 (2001)……………..…………………….…………………….…………..9

Williams v. FERC,
3 F.3d 1544 (D.C. Cir. 1993)………………………………………………………..28

ADMINISTRATIVE CASES:

ANR Pipeline Co.,
85 FERC ¶ 61,003 (1998)…………………..………………………………………29

Burlington Resources Oil & Gas L.P.,
103 FERC ¶ 61,005 (2003), *reh'g denied*,
104 FERC ¶ 64,317 (2003)……….…………………..…………….……….........4, 28

Burlington Resources Oil & Gas Company,
112 FERC ¶ 61,053 (2005) ("Remand Order"),
reh'g denied……………………………………….........3, 6, 10, 11, 17-25, 31-33

Burlington Resources Oil & Gas Company,
113 FERC ¶ 61,257 (2005) ("Rehearing Order")…................2, 6, 11-16, 20, 22, 25-29, 31, 33, 34

Colorado Interstate Gas Co.,
65 FERC ¶ 61,292 (1993)…………………………………….……………………26

El Paso Natural Gas Co.,
85 FERC ¶ 61,003 (1998)……………………………………………………………29

Northern Natural Gas Company,
93 FERC ¶ 61,311 (2000)…………………………………….………….........4

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES: (con't)

Panhandle Eastern Pipe Line Company,
96 FERC ¶ 61,274 (2001)……………………….……..………………..…..……….3

Panhandle Eastern Pipe Line Company,
103 FERC ¶ 61,007 (2003), *reh'g denied*, 105 FERC ¶ 61,141 (2003)……………..………4

Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations,
FERC Stats. & Regs., Regs. Preambles 1982-1985 ¶ 30,637 (1985)…………………31

Southern Union Company,
41 FERC ¶ 61,203 (1987)……………………………………………..…………14

STATUTES:

Natural Gas Act

Section 4(c), 15 U.S.C. 717c(c)…….………………………………………………...11

Natural Gas Policy Act of 1978

Section 15, U.S.C. §§ 3291 (*et seq.*)…………..……..…………………………..........2

Section 110, 15 U.S.C. § 3320(a)(1)…..……………………………………………...3

Section 501(a), 15 U.S.C. § 3411(a)………………………………………………...7, 17

Section 502(c), 15 U.S.C. § 3412(c)……………………………………….5, 6, 17, 30

Section 504, 15 U.S.C. § 3414………………………………………………….……...20

Section 504(a)(1), 15 U.S.C. § 3414(a)(1)……….......................4, 5, 7, 11, 21, 23, 32

Section 504(b)(1), 15 U.S.C. § 3414(b)(1)……………………………………7, 17

Section 506(a)(4), 15 U.S.C. § 3416(a)(4)……………………………….……………...9

TABLE OF AUTHORITIES

PAGE

STATUTES: (con't)

Natural Gas Wellhead Decontrol Act of 1989,
Pub. L. 101-60, 103 Stat. 158 (1980)……………...……………………….……............3

REGULATION:

18 C.F.R. § 2.76……………..……..………………..……………………………….32

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

No. 06-1042

BURLINGTON RESOURCES INC.
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether, pursuant to the Court's remand, the Commission, in exercising its prosecutorial discretion, "adequately explained" why there is no inconsistency between its refusal to enforce indemnity clauses in take-or-pay settlements (which resulted in a natural gas producer's retaining *ad valorem* tax refund obligations) and its approval of "omnibus" *ad valorem* settlements (which, in settling hundreds of claims, likely relieved some producers from similar obligations).

2. Whether the Commission's denial of a natural gas producer's request for equitable relief from statutory pricing limits was an appropriate exercise of the

Commission's discretion, when the request did not demonstrate any special hardship or inequity to justify a waiver.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

In *Burlington Resources Oil & Gas Company v. FERC*, 396 F.3d 405, 406 (D.C. 2005) ("*Burlington*"), this Court remanded for "a more adequate explanation" Commission orders "having the end result that Burlington must refund certain *ad valorem* taxes it collected from two pipeline gas purchasers pursuant to take-or-pay natural gas sales contracts." The Commission reaffirmed its findings and provided additional explanation in the orders challenged here. *Burlington Resources Oil & Gas Company*, 112 FERC ¶ 61,053 (July 8, 2005) ("Remand Order") (JA 397), *reh'g denied*, 113 FERC ¶ 61,257 (December 12, 2005) ("Rehearing Order") (JA 479).

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

The background is set forth in *Burlington*, 396 F.3d at 406, and the cases cited therein. In brief, the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3291 (*et seq.*), established a "maximum lawful price" ("ceiling price") for a

"first sale" of natural gas production.[1] An exception to the ceiling price was contained in NGPA § 110, 15 U.S.C. §3320(a)(1), which permitted the first sale to exceed the ceiling price "to the extent necessary to recover . . . State severance taxes attributable to the production" of natural gas. After much litigation, this Court upheld as reasonable FERC's determination that the Kansas *ad valorem* tax did not qualify as a reimbursable NGPA § 110 severance tax, but concluded that producers must refund *ad valorem* taxes accrued as of October 1983, rather than June 28, 1988 (as the Commission had found). *Burlington*, 396 F.3d at 406, *citing Public Service of Colorado v. FERC*, 91 F.3d 1478, 1488-91 (D.C. Cir. 1996) ("*Public Service*"), *cert. denied*, 520 U.S. 1224 (1997).

Implementing the *Public Service* refund requirements involved hundreds, if not thousands, of *ad valorem* claims going back almost 20 years. Remand Order at P 20 (JA 399). Extensive discussions among the parties, facilitated by the Commission's Dispute Resolution Service, resulted in settlements of most claims. The Commission approved such settlements for Panhandle Eastern Pipe Line Company ("Panhandle") and Northern Natural Gas Company ("Northern"), the two pipeline gas purchasers involved here (collectively, the "Pipelines"). *Panhandle Eastern Pipe Line Company*, 96 FERC ¶ 61,274 (2001); *Northern*

---

[1] Congress repealed NGPA Title I pricing provisions effective January 1, 1993. See Natural Gas Wellhead Decontrol Act of 1989, Pub. L. 101-60, 103 Stat. 158 (1980).

Natural Gas Company, 93 FERC ¶ 61,311 (2000) (collectively, "Omnibus *Ad Valorem* Settlements"); *see Burlington*, 396 F.3d at 407.

Burlington Resources Oil & Gas Company L.P. ("Burlington") declined to settle, contending that release and indemnification clauses contained in earlier Take-or-Pay Settlements it had entered into with Northern in 1989 and Panhandle in 1992 relieved it of any obligation to make *ad valorem* tax refunds.[2] *Id*. at 410. The Commission rejected this argument in the orders reviewed in *Burlington*,[3] finding that even if Burlington's reading of the take-or-pay indemnity clauses was correct, Burlington could not prevail because NGPA § 504(a)(1), 15 U.S.C. § 3414(a)(1), bars a buyer in a first sale from agreeing to pay more than the NGPA ceiling price. Thus, any agreement requiring the buyer to do so is unenforceable. *See Burlington*, 396 F.3d at 408-409.

FERC also rejected Burlington's argument that this interpretation of NGPA § 504(a) was inconsistent with the Commission's approval of the Omnibus *Ad*

---

2 A take-or-pay contract is one in which a pipeline promises either to take or to pay the producer for the gas it has contracted to buy. Economic and regulatory conditions encouraged pipelines to enter into long-term take-or-pay contracts in the 1960's and 1970's. The NGPA's enactment, *inter alia*, changed those conditions, leading to much litigation. *See generally*, *Associated Gas Distributors v. FERC*, 893 F.2d 349, 353 (D.C. Cir. 1989) ("*Associated Gas Distributors*").

3 The FERC orders remanded in *Burlington* include the following: *Burlington Resources Oil & Gas L.P.*, 103 FERC ¶ 61,005 (2003), *reh'g denied*, 104 FERC ¶ 64,317 (2003) (JA 439, 485); *Panhandle Eastern Pipe Line Company*, 103 FERC ¶ 61,007 (2003), *reh'g denied*, 105 FERC ¶ 61,141 (2003) (JA 438, 502).

Valorem Settlements, which had waived liability for some producers. *Burlington,* 396 F.3d at 409. The Commission has "a degree of prosecutorial discretion in determining how to expend its resources in the enforcement of [the] ceiling prices," s*ee id*., (citation omitted), and the circumstances of the Omnibus *Ad Valorem* Settlements differed from those of the take-or-pay settlement agreements at issue here. *See id.* FERC also denied Burlington's request pursuant to NGPA § 502(c), 15 U.S.C. § 3412(c), for an equitable waiver of liability.

B. The *Burlington* Decision

The Court remanded the orders, finding that the "important question left unanswered . . . is how, in light of the Commission's approval of the Omnibus Settlement Agreements, the rule in the Orders under review can be correct." *Burlington*, 396 F.3d at 406. More particularly, the Court was concerned that:

> [N]one of the challenged orders explain how the rule applied by the Commission to the 1989 or 1992 Settlement Agreements is consistent with its approval of the pipelines' Omnibus Settlement Agreements allowing some producers to escape all or partial liability for ad valorem tax refunds. The Commission's position that its encouragement of settlement of take-or-pay liability did not intend for NGPA ceiling prices to be exceeded begs the question of how it could approve the Omnibus Settlement Agreements, although such settlements would likewise violate section 504(a) of the NGPA under the Commission's interpretation here.

Burlington, 396 F.3d at 411.

The Court also found lacking the Commission's treatment of the consideration paid by Burlington under the take-or-pay contracts:

> [T]he Commission fails to explain why, in light of the substantial consideration paid by Burlington, in part for release and indemnification by Northern and Panhandle 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 clauses in the 1989 and 1992 Settlement Agreements.

Burlington, 396 F.3d at 411.

The Court remanded the case "for a more adequate explanation" of these matters, *id*. at 406, explicitly declining "to decide whether there could be a legally relevant distinction between the Northern and Panhandle Settlement Agreements and the Omnibus Settlement Agreements," *id*. at 412. Because of the remand, the Court declined to reach Burlington's additional claim that it was entitled to a waiver of liability under NGPA § 502(c), 15 U.S.C. § 3412(c). *Id.*

C. The Orders Challenged Here

On remand, the Commission found that there are significant differences between the Omnibus *Ad Valorem* Settlements and the Take-or-Pay Settlements, and reaffirmed its decision "to require Burlington to refund to [the Pipelines] the *ad valorem* tax reimbursements it collected from them and to not enforce the release and indemnity clause in Burlington's take-or-pay 1989 and 1992 settlement agreements." Remand Order at P 11 (JA 398). FERC also denied Burlington's request for an NGPA § 502(c) waiver. *Id.* at P 51-54 (JA 404-05).

Burlington sought rehearing, which the Commission denied. Rehearing Order at P 1 (JA 479). This appeal followed.

SUMMARY OF ARGUMENT

NGPA § 504(a)(1) made it unlawful for a person to sell natural gas at a first sales price that exceeded statutory ceiling prices. This rendered illegal and unenforceable all private contracts in first sales which required the purchaser to pay in excess of the statutorily mandated ceiling price.

NGPA §§ 501(a) and 504(b)(1) provide the Commission limited prosecutorial discretion in enforcing NGPA § 504(a)(1). Prosecutorial discretion allows FERC to decide how best to use its limited resources to maximize achievement of congressional goals. When an agency declines to act, it generally does not exercise its coercive power over an individual, and thus does not infringe upon areas that courts are often called upon to protect.

The Omnibus *Ad Valorem* Settlements were illegal to the extent that they may have permitted some producers to retain amounts collected in excess of ceiling prices. However, FERC properly exercised its prosecutorial discretion to approve the Settlements, which resulted in substantial payments to customers, ended what likely would have been years of litigation, conserved Commission resources for other activities, and required no exercise of coercive power.

The release and indemnification clauses, as interpreted by Burlington, constitute an illegal private agreement because they require the Pipelines (the first purchasers) to make refunds to their customers while Burlington retains those

amounts. Enforcing the clauses would go beyond any limited prosecutorial discretion the NGPA allowed the Commission. The Commission would not be simply withholding action, but would be taking a positive coercive action by ordering the Pipelines to pay an amount in excess of the ceiling prices. Moreover, the Commission would save no resources by such an action.

The consideration that Burlington provided in the Take-or-Pay Settlements does not warrant a different result. Each settlement resolved multiple disputes between the parties, with significant consideration flowing both ways. There is no way of determining precisely what consideration, if any, Burlington may have given for the specific purpose of satisfying its refund obligations, particularly since the primary focus of the settlements was to resolve significant disputes that were unrelated to any alleged NGPA ceiling price violations.

The Commission's refusal to waive Burlington's refund obligations was also reasonable. Burlington received substantial consideration under the Take-or-Pay Settlements, it unlawfully retained amounts collected in excess of ceiling prices, and Burlington and Southland (its predecessor-in-interest) knew, or should have known, that the Commission never intended that take-or-pay agreements should relieve producers of their *ad valorem* obligations.

ARGUMENT

I. THE COMMISSION'S REFUSAL TO ENFORCE THE RELEASE AND INDEMNIFICATION CLAUSES WAS AN APPROPRIATE EXERCISE OF ITS PROSECUTORIAL DISCRETION.

A. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See*, *e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). For this purpose, FERC's factual findings are conclusive if supported by substantial evidence. NGPA § 506(a)(4), 15 U.S.C. § 3416(a)(4). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). A court need only find that the agency "has met the minimum standards set forth in the statute;" it cannot "substitute its own judgment for that of the [agency]." *United States Postal Service v. Gregory*, 534 U.S. 1, 11 (2001). Deference to FERC's decisions regarding rate issues is broad, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

On remand, the Commission recognized that the Court was troubled by:

(1) the seeming inconsistency in the Commission's treatment of the Take-or-Pay and Omnibus *Ad Valorem* Settlements; and (2) why "in light of the substantial consideration paid by Burlington in part for release and indemnification by Northern and Panhandle for all claims arising from the take-or-pay contracts, [the Commission] refused to exercise its prosecutorial discretion to give effect to the release and indemnity clauses in the 1989 and 1992 Settlement Agreements." Remand Order at P 6-9 (JA 398) (citing *Burlington Resources*, 396 F.3d at 411). As now demonstrated, the Commission has answered each concern.

B. The Commission Fully Explained Why It Refused to Relieve Burlington of Its *Ad Valorum* Obligations While Approving The Omnibus *Ad Valorem* Settlements.

The Commission found that as a result of the Omnibus *Ad Valorem* Settlements, "some producers may end up retaining some amounts they collected in excess of the [ceiling prices]." Remand Order at P 30 (JA 401). However, "there are significant differences between the take-or-pay settlement agreements Burlington relies upon and the [Omnibus *Ad Valorem* Settlements] entered into by Panhandle and Northern to resolve the outstanding *ad valorem* refund claims against hundreds of producers." *Id.* at P 11 (JA 398). These differences "justify the Commission's differing actions with respect to each." *Id.*

(i) Private Agreements That Require First Sales Purchasers To Pay In Excess Of Statutory Ceiling Prices Are Unlawful.

"Where there is a federally-regulated price governing the sale of gas, any agreement by the buyer to pay in excess of that price is unenforceable, even if the seller furnished consideration in exchange for being entitled to receive that excess amount." Rehearing Order at P 30 (JA 483); Remand Order at P 13 (JA 398). This conclusion is required by NGPA § 504(a); *Arkansas Louisiana Gas Co. v. Hall*, 543 U.S. 571 (1981) ("*Arkla*"); and *Southern Union Gas Co. v. FERC*, 857 F.2d 812 (D.C. Cir. 1988) ("*Southern Union*"). Rehearing Order at P 30-42 (JA 483).

NGPA § 504(a), provided that "[i]t shall be unlawful for any person to sell natural gas at a first sale price in excess of any applicable maximum lawful price under the NGPA." *Arkla* found that parties may not make private agreements to vary rates under parallel Natural Gas Act ("NGA") maximum rate provisions[4] and *Southern Union* extended that principle to sales that fell under the NGPA.

In *Arkla*, a state court awarded damages to a seller of interstate gas after finding that it was the buyer's failure to inform the seller of payments that would have triggered a favored-nation clause that prevented the seller from filing rate increases with the Commission. The Supreme Court vacated the state court damage award, finding that, "Not only do the courts lack authority to impose a

[4] Natural Gas Act § 4(c), 15 U.S.C. § 717c(c).

different rate . . ., but the Commission itself has no power to alter a rate retroactively," *Arkla*, 453 U.S. at 578, and "to permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme . . ." *Id.* at 582.[5]

Southern Union involved gas sales that were subject to the NGPA price ceilings. In that case, Southern Union Gas Company ("Southern"), a gas purchaser, and Consolidated Oil and Gas Company, Inc. ("Consolidated"), a gas producer, entered into ten gas purchase contracts, four involving interstate gas and six intrastate gas. *See* Rehearing Order at P 32-42 (JA 483) (summarizing case). Subsequently, Consolidated filed a state court suit against Southern for breach of contract, alleging that favored nations provisions in the intrastate gas contracts had been activated, entitling it to higher prices. In 1976 the parties entered into a settlement agreement which provided for higher prices under the disputed contracts, a lump-sum payment to Consolidated related to past sales, and Consolidated's dismissal of the pending court action. *See id.* at P 33 (JA 483-84).

The 1976 agreement also contained a recitation that all gas covered by the settlement was solely intrastate. Later, Southern, claiming mistake, asserted that

---

[5] In the context of the NGPA, permitting parties by private contract to exceed ceiling rates would even more clearly undercut the congressional scheme, since Congress itself had established the lawful rates. Remand Order at P 14 (JA 398). Also, the Commission lacks authority (except in limited circumstances not relevant here) to modify the NGPA prices even prospectively. *Id.*

four of the contracts were for the sale of interstate gas, so that Southern could lawfully pay no more than the federally-mandated price.

Consolidated sued Southern in state court, seeking specific performance and damages equal to the unpaid difference between the rate specified in the 1976 agreement and the lower interstate rate that Southern had paid. The state court referred the issue of the nature of the gas to FERC, which ruled that the gas under the four contracts was interstate gas and subject to NGPA ceiling prices as of December 1, 1978. *See Southern Union*, 857 F.2d at 814.

Besides breach of contract, Consolidated's state court complaint had alleged both fraud and negligent misrepresentation. The state court found that Southern had negligently misrepresented the facts, inducing Consolidated to release its claims in the earlier litigation, and the court awarded Consolidated damages of over $8,000,000, the amount of the difference between the interstate rate actually paid and the higher rate that "would have been paid had Southern's representations been true." *See* Rehearing Order at P 36 (JA 484) (citations omitted).

Southern asked the Commission for a declaratory order that Consolidated could not collect the judgment because to do so would constitute exacting an unlawful price for interstate gas. FERC denied the request on grounds that the judgment was an award of damages for tort, not for the purchase price of gas, stating that, "The judgment award in this case was given to Consolidated because

the state court found that Consolidated, by relying on Southern Union's negligent misrepresentation, gave up valuable consideration by not pursuing its court claim and suffered damages as a result." *Southern Union Company*, 41 FERC ¶ 61,203 at 61,531 (1987).

Southern appealed, arguing that the Commission's ruling was contrary to *Arkla*. *Southern Union* agreed that *Arkla* controlled. After examining the "practical effect" of the state remedy, the Court concluded that the state measure of damages for Southern Union's negligent misrepresentation has the effect "of awarding a price for interstate gas that, to the extent that price exceeds federal guidelines, the state court has no power to award." *Southern Union*, 857 F.2d at 818. "To that extent, the settlement agreement simply is a bargain that the state has no power to enforce." *Id*. The Court set aside the Commission's order and remanded the matter to the Commission, which ordered Consolidated to refund any amounts Southern had paid it under the state court judgment.[6] Rehearing Order at P 42 (JA 485).

Accordingly, as the Commission found, *Southern Union* stands for the proposition that private agreements may not require payments in excess of ceiling rates, despite consideration that may have been paid:

---

[6] With interest, the total reached $11,377,899.20. Rehearing Order at P 42 n.29 (JA 485).

> … despite the consideration Consolidated had given to Southern Union in the settlement agreement, including the dismissal of its 1974 state court suit in which it might have obtained higher rates for the intrastate contracts, Consolidated could not retain any excess over the federally-regulated price with respect to the interstate contracts. The Commission concludes that *Southern Union* is clear precedent that any agreement by a buyer in a first sale to pay more than the NGPA ceiling price is unenforceable, even if the first seller provided consideration in exchange for being entitled to receive that excess amount.

Rehearing Order at P 42 (JA 485).

(ii) The Take-or-Pay Settlements and the Omnibus *Ad Valorem* Settlements Are Unlawful To The Extent They Permit Producers To Retain Amounts Collected In Excess Of The Ceiling Rates.

Applying the *Southern Union* reasoning to the Take-or-Pay Settlements, FERC found them unenforceable with regard to *ad valorem* refunds:

> To the extent Burlington's private take-or-pay settlements would allow Burlington to retain the excess of the Congressionally-mandated price it had received previously, it is a bargain that cannot be enforced. That result follows notwithstanding that in those settlements Burlington may have granted the pipelines certain consideration in order to settle contractual disputes not involving the particular first sales in which the NGPA ceiling price was violated. The same situation was present in *Southern Union* when the producer agreed to dismiss its state court action, and thus did not pursue its full contract claims with respect to the intrastate contracts. However, that did not prevent the producer in *Southern Union* from having to disgorge the excess over the federally-regulated price without regard to any offsetting consideration provided to the purchaser by the settlement with respect to the intrastate contracts.

Rehearing Order at P 47 (JA 485).

Burlington had not contested the amount of refunds owed. In the Omnibus *Ad Valorem* proceedings, many producers and working interest owners did dispute the claims. Remand Order at P 3 (JA 397). Thus, while the Settlements may have permitted some producers to retain some excess amounts, actual liabilities were never established. Nevertheless, to the extent the Settlements may have permitted some producers to retain some excess, the Settlements would be "unlawful and unenforceable." Remand Order at P 30 (JA 401).

For its part, Burlington contends (Br. at 30) that *Arkla* and *Southern Union* are irrelevant because both cases involved state court judgments and "neither case addresses the lawfulness of good faith, arm's-length settlements" such as the Take-or-Pay Settlements or the consideration that Burlington provided in those settlements. The reasoning in these cases is "directly applicable" here, however, because the producer in *Southern Union* had also provided consideration:

> The same situation was present in *Southern Union* when the producer agreed to dismiss its state court action, and thus did not pursue its full contract claims with respect to the intrastate contracts. However, that did not prevent the producer in *Southern Union* from having to disgorge the excess over the federally-regulated price without regard to any offsetting consideration provided to the purchaser by the settlement with respect to the intrastate contracts.

Rehearing Order at P 47 (JA 485); *see id.* at P 48 (JA 485). Moreover, as discussed *infra* at 25-29, there is no basis for Burlington's assertion that it has already paid its *ad valorem* refunds in the form of debt forgiveness and other consideration.

(iii) The Commission Has Limited Prosecutorial Discretion To Permit A Seller To Retain Amounts Collected Above The Ceiling Rates.

Although private contracts which require the buyer to pay in excess of the ceiling price are illegal and unenforceable under the NGPA, the Commission has available two limited avenues to permit a seller to retain the excess amounts collected. Remand Order at P 15 (JA 399). The first is its prosecutorial discretion not to bring an enforcement action.[7] NGPA § 501(a), 15 U.S.C. § 3411(a), provides:

> The Commission . . . is authorized to perform any and all acts (including any appropriate enforcement activity) . . . as it may find necessary or appropriate to carry out its functions under this Act.

In addition, NGPA § 504(b)(1), 15 U.S.C. § 3414(b)(1), provides that the Commission "may bring an action in a United States District Court . . . to enforce compliance with this Act." In *Baltimore Gas and Electric Company v. FERC*, 252 F.3d 456, 460-61 (D.C. Cir. 2001), the Court interpreted similarly broad language in the NGA as giving FERC prosecutorial discretion.

The Commission's discretion not to prosecute arises, *inter alia*, from the fact that it has limited resources and must decide how best to use them to maximize achievement of congressional goals:

---

[7] The second is the Commission's authority to grant adjustment relief under NGPA § 502(c), discussed *infra* at 30-34.

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency is far better equipped than the courts to deal with the many variables involved in a proper ordering of its priorities.

Remand Order at P 17 (JA 399), *quoting Heckler v. Chaney*, 470 U.S. 821, 831-2 (1985) ("*Heckler*").

Moreover, a decision not to enforce also is generally not coercive: "When an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Heckler*, 470 U.S. at 832; Remand Order at P 18 (JA 399). Consistent with *Heckler* and *Arkla*, FERC found that its discretion in NGPA first sales cases is limited to withholding action:

> [T]he Commission does not view its prosecutorial discretion as including a positive right to approve and enforce private agreements requiring purchasers in first sales to pay in excess of the Congressionally mandated maximum lawful prices for such sales. Rather, the Commission views its prosecutorial discretion in the nature of a negative right to withhold action, *i.e.*, a right to conserve its resources by not taking all the actions necessary in a particular case to provide a full remedy for a violation.

Remand Order at P 18 (JA 399).

(iv) The Commission Exercised Its Prosecutorial Discretion Appropriately In Approving The Omnibus *Ad Valorem* Settlements.

The Remand Order at P 20-32 (JA 399-401) explains why the Commission did not enforce the ceiling prices in all of the transactions involved in the Omnibus *Ad Valorem* Settlements. In implementing *Public Service*, the Commission "was faced with resolving hundreds, if not thousands of *ad valorem* refund claims, involving events going back almost 20 years." *Id*. at P 20 (JA 399) (citing examples). Panhandle, for example, sought refunds from 836 operators and working interest owners, and Northern sought refunds from 790 producers, 738 of which claims were for less than $50,000. *Id*. at P 21 (JA 400).

Many producers disputed the claimed refunds and/or filed petitions for adjustment or other relief. *Id*. Objecting producers challenged, among other things, the claimed amount, the allocation of the amount among the working interest owners, and the collectability of the royalty owners' refund portion. *Id*. Consequently, FERC delayed acting "while settlement discussions were conducted among all affected parties, including the producer/first seller, the pipeline purchaser in the relevant first sale, the pipeline's customers who would benefit from any flowthrough by the pipeline of the refunds it received, and the state regulatory commissions in those jurisdictions where affected customer[s] resided." *Id*. at P 22 (JA 400).

The Commission approved the resulting settlements, including the Omnibus *Ad Valorem* Settlements, finding them "fair and reasonable and in the public interest." Remand Order at P 25 (JA 400). The settlements resulted in substantial payments to customers, while conserving Commission resources for other activities. *Id.* Thus, the Panhandle settlement required refund payments in excess of $40,000,000 and the Northern settlement payments in excess of $45,000,000, which were promptly flowed through to the pipelines' customers. Rehearing Order at P 72 (JA 489). Absent the waiver of a portion of the refunds and the resulting settlements, the FERC proceedings would likely have continued for years. Remand Order at P 25 (JA 400).

Under these circumstances, FERC's approval of the Omnibus *Ad Valorem* Settlements was an appropriate exercise of prosecutorial discretion for the reasons enunciated in *Heckler*. *Id.* at P 26 (JA 401). Settlement allowed the Commission to concentrate its resources on current regulatory initiatives, rather than expend them on remedying long past violations of a statute no longer in effect. *Id.* at P 27 (JA 401). Moreover, approval of the Omnibus *Ad Valorem* Settlements did not constitute the exercise of coercive power; *e.g.*, FERC took no positive action to enforce any private agreement that violated the NGPA price ceilings. *Id*. at P 28-29 (JA 401) (citing *Baltimore Gas and Electric v. FERC*, 252 F.3d at 460, which found a Commission settlement "and its consequent decision not to see its

enforcement action through to fruition, [] a paradigmatic instance of an agency exercising its presumptively nonreviewable enforcement discretion").

As the Remand Order emphasized, the Commission's approval of the Omnibus *Ad Valorem* Settlements "is not the equivalent of the Commission recognizing that NGPA Section 504 'does not render unlawful all private agreements allowing a producer to retain funds collected' in excess of the [ceiling prices]." Remand Order at P 30 (JA 401). All such agreements are unlawful and unenforceable. *Id.* All the Omnibus Settlement Agreements did was end enforcement proceedings. *Id*. at P 30-32 (JA 401).

(v) The Circumstances Of The Take-or-Pay Settlements Do Not Justify Similar Treatment.

As the challenged orders explain, the circumstances which justified the Commission's exercise of its prosecutorial discretion in approving the Omnibus *Ad Valorem* Settlements do not exist with respect to Burlington's Take-Or-Pay Settlements. "The [Take-or-Pay Settlements] arose in a completely different context and bear little similarity to the [Omnibus *Ad Valorem* Settlements] except for the fact that they related to gas purchase contracts between Burlington and [each Pipeline]." *Id*. at P 33 (JA 401-02). All parties reached agreement in the Omnibus *Ad Valorem* Settlements, the Settlements were submitted for approval under the Commission's settlement regulations, and the Commission approved

them for all consenting parties "without resolving on the merits any litigated issues." Remand Order at P 43 (JA 403); Rehearing Order at P 20 (JA 481).

Panhandle and Northern, however, contested Burlington's interpretation of the indemnity clauses in the private Take-or-Pay Settlements. *See* Remand Order at P 33-42 (JA 401-03) (summarizing settlements). When Panhandle sent its statement of refunds due, Burlington (though never quantifying the consideration) asserted that it had already reimbursed Panhandle for the value of any *ad valorem* tax refunds. Panhandle responded that the primary consideration it had received was the premature termination of gas purchase contracts, which had no relation to volumes of gas already taken. Remand Order at P 37 (JA 402).

Similarly, in response to Northern's statement of refunds due, Burlington argued that the Take-or-Pay Settlement had already provided consideration far in excess of the *ad valorem* refunds owed. Northern asserted that it had not agreed to allow Burlington to keep amounts in excess of the ceiling prices or to indemnify Southland from *ad valorem* refund liabilities. *Id.* at P 41-42 (JA 403).

Because there was no agreement among the parties, the Commission could not simply withhold enforcement action, as it had with the Omnibus *Ad Valorem* Settlements, and let the settlements take effect. Instead, the issue became "whether the Commission should require Burlington to refund the *ad valorem* tax reimbursements collected by it from [Northern] and Panhandle, or . . . grant

specific performance of the release and indemnity clauses and order the purchasing pipelines to be responsible for the refunds on behalf of Burlington." Remand Order at P 44 (JA 403).[8]

The Commission's conclusion that granting specific performance would go beyond any limited prosecutorial discretion Congress allowed regarding NGPA ceiling prices is well supported. Any private agreement between the purchaser and seller in a first sale, including an agreement intended to settle disputes between the two parties, which requires the purchaser to pay more than the ceiling price, is illegal and unenforceable. *Southern Union*, 857 F.2d at 818; NGPA § 504(a); *see* discussion, *supra*, at 11-15. The release and indemnification clauses, as interpreted by Burlington, constitute just such a private agreement. Remand Order at P 47 (JA 404. Under Burlington's interpretation, the clauses allow it to retain the tax reimbursements it collected from the Pipelines and require the Pipelines to pay the same amount to their customers. *Id*. Enforcing such agreements goes beyond the bounds of prosecutorial discretion as set forth in *Heckler*:

> Burlington suggests, in essence, that we use our prosecutorial discretion to enforce the release and indemnity clauses of its private settlement agreements with [the Pipelines]. However, enforcing those clauses, as interpreted by Burlington, would go beyond any limited prosecutorial discretion Congress allowed the Commission in

---

[8] For purposes of the challenged orders, FERC accepted Burlington's interpretation of the release and indemnification clauses, noting however, that both pipelines disputed this interpretation. Rehearing Order at P 26-27 (JA 482-83).

> enforcing the NGPA ceiling prices. The Commission would not simply be withholding an enforcement action against Burlington and thereby permitting its violation of NGPA ceiling prices to go unremedied. Rather, the Commission would be taking a positive coercive action to enforce an illegal private settlement agreement and ordering the pipeline purchasers in the first sales to pay an amount in excess of the Congressionally mandated NGPA ceiling prices.
>
> Thus, accepting Burlington's position would require the Commission to order the pipelines to pay the refunds, a clearly coercive act going beyond the prosecutorial discretion discussed in *Heckler*. While the Commission's refusal to require a 100 percent recovery in the Omnibus Settlements allowed the status quo to remain as to some portion of [ceiling price] violation, adopting Burlington's view would require the exercise of coercive power over the pipelines. Thus one of the core reasons for the recognition of [an] administrative agency's prosecutorial discretion is not applicable to the [Take-or-Pay Settlements].

Remand Order at P 48-49 (JA 404).

The Commission is not aware of any instance where it has ordered purchasers in a first sale to pay in excess of NGPA ceiling prices. *Id*. at P 49 (JA 404). Moreover, such an action would be contrary to *Arkla*, which held that FERC lacks the authority to alter a lawful rate, and with *Southern Union*, "since it would entail the Commission enforcing an illegal private settlement agreement." *Id.*

Finally, none of the other *Heckler* considerations exist for the Take-or-Pay Settlements:

> Through the Omnibus Settlements producers agreed to disgorge a substantial amount of the overcharges, which might not have been recovered as quickly, and in that amount absent the settlements, while conserving Commission resources that were now available for other Commission activities. The [Take-or-Pay Settlements] exhibited none

> of these reasons. The amount of the refund was never in dispute, so allowing the waiver of the liability would not conserve any Commission resources that would have been devoted in establishing the amount of Burlington's liability. Moreover, to allow the waiver of the amount Burlington admittedly owed could be expected to be contested by the two pipelines to the same extent Burlington has contested our order that it make refunds.

Remand Order at P 50 (JA 404).

For its part, Burlington's overarching contention is that the Commission has disregarded the consideration that Burlington provided in the Take-or-Pay Settlements. Likewise, in *Burlington*, the Court found that FERC had failed to explain why, "in light of the substantial consideration" Burlington had paid, the Commission had not relieved Burlington of its refund obligations. *Burlington*, 376 F.3d at 411. On remand, the Commission fully explained why Burlington's consideration is not dispositive.

C. Burlington Did Not Demonstrate That The Consideration It Gave To The Pipelines In The Take-or-Pay Settlements Satisfied Its *Ad Valorem* Refund Obligations.

As the Commission emphasized, Burlington has received all of the consideration it should have received under the Take-or-Pay Settlements except for *ad valorem* reimbursement. Rehearing Order at P 28-29 (JA 483). The purpose of the Settlements was to resolve industry problems caused by the long-term purchase contracts, not to address *ad valorem* refunds. Remand Order at P 54 (JA 405). If the Commission and the Court had determined that Kansas *ad valorem* taxes were

severance taxes so that no refunds were due, Burlington would still have received and provided the other consideration set forth in the Settlements.

More specifically, the Commission found that there was no basis for finding that Burlington had fully refunded the excess it had received over the ceiling prices by providing debt forgiveness and take-or-pay contract reformation:

> The Commission could only find that the settlements effected a full refund, if it could be shown that the consideration furnished by Burlington included a component attributable to the pipelines' agreement to release the claim for *ad valorem* refunds which equaled the amount of those refunds. For example, if Burlington accepted lump-sum payments that were lower than they would have been without resolution of the *ad valorem* tax issue by an amount equal to its refund obligation, it could be found that the settlements effected a full refund of the amounts in excess of the [ceiling prices] which the pipelines had paid for the past gas purchases.

Rehearing Order at P 49 (JA 486).

In the Take-or-Pay Settlements, however, there is nothing to show what consideration, if any, Burlington gave for the specific purpose of obtaining a release from its potential *ad valorem* tax refund obligation. *Id*. at P 50 (JA 486). Each Take-or-Pay Settlement resolved multiple disputes, including disputes over take-or-pay liability and the price of gas actually purchased by the pipelines, with significant consideration flowing each way. *Id*. at P 50 (JA 486). The benefits Burlington received included, among other things:

> (1) the release of gas reserves in Kansas and other states from their dedication to the pipeline, enabling Burlington to sell the gas to other buyers; (2) the ability to obtain open access transportation of that gas

> without the need to grant take-or-pay credits [pursuant to FERC regulations]; (3) the avoidance of substantial litigation costs in pursuing court action against the pipelines; (4) the agreed-upon lump-sum payments from the pipeline; as well as (5) the release of all future claims by the pipelines for refunds.

Rehearing Order at P 50 (JA 486). While Burlington provided substantial consideration to the Pipelines in exchange, including, for example, the more than $25,000,000 reduction in Northern's take-or-pay liability, "neither settlement identified what component of the overall consideration provided by Burlington was given for each of the benefits it obtained under the settlement, including the refund release." *Id*.

It is reasonable, as the Commission found, to presume that under these circumstances the exchange of consideration in the Take-or-Pay Settlements does not reflect a full refund of the *ad valorem* taxes. *Id.* at P 52 (JA 486). The Settlements were executed before the Commission issued its order reversing its prior determination that the *ad valorem* taxes were permissible add-ons to the ceiling prices.[9] "[I]t would appear highly unlikely Burlington would agree to provide a full refund of *ad valorem* taxes at a time when the Commission's position was that the amounts were a permissible add-on to the NGPA ceiling prices." *Id*. at P 51 (JA 486).

---

[9] *Colorado Interstate Gas Co*., 65 FERC ¶ 61,292 (1993).

Regardless of the reasonableness of the above presumption, however, the Commission's "fundamental reason for refusing to treat [the Take-or-Pay Settlements] as satisfying Burlington's refund obligation "is that there is no way of determining precisely what consideration, if any, Burlington may have given for the specific purpose of satisfying its refund obligations." Rehearing Order at P 52 (JA 486). This accords with Commission actions elsewhere:

> As the Commission has previously held, where, as here, a comprehensive settlement resolving numerous issues fails to identify what components of the consideration paid by a party are given for what purpose, it is simply "not possible to distinguish reliably" what portion of the costs incurred by that party was incurred for the purpose of resolving any particular issue. [citing *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544 (D.C. Cir. 1993) and its underlying proceedings].

Id. Here, "where the primary focus of the [Take-or-Pay Settlements] is to resolve significant contractual disputes between a producer and a pipeline unrelated to any alleged violation of the NGPA ceiling prices," the Commission's unwillingness "to treat any portion of the consideration given by the producer as constituting a refund of a pipeline's actual payment for gas in excess of the NGPA ceiling price" is reasonable. *Id.*

For its part, Burlington contends (Br. at 24) that *Williams v. FERC* is "completely inapposite." This contention lacks merit for the reasons set forth in the Rehearing Order at P 53-55 (JA 487). In brief, "[T]he only difference between this case and *Williams v. FERC* is that in that case a purchaser in a first sale sought

to have a portion of its lump-sum settlement payment treated as part of the amount it paid for a first sale of gas, while here the first seller is seeking to have a portion of the overall non-cash consideration it provided under a similar settlement as a refund of amounts it received from the pipeline in a first sale." Rehearing Order at P 54 (JA 487). As the Commission found, there is no reason to apply different evidentiary standards in the two cases. *Id*. Indeed, "Burlington's position would render the NGPA ceiling prices unenforceable in the context of comprehensive settlements of this nature, and fly in the face of . . . *Southern Union*" by permitting the seller to retain any excess over the ceiling price even in the absence of a showing that the settlement's exchange of consideration reflects a full refund of the overcharge. *Id.* at P 55 (JA 487).

Burlington also contends (Br. at 24-25) that the Commission's treatment of Burlington's non-cash consideration is at odds with *El Paso Natural Gas Co*., 85 FERC ¶ 61,003 (1998) and *ANR Pipeline Co*., 85 FERC ¶ 61,005 (1998). As the Commission found, however, neither case is relevant here. Rehearing Order at P 59 (JA 488). The rates at issue in those cases were governed by the NGA, not the NGPA, and there was no issue as to any first seller retaining more than the NGPA ceiling price. *Id*.

II. THE COMMISSION'S REFUSAL TO WAIVE BURLINGTON'S REFUND LIABILITY WAS A PROPER EXERCISE OF ITS DISCRETION UNDER NGPA § 502(c).

A. Standard of Review

As the NGPA § 502(c) adjustment is discretionary, "appellate review ... is necessarily limited in scope ... [and] the abuse of discretion standard for reviewing the FERC's denial of such special relief" applies. *Perlman v. FERC*, 845 F.2d 529, 532 (5th Cir. 1988). In reviewing denials of adjustments, the scope of review is limited to ascertaining whether there is a rational basis for and substantial evidence supporting the agency's determination. *Id.* "[W]hile equities of a certain case may appear to support a deviation from the strict application of the NGPA, the FERC is guided at all times by the principle that … FERC's duty [is to] balance congressional policy with the equities of each situation," and absent an abuse of discretion, the FERC decision will not be overturned. *Perlman*, 845 F.2d at 532 (citations omitted).

B. Burlington Did Not Demonstrate That Waiver Pursuant to NGPA § 502(c) Was Warranted Here.

Under NGPA § 502(c), the Commission may make such adjustments, "consistent with the other purposes of [the NGPA]," as may be necessary "to prevent special hardship, inequity, or an unfair distribution of burdens." 15 U.S.C. § 3412(c). In the orders reviewed in *Burlington*, the Commission concluded that Burlington had not shown that payment of the refunds would result in hardship or

inequity, and denied Burlington's request for an NGPA § 502(c) waiver. *See e.g. Burlington Resources Oil and Gas Co.*, 103 FERC ¶ 61,005 at P 32 (JA 14). *Burlington* did not address this issue in light of the ruling on the enforcement issue. *Burlington*, 396 F.3d at 412.

The Commission's affirmance of its denial of waiver on remand is well-supported. Burlington's overarching contention is that it is entitled to equitable relief because of the consideration it gave the Pipelines under the take-or-pay contracts. However, as the Commission found, the arguments concerning consideration are unpersuasive for the reasons discussed above. Rehearing Order at P 63 (JA 488).

Moreover, as the Commission further found, even assuming that Southland Royalty Company ("Southland"), Burlington's predecessor, actually considered *ad valorem* refunds when it entered into the take-or-pay contracts (at a time when *ad valorem* taxes were still deemed reimbursable severance taxes), Southland could not reasonably have assumed that the refunds could be eliminated in a take-or-pay settlement. Remand Order at P 52 (JA 404-05). In 1985, the Commission issued a Take-or-Pay Policy Statement ("Policy Statement")[10] which sought to resolve issues impeding producer/pipeline negotiations on the take-or-pay problem. The

[10] *Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations*, FERC Stats & Regs., Regs. Preambles 1982-1985 ¶ 30,637 (1985).

Policy Statement promulgated a regulation, 18 C.F.R. § 2.76, that found that pipeline payments to producers as consideration for amending or waiving take-or-pay provisions are payments for breaches of contract, not part of the price for an NGPA § 504(a) "first sale" of "natural gas" "delivered" during a particular month. *See* Take-or-Pay Policy Statement at 31,302-03. Consequently, such payments would not result in violations of NGPA ceiling prices. *See Associated Gas Distributors v. FERC,* 893 F.2d 349 (D.C. Cir. 1989 (affirming that take-or-pay buyouts are not part of a pipeline's payment for gas).

The Take-or-Pay Policy Statement never sanctioned any type of agreement as part of settling take-or-pay obligations that would require a purchaser in a first sale to pay more than the ceiling price for any gas it actually purchased. Remand Order at P 52 (JA 405). As sophisticated entities, Burlington (and Southland) should have known that to the extent the indemnity clauses were intended to allow the producer to retain amounts in excess of the ceiling prices, there was, at the very least, a substantial risk that the provision would be found unlawful and unenforceable, particularly since *Southern Union* issued before either settlement was entered into. *Id*.

As the Commission concluded, *id*. at P 53 (JA 405), an illegal agreement is not an appropriate basis for equitable relief, and the consideration received by the Pipelines does not change this:

> Burlington mischaracterizes the nature of the consideration under the settlement by implying that the consideration it gave was in exchange for the *ad valorem* indemnification clause. [note omitted] The take-or-pay settlements were mutual exchanges of consideration to resolve industry problems caused by the long-term gas purchase contracts between producers and pipelines. Thus, Burlington not only received the substantial immediate payment from the pipeline for actual and potential breaches of take-or-pay clauses in the contract, but Burlington obtained release of the gas from its dedication to the original contracting pipeline enabling Burlington to sell the gas to other buyers. In addition, Burlington now had rights to obtain open access transportation of that gas over the pipeline's system without the need to grant take-or-pay credits to the pipeline for any of its gas transported on that pipeline . . .

Remand Order at P 54 (JA 405).

Moreover, all major pipelines entered into take-or-pay settlements, payments by pipelines under these settlements were generally less than 20 percent of the total producer claims settled by those payments, and the settlements could be expected to have general release and indemnification provisions. *Id*. Accordingly, Burlington's settlement was typical of industry settlements. If found acceptable, Burlington's argument "would be applicable to every take-or-pay settlement, and would, in effect, eliminate most *ad valorem* refund claims when it is clear that the Policy Statement concerning take-or-pay claims never intended to permit producers, by settlement, to obtain more than the NGPA maximum lawful prices for gas actually taken." *Id.*

For its part, Burlington makes various arguments in support of waiver (Br. at 40-44). These arguments are addressed for the most part in the Rehearing Order at

P 68-88 (JA 489-91). For example, Burlington contends (Br. at 42, 44) that it is inequitable to fail to give effect to the indemnification clause because the Commission encouraged the parties to settle. However, as the Rehearing Order states, the Commission never authorized waiver of NGPA ceiling prices, as demonstrated by the 1985 Policy Statement. Rehearing Order at P 68, 71 (JA 489). For similar reasons, the Commission found unpersuasive Burlington's argument (see Br. at 42) that the Take-or-Pay Settlements were not entered into for the purpose of circumventing the ceiling prices. *Id*. Moreover, "that not all producers have raised this defense to their *ad valorem* tax refund obligation is understandable" given the Commission's "clear position that a take-or-pay settlement has no application to *ad valorem* relief obligations that may arise under the contracts covered by that settlement." Rehearing Order at P 70 (JA 489) (regarding whether the settlements were typical for the industry; *see* Burlington Br. at 43).

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Judith A. Albert
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6046
Fax: 202-273-0901
judith.albert@ferc.gov
March 29, 2007