

125 FERC ¶ 63,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ANR Pipeline Company

Docket Nos. RP07-439-000
RP07-439-001

INITIAL DECISION

(Issued December 15, 2008)

APPEARANCES

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BRUCE L. BIRCHMAN, Presiding Administrative Law Judge

PROCEDURAL BACKGROUND

1. In summary, on the record as made, and, on balance, I find that ANR Pipeline Company (ANR) has demonstrated that it owns the 2.6 Bcf of excess gas it sold in 2006; that ANR's customers do not possess an ownership interest in the 2.6 Bcf of excess gas; and that, in the circumstances present here and on the record as made, ANR is entitled to the proceeds from the sale. I further find that there is no evidence to warrant equitable relief as sought variously by interveners and Commission Staff (Staff) for ANR's use of its storage capacity to store the 2.6 Bcf of excess gas.

2. This proceeding has its genesis in a filing by ANR on May 1, 2007, of a report of Operational Purchases and Sales of Gas for the 12-month period from January 1, 2006 through December 31, 2006.¹ The filing stated that ANR "made sales of excess gas owned by ANR and not used in operations."² ANR identified 2,633,464 Dth as excess gas and \$28,145,771 as the amount received from the sale of the excess gas in 2006.³ On August 1, 2007, in response to an informal request by FERC Staff, ANR filed a supplemental statement that "ANR has owned and held in storage [the excess gas] since at least 1993, the time of the unbundling of its sales service in compliance with the FERC's Order 636."⁴

3. In light of the various protests, by an order issued on October 26, 2007, the Commission set for hearing under sections 4, 5, and 18 of the Natural Gas Act the lawfulness of ANR's filings.⁵ The Commission found that ANR had not provided

¹ Item by Reference (IBR-) D.

² *Id.* at 2

³ *Id.* at 4-5.

⁴ IBR-E at 1.

⁵ ANR Pipeline Company, 121 FERC ¶ 61,093 at P (A) (2007).

sufficient support in its informational report and supplement for its proposal to retain the revenues from the sale of the alleged 2.6 Bcf of excess gas.⁶ The Commission further found that the record was inadequate to allow it to determine the source of and ownership rights to the excess gas and whether the proposal is just and reasonable.⁷ The Commission required an evidentiary hearing to examine all the issues raised in the protests and to develop a more complete record concerning: the source of the excess gas, the need to retain the gas in storage for 14 years, and the entitlement to the proceeds from the sale of the gas.⁸ Under the governing trial schedule established at the prehearing conference held on November 8, 2007, ANR filed direct testimony on January 15, 2008; Staff, jointly, interveners ConocoPhillips Company and ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation (CE), and intervener Wisconsin Distributor Group⁹ (WDG) filed answering testimony on March 25, 2008¹⁰; and on June 13, 2008, WDG filed rebuttal testimony on section 5 issues and ANR filed rebuttal testimony on section 4 issues.¹¹

4. At the prehearing conference I ruled that the Commission's hearing order required a section 4 hearing at which ANR had the burden of proof of establishing a *prima facie* case and the ultimate burden of proof concerning the lawfulness of its filings.¹² As the time for seeking rehearing of the Commission's hearing order had not expired, on November 26, 2007, ANR sought rehearing and argued essentially that the hearing was a section 5 hearing and not a section 4 hearing. On December 26, 2007, the Commission granted rehearing for further consideration. Rehearing is pending before the Commission.

5. At an oral argument on April 4, 2008, I ruled that portions of witness Lovinger's direct testimony should be stricken. Tr. at 96-99. On April 18, 2008, ANR appealed that

⁶ *Id.* at P 24.

⁷ *Id.*

⁸ *Id.*

⁹ WDG consists of Wisconsin Power & Light Company, Wisconsin Gas LLC, Wisconsin Electric Power Company, Madison Gas & electric Company, Wisconsin Public Service Corporation, and City Gas Company.

¹⁰ On July 9, 2008, Staff moved to substitute its witness and filed an errata to its answering testimony.

¹¹ On July 15, 2008 ANR filed corrected rebuttal testimony.

¹² Tr. at 59.

ruling to the Commission. On May 9, 2008, the Commission issued an Order on Interlocutory Appeal, 123 FERC ¶ 61,137 (2008) which granted the interlocutory appeal. The Commission also found that the ALJ remained free to accord the evidence the weight he deems appropriate.¹³

6. At a May 1, 2008 oral argument on ANR's motion to compel discovery from WDG, I granted the motion in large part.

7. I adopted a Joint Stipulation of Issues on May 6, 2008, and a Revised Joint Stipulation of Issues (RJS) on July 16, 2008. The RJS governs the adjudication of the issues set for hearing and adjudicated at the hearing. Pre-trial briefs (PTB) were filed on August 11, 2008. At the hearing, I granted ANR's motion to strike a portion of Staff's PTB and for an order that the parties not be permitted to raise the issue in their post-hearing briefs. Tr. at 557. In its PTB, Staff argued, *inter alia*, that ANR did not have the authority to store its own merchant gas and sell that gas on a bundled basis. Staff PTB at 14-19, *citing Starks Gas Storage, L.L.C.*, 111 FERC ¶ 61,105 (2005), reh'g denied, 111 FERC ¶ 61,484 (2005) (*Starks*). I found that the argument Staff wished to raise involved a variety of mixed issues of law and fact that should have been raised in Staff's evidentiary case through a witness in order to provide ANR with an opportunity to respond. Tr. at 558. I further found that it would not be sufficient to extract facts from other portions of the record directed to other stipulated issues. Tr. at 557. I concluded that allowing this argument to be pursued would deprive ANR of due process. Tr. at 557. The argument addressed matters beyond the scope of the RJS and stipulated issues which governed adjudication of the issues at the hearing and Staff witness Sosnick's testimony, Ex. S-1 and supporting exhibits. Tr. at 558. Consequently, I prohibited the parties from addressing the matter in their post-trial briefs. Tr. 558-59. In response to a request for clarification from Staff counsel, I stated that the *Starks* case could be cited in the post-trial briefs, but not in the manner raised in Staff's PTB. Tr. at 559.

8. The record spans 284 pages and includes 50 pre-filed exhibits of which one was not admitted in evidence, 25 cross-examination exhibits of which two were not admitted in evidence, Items by Reference (IBR) IBR-A-E, and Ex. ALJ-1.¹⁴

¹³ *Id.* at P 9.

¹⁴ IBR-A-E and Ex. ALJ-1 are denoted on the Master Exhibit List which is included in Volume No. 5 of the hearing on August 27, 2008.

DISCUSSION, FINDINGS, AND CONCLUSIONS ON THE STIPULATED ISSUES

I. Did ANR own the 2.6 Bcf of excess gas sold in 2006?Finding

9. The short answer to this is “Yes.” The following chronology and discussion are relevant to this resolution.

Chronology

10. Before 1992, ANR was in the merchant business in which it provided a bundled sales service of gas, among other services. Ex. ANR-1 at 2; Ex. ANR-5 at 12. ANR recovered the cost of the gas that it sold through a purchased gas adjustment mechanism (PGA). Ex. ANR-1 at 2.

11. In March 1992, ANR filed a settlement of several dockets to restructure ANR services and to settle ANR’s rates. Id. As part of the settlement, the parties agreed that ANR would terminate the PGA mechanism and would implement sales services that included a gas inventory charge (GIC). Id. Shortly after the filing of this settlement, the Commission issued Order No. 636.¹⁵ Id. The Commission found that terms of the settlement deviated from Order No. 636, but the Commission approved the settlement on a one-year interim basis. Id. at 3. ANR operated under the interim settlement until it restructured its services under Order No. 636 on November 1, 1993. Id.

12. The PGA mechanism ended on October 31, 1992, and the GIC mechanism was in effect from November 1, 1992 up to the end of the interim settlement on October 31, 1993. Ex. ANR-5 at 8. The purpose of the GIC mechanism was to compensate ANR for contracting for the gas supply to meet the needs of ANR’s customers. Id. The GIC mechanism was developed as an interim method to assist ANR through its restructuring process to conclude its merchant gas business. Id.

13. While ANR was implementing the GIC mechanism under the interim settlement, ANR and its customers were engaged in Order No. 636 restructuring proceedings in

¹⁵ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh’g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh’g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh’g*, 62 FERC ¶ 61,007 (1993), *aff’d in part and remanded in part sub nom.* United Distributors Cos. v. FERC, 88 F. 3d 1005 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997) (Order No. 636).

Docket No. RS92-1. Ex. ANR-1 at 3. As a result of these proceedings, ANR eliminated its sale function altogether. Id. In a restructuring order, the Commission approved ANR's allocation of 25 Bcf of storage capacity for system balancing purposes. IBR-B at 62,006; *see also* Ex. S-3 at 71. The Commission also permitted ANR to include in its rates the costs associated with 20 Bcf of gas for system balancing and no-notice service. Ex. ANR-1 at 3; *Third Order on Compliance Filing, Second Order on Rehearing and Order on Complaint*, 65 FERC ¶ 61,162 at 61,790 (1993) (*Third Order on Compliance Filing*). This determination was subject to revisiting in ANR's upcoming rate case in Docket No. RP94-43, filed on November 1, 1993. Ex. ANR-1 at 3. ANR and its customers resolved the rate case in a black-box settlement that was filed on October 17, 1997. IBR-A; *see also* Ex. ANR-10 at 5. ANR witness Pollard stated that ANR has continued to include the costs associated with the 20 Bcf in its rates for system balancing and no-notice service. Ex. ANR-1 at 3.

14. Prior to restructuring, ANR required sufficient volumes of gas and storage capacity to provide for system balancing and no-notice service. Id. at 3-4. The actual system gas storage balance fluctuated on a daily basis due to injection and withdrawal activity. Id. at 4. The actual physical storage balance of gas in the ground at the time of the restructuring was approximately 22.6 Bcf. Id. at 3.

15. The difference between the actual balance of 22.6 Bcf and the 20 Bcf that the Commission allowed ANR to include in its rates is the 2.6 Bcf of excess gas that is the subject of this proceeding. Id. at 2-3. The difference was a result of the actual injection and withdrawal activity of ANR's customers prior to November 1, 1993 and the amount of working gas that was purchased by ANR's customers as part of the restructuring process. Id. at 4.

16. ANR maintains monthly storage registers that track ANR's monthly storage activity and show the volumes of gas stored in the fields that ANR owned or leased. Id. at 4. Exhibit No. ANR-2 contains the Storage Register for the last two months prior to ANR's restructuring under Order No. 636 on November 1, 1993. Ex. ANR-2 at 1-2. The October 1993 Storage Register illustrates how the actual physical storage balance of 22.6 Bcf was calculated. Id. at 2. The register shows a total balance of 87,975,064 Dth of ANR-owned gas as of October 31, 1993. Id. At the bottom of the register, in what appear to be adding machine entries, are notations reflecting a sale of 1,999,600 Dth to ANR's small shippers under Rate Schedule STS and a reclassification of working gas to base gas of 63,342,000 Dth. Id.; *see also* Ex. ANR-1 at 4; Tr. at 280. Subtracting these two amounts from the total balance results in 22,633,464 Dth, or approximately 22.6 Bcf, of working gas in storage as of October 31, 1993. Ex. ANR-2 at 2; *see also* Ex. ANR-1 at 4; Tr. at 280. This amount of 22,633,464 Dth is listed in an adding machine entry at the bottom of the October 1993 Storage Register. Ex. ANR-2 at 2.

17. ANR has maintained another record that substantiates that ANR owned 22.6 Bcf of system balancing gas as November 1, 1993. Ex. ANR-1 at 5. Beginning with ANR's restructuring on November 1, 1993, ANR has maintained a System Balancing Account schedule which records the company's monthly activity regarding its various uses of gas included for system balancing. Id.; Ex. ANR-3 at 1. Ex. ANR-3 consists of ANR's System Balancing Account from October 31, 1993 to September 1998. Ex. ANR-3 at 1. The schedule identifies the beginning balance on October 31, 1993 as 22,663,464 Dth, which is the same amount of gas reported on the October 1993 Storage Register. Id.; Ex. ANR-2 at 2.

18. Because gas is fungible, ANR does not know the exact source of the 2.6 Bcf of gas. Ex. ANR-1 at 5; *see also* IBR-E at 1. ANR is unable to match the 2.6 Bcf with any specific gas purchase. Ex. ANR-1 at 5. However, ANR has concluded that the 2.6 Bcf of gas was purchased in October 1993, the month before ANR's restructuring. Ex. ANR-1 at 5-6. ANR used the first in, first out (FIFO) method of valuation, which means that for accounting purposes the first gas purchased by the company was the first gas sold. Ex. ANR-5 at 8, 12. Given that ANR used the FIFO accounting method, I find and conclude that it was reasonable for ANR to consider that the 2.6 Bcf of gas was purchased last, in October 1993. Ex. ANR-1 at 5-6.

19. ANR's accounting records demonstrate that it purchased in October 1993 approximately 8.4 Bcf of gas, which included the 2.6 Bcf of excess gas. The difference between 87,975,064 Dth, the total amount of ANR-owned gas listed in ANR's October 1993 Storage Register, and 79,526,112 Dth, the total amount ANR-owned gas listed in ANR's September 1993 Storage Register, is 8,448,952 Dth, or roughly 8.4 Bcf. Ex. ANR-2 at 1-2. This amount of 8,448,942 Dth is recorded in the October 1993 Storage Register as the net change in the total ANR gas stored. Id. at 2.

20. In addition, ANR's General Ledger System Journal Voucher, which describes storage activity for the month of October 1993, listed this same amount of 8,448,942 Dth as a GIC Storage Injection. Ex. ALJ-1 at 5; Tr. at 260. The value of the 8.4 Bcf of gas is estimated at \$16,173,828.81. Id. The gas was credited to Account 808.2 which tracks gas delivered to storage. Tr. at 258, 260. It was debited to ANR's working gas account, which is Account 164.1, Gas Stored – Current of the FERC Uniform System of Accounts. Ex. ALJ-1 at 5; Ex. ANR-1 at 6-7. The gas also was debited to the gas purchase expense account, Account 800 through 805. Ex. ALJ-1 at 2-3; *see also* Ex. ANR-5 at 7; Tr. at 260. This accounting treatment is consistent with ANR's ownership of the gas. Tr. at 260-61. If ANR had not purchased the gas or if the gas was customer gas, ANR would not have recorded the gas to Account 800 through 805. Tr. at 261. ANR's accounting records show that ANR purchased the 8.4 Bcf of gas and put it in storage, and, thus, owned the 8.4 Bcf of gas in storage. Tr. at 260.

21. ANR's Journal Voucher for October 1993 lists the two components of the 8.4 Bcf increase between September 1993 and October 1993. Ex. ANR-29 Att. 1 at 1; Tr. at 258. The Journal Voucher lists the Actual GIC Storage Injection as 5,406,413 Dth, at an actual value of \$11,102,069.10. Ex. ANR-29, Att. 1 at 1; Tr. at 258. The voucher lists the net Storage Balancing Injection as 3,042,539 Dth, at an actual value of \$5,867,840.72. Ex. ANR-29 Att. 1 at 1. ANR's accounting records regarding storage balancing show that the 3,042,539 Dth is the net difference between the 3,400,464 Dth of total injections and 357,925 Dth of withdrawals. Id., Att. 1 at 3.

22. ANR initially recorded the 20 Bcf of gas for system balancing and the 2.6 Bcf of excess gas in account 164.1. Ex. ANR-1 at 6. In 1994, this accounting treatment changed when ANR accounted for all of its base and working gas in Account 117. Id.; *see also* Ex. ANR-4 at 2.

23. In 1996, the accounting treatment of the 2.6 Bcf of gas changed again under Order No. 581, FERC Stats. & Regs. ¶ 31,026 (1995); Ex. ANR-1 at 6; Ex. ANR-5 at 5. Order No. 581 replaced Account 117 with Sub-Accounts 117.1 through 117.4: Account 117.1, Gas Stored – Base Gas; 117.2, System Balancing Gas; Account 117.3, Gas Stored in Reservoirs and Pipelines – Noncurrent; and Account 117.4, Gas Owed to System Gas. Ex. ANR-5 at 5.

24. Order No. 581 also allowed pipelines to account for system gas by using either a fixed asset model or an inventory model. Ex. ANR-1 at 6; Ex. ANR-5 at 6. ANR elected the fixed asset model and transferred its system balancing gas, which included the excess 2.6 Bcf, from Account 117 to Account 117.2 – System Balancing Gas. Ex. ANR-1 at 6. ANR initially chose to use the 25 Bcf, or 25,000,000 Dth, of capacity to report as system balancing in Account 117.2. Tr. at 304; *see also* Ex. ANR-4 at 3. Any encroachments on that 25 Bcf of capacity were reported into Account 117.4. Tr. at 304.

25. In 2004, ANR reclassified the excess 2.6 Bcf of gas from Account 117.2 to Account 117.4. Ex. ANR-1 at 6; *see also* Ex. ANR-4 at 5-6. ANR determined that Account 117.2, the system balancing account, should only represent the 20 Bcf of gas that the Commission originally approved ANR to include in its rates for system balancing. Tr. at 304; *see also* Ex. No. ANR-4 at 4. ANR considered the 2.6 Bcf of excess gas as a positive encroachment on the system gas and, thus, reported it in Account 117.4. Tr. at 304.

26. ANR's recording of the 2.6 Bcf of excess gas in Account 164.1 and then in Account 117 and its Subaccounts is consistent with its ownership of the gas. As noted above, ANR recorded the gas it owned and used for system balancing in Account 164.1 and then in Account 117. Ex. ANR-1 at 6-7. The gas recorded in Account 164.1 and Account 117 represents ANR's investment in storage gas. Ex. ANR-5 at 5-6. ANR's system balancing gas is accounted for separately from customer-owned gas. Ex. ANR-1

at 7. ANR does not account for customer-owned gas under FERC's Uniform System of Accounts because ANR does not own the gas. Id. ANR tracks the amount of customer-owned gas in its storage facilities in the monthly storage registers and by contract for each customer. Id.

27. On June 24, 2005, ANR's Risk Management Committee approved the sale of the excess 2.6 Bcf of gas. Id.; Ex. WDG-16 at 1. ANR sold the gas to three parties. Ex. ANR-1 at 7. ANR made three sales to WPS Energy, each for delivery in February 2006: (1) July 18, 2005 sale for 300,000 Dth at \$9.22 per Dth; (2) July 22, 2005 sale for 330,000 Dth at \$9.07 per Dth; and (3) September 15, 2005 sale for 500,000 Dth at \$12.18 per Dth. Ex. ANR-1 at 7. ANR made a sale to Tenaska Marketing on November 18, 2005 for 1,000,000 Dth at \$9.15 per Dth for delivery in February 2006. Id. at 7. ANR made the final sale to NJR Energy Services on December 12, 2005 for 503,464 Dth at \$14.195 per Dth for delivery in March 2006. Id. at 7. For each of these transactions, ANR exchanged the gas to the purchasers through an infield storage transfer. Ex. ANR-21 at 2; Tr. at 354, 419. The total revenue ANR received from the sale of the excess 2.6 Bcf was \$28,145,771. IBR-D at 4-5. ANR booked the revenues in Account 495 and credited Account 117.4 for the cost of the gas. Ex. ANR-1 at 8.

Storage

28. As noted above, in the Commission's Order No. 636 restructuring orders, the Commission approved ANR's inclusion in its rates of 25 Bcf of storage capacity and 20 Bcf of gas for system balancing and no-notice service. IBR-B at 62,006; *Third Order on Compliance Filing* at 61,790-791; *see also*, Ex. S-3 at 71. The difference between the 25 Bcf of storage capacity and the 20 Bcf of gas is 5 Bcf of capacity, referred to as headroom, which was to be available for overall system long positions. Ex. WDG-1 at 6. Long positions occur when ANR's customers need to leave extra gas on the system beyond the full 20 Bcf of gas for system balancing. Tr. at 238-239.

29. From October 31, 1993 until the sales of the excess 2.6 Bcf of gas in 2006, ANR included the 2.6 Bcf of excess gas with the 20 Bcf that ANR used for system balancing and no-notice service. Ex. ANR-21 at 6; Ex. S-3 at 71. The 2.6 Bcf was available for system balancing. Ex. ANR-21 at 6. For accounting purposes, ANR tracked the 2.6 Bcf of excess gas as part of the system balancing gas that was stored in the 25 Bcf of capacity. Id.; Ex. S-3 at 71. Thus, ANR treated the 22.6 Bcf as stored in the 25 Bcf of capacity, and the 2.6 Bcf of excess gas as stored in the 5 Bcf of headroom. *See* Ex. WDG-1 at 6; Ex. ANR-21 at 6; Ex. S-3 at 71. *As a physical matter, however, there was no specific earmarked capacity for the 20 Bcf or the excess 2.6 Bcf.* Ex. ANR-21 at 6. ANR stored the 20 Bcf of system balancing gas and the 2.6 Bcf of excess gas in ANR's overall storage complex where the gas was commingled with other gas within the storage complex. Id.; *see also* Ex. ANR-24 at 2.

Other Gas Purchases and Sales

30. According to ANR's Components of Gas in Storage report and the testimony of ANR witness Pollard, in 1994 ANR made additional purchases of gas. *See* Ex. CE-4 at 1-4 and Ex. CE-12 at 2; *see also* Tr. at 408. The original report labeled these additional purchases as "Purchase Gas Replacement Gas" and listed the estimated volume of this additional gas as 7,289,514 Dth. Ex. CE-4 at 1-4. The revised report labeled the purchases as "Purchase Replacement Gas" and listed the actual volume as 7,092,582 Dth, or approximately 7.09 Bcf. Ex. CE-12 at 2.

31. Starting with the month of February 1995, ANR's Storage Register lists the gas volume of 7,092,582 Dth in a category labeled "Gas in Resv. & Pipelines – Noncurrent."¹⁶ Ex. WDG-8 at 162. "Gas in Resv. & Pipelines – Noncurrent" is identified as a separate category from ANR's "Base Reserve," listed at a volume of 63,342,000 Dth, and "ANR's System Balance," listed for February 1995 at a volume of 17,991,139 Dth. *Id.*; *see also* Tr. at 338-339. The sum of the volumes in these three categories equals 88,425,721 Dth, which is listed in the register as the cumulative balance of the "Total ANPL Gas Stored." Ex. WDG-8 at 162; *see also* Tr. at 338-339.

32. The last month that "Gas in Resv. & Pipelines – Noncurrent" is listed as a separate category in ANR's Storage Register is December 1995. Ex. WDG-8 at 152; *see also* Tr. at 339-340. ANR's December 1995 Storage Register lists a gas volume of 2,091,609 Dth in "Gas in Resv. & Pipelines – Noncurrent." Ex. WDG-8 at 152. This reflects an approximately 5 million dekatherm, or about 5.0 Bcf, reduction in the "Gas in Resv. & Pipelines – Noncurrent" category from February 1995. *Compare* Ex. WDG-8 at 152 *with* Ex. WDG-8 at 162; *see also* Tr. at 345. Footnotes in ANR's Storage Registers for the months April through October 1995 explain that the reduction was a result of "sales of excess storage gas" during these months to Consumer Power, Gulf States Utilities, and Louisiana Power & Light.¹⁷ Ex. WDG-8 at 154-160. ANR witness Pollard testified that there is no correlation between these sales and the sale of the 2.6 Bcf of gas. Tr. at 410.

¹⁶ Presumably, this category corresponds to Account 117.3 of the FERC Uniform System of Accounts.

¹⁷ The storage sales that occurred during the months of April 1995-July 2005 also are specifically identified in ANR's 1995 Components of Gas in Storage report. Ex. ANR-26 at 2-4; *see also* Tr. at 349-350, 413. Entries reflecting the dollar amounts of these sales are demarcated by the report's footnotes 2-4. Ex. ANR-26 at 2-4; *see also* Tr. at 349-350, 413.

Discussion

33. CE Witness Crowe states that to retain the revenues from the sale of the excess 2.6 Bcf of gas, ANR needed to demonstrate that ANR “purchased, owned, and during the entire period was solely at risk for, the gas that it sold as ‘excess’ gas.” Ex. CE-1 at 3. Crowe argues that to make this showing: “ANR should have at a minimum demonstrated in its filings and testimony that it (1) purchased the gas, and (2) was able to track the actual purchased gas from the date of purchase to the date of sale, including how the gas was used, stored and differentiated from other gas held by ANR.” Id. Crowe believes that ANR did not demonstrate either of these minimum steps. Id.

34. Crowe asserts that at least 8-10 Bcf of the approximately 22.6 Bcf of system balancing gas was gas that ANR did not purchase. Id. at 10. Supporting this claim, Crowe cites Ex. No. CE-4, ANR’s Components of Gas in Storage report as of December 31, 2004. Id. at 6-8, referencing Ex. CE-4 at 1-4. The 22,633,464 Dth of system balancing gas, which ANR possessed at the time of its restructuring on November 1, 1993, is listed at the bottom of the report as the sum of the “system balancing balance” of 13,965,980 Dth and 8,667,484 Dth. Ex. CE-4 at 1-4. Crowe notes that 8,667,484 Dth is the sum of the three entries on lines 5-7 of the report: “interim fuel gain, etc.” on line 5 at a volume 2,556,278 Dth; “increase fuel gain” on line 6 at a volume of 2,160,023 Dth; and “increase fuel gain” at a volume of line 7 of 3,951,183 Dth. Ex. CE-1 at 7, referencing CE-4 at 1-4. Crowe further asserts that these three entries represent fuel over-recoveries from customers injected into storage by ANR prior to November 1, 1993. Ex. CE-1 at 7-8. Because the sum of the three entries was listed as a component of the 22.6 Bcf of system balancing, Crowe concludes that 8,667,484 Dth of fuel over-recoveries were specifically included in the 22.6 Bcf of gas.¹⁸ Ex. CE-1 at 8. Crowe states that this conclusion contradicts ANR’s claim that it definitely purchased the 2.6 Bcf in October 1993. Id.

35. Crowe cites the Commission’s Order on Initial Decision in ANR’s GIC proceeding, *ANR Pipeline Co.*, 82 FERC ¶ 61,248 (1998) (GIC Order) as additional

¹⁸ In ANR’s revised Components of Gas in Storage report for this period, the 22,633,464 Dth of system balancing gas is listed as the sum of the revised “system balancing balance” of 14,960,007 Dth and 7,673,457 Dth. Ex. CE-12 at 2. The revised amount of 7,673,457 Dth is also the sum of the revised three fuel gain entries: “interim fuel gain, etc.” on the fifth line of the revised report, “increase fuel gain” on the sixth line, and “increase fuel gain” on the seventh line. In addition, subtracting 7,673,457 Dth by the revised entry for “636 period fuel loss” of 389,375 Dth and the revised entry for “fuel used to transport purchase” of 191,500 Dth yields 7,092,582 Dth, which, as noted above, is the amount of replacement gas ANR purchased in 1994. Ex. CE-12 at 2. It is unclear from the record why these values are equivalent.

information to support the argument that some of the gas in ANR's storage complex at the time of ANR's restructuring was fuel over-recoveries which ANR did not purchase. *Id.* at 8-9. In the GIC proceeding, ANR stated that during the GIC period it had about 65.9 Bcf of physical net metered storage withdrawals. 82 FERC ¶ 61,248 at 61,986. ANR adjusted this amount by 10 Bcf to claim 75.9 Bcf of storage withdrawals so that ANR could balance the volume of its gas supplies with the volume of its gas sales. 82 FERC ¶ 61,248 at 61,986. Crowe asserts that the GIC Order makes clear that ANR purchased and withdrew from storage 10 Bcf of gas less than it sold during the GIC period. Ex. CE-1 at 8-9, citing *ANR*, 82 FERC ¶ 61,248 at 61,986. Crowe concludes that 10 Bcf of the gas sold by ANR during the GIC period came from one or more sources besides gas purchases and storage withdrawals. *Id.* at 9. Crowe interprets the testimony of one of ANR's witnesses in the GIC proceeding to conclude that the most probable source of the gas was fuel over-recoveries. *Id.*, citing *ANR*, 82 FERC ¶ 61,248 at 61,986.

36. Crowe also asserts that ANR should not retain the proceeds of the sale of the 2.6 Bcf because the fuel over-recoveries were gas that ANR did not purchase. Ex. CE-1 at 10. CE argues that ANR has not provided verifiable evidence to support its claim that it purchased and paid for the 2.6 Bcf of excess gas in 1993. ConocoPhillips PTB at 4; ExxonMobil PTB at 6; CE IB at 7. Crowe asserts that: "Because ANR cannot demonstrate the actual source of the 'excess' gas, ANR cannot show that it purchased and owned the 'excess' gas during the entire period or that the customers did not have any costs or risks associated with the "excess" gas." Ex. CE-1 at 11.

37. CE also argues that ANR has failed to meet the second prong of Crowe's test, noting Crowe's determination that ANR has been unable to track the 2.6 Bcf of excess gas from the date of the purchase to the date of the sale. ExxonMobil PTB at 6; CE IB at 14, referencing Ex. CE-1 at 3. CE cites Ex. CE-5. ExxonMobil PTB at 7; CE IB at 11-12. In this exhibit, ANR stated that data was not available to identify specifically the 2.6 Bcf in Account 164.1 or Account 117 from 1993-1995. ExxonMobil PTB at 7; CE IB at 11-12, referencing Ex. CE-5 at 3. Further, according to Ex. CE-5, ANR's 2004 Form 2 was the first time ANR specifically identified the 2.6 Bcf as distinct from other gas quantities. ExxonMobil PTB at 7, referencing Ex. CE-5 at 3-4; *see also* CE IB at 11-12; Tr. at 307-308.

38. ANR witness Pollard disagreed with Crowe that ANR had significant fuel over-recoveries during the GIC period. Ex. ANR-24 at 3. Pollard established that two of the three fuel gain entries in the Components of Gas in Storage report cited above are offset by corresponding negative entries equal to the same volumes. Ex. ANR-24 at 5. The "increase fuel gain" on Line 6 of 2,160,023 Dth is offset by a negative entry for the same volume with the label of "decrease in exchange receipts" on Line 3. *Id.* at 5, referencing Ex. CE-4 at 1-4. Similarly, the "increase fuel gain" on Line 7 of 3,951,183 Dth is offset by a negative entry for the same volume with the label of "exchange reserve" on Line 4. *Id.* Pollard testified that the remaining volume of 2,556,278 Bcf, in

the category of “interim fuel gain, etc.” may have been some type of catch-all category. Ex. ANR-24 at 5. Pollard stated that he did not know why the preparer of the report chose the labels of “interim fuel gain, etc.” and “increase fuel gain.” He asserted that they appeared to be arbitrary labels. Id.

39. ANR witness Pollard also disagreed with Crowe’s interpretation of the Commission’s GIC Order. He rebutted CE witness Crowe’s conclusion that the 10 Bcf of gas came from fuel over-recoveries. Id. at 6-7. Pollard noted that the Commission in the GIC proceeding agreed with ANR that it was appropriate to use storage as the source of the gas to balance gas purchases against sales during the GIC period. Id. at 8, citing ANR, 82 FERC ¶ 61,248 at 61,986. Pollard stated that the Commission’s discussion in the GIC Order neither suggests that ANR’s customers contributed the 10 Bcf of gas, nor that the customers have any ownership interest in the 2.6 Bcf of the excess gas. Ex. ANR-24 at 9. He asserts that the Commission’s discussion merely indicates that ANR sold more gas than it purchased, and the difference was assumed to come from storage. Id.

40. As additional support that ANR did not have significant fuel over-recoveries, Pollard noted that in 1996, while the GIC proceeding was still pending, ANR made a fuel filing based on the three-year period of 1993-1995. Id. at 7, citing ANR Pipeline Co., 78 FERC ¶ 61,920. In the Commission’s *Order After Technical Conference*, the Commission found that ANR had *under-collected* 2,280,730 Mcf, or approximately 2.3 Bcf during the three-year period. Ex. ANR-24 at 7, citing ANR, 78 FERC ¶ 61,920 at 62,267. For 1993, which included 10 of the last 12 months of the GIC period, the Commission determined that ANR had only a slight *over-recovery* of 100,323 Mcf, or approximately .1 Bcf. Id.

41. Pollard correctly pointed out that even if some of the 22.6 Bcf of system balancing gas were fuel over-recoveries, ANR was entitled to retain these over-recoveries. Ex. ANR-1 at 8-9; Ex. ANR-24 at 3-4. Pollard stated that prior to April 2005, when ANR implemented a true-up provision, ANR was at risk for the under-recovery of fuel and had the right to keep any fuel over-recoveries. Ex. ANR-1 at 8-9; Ex. ANR-24 at 3-4. CE witness Crowe acknowledged that ANR was entitled to retain fuel over-recoveries. Ex. CE-1 at 10.

42. Pollard explained the extent to which the Commission addressed fuel over-recoveries in the GIC Order. Ex. ANR-24 at 6-7, citing ANR, 82 FERC ¶ 61,248 at 61,990-91. WDG, one of ANR’s customers, had alleged that ANR had over-recovered 9.5 Bcf of fuel during the GIC Period and that ANR should refund the value of this gas. Ex. ANR-24 at 6, citing ANR, 82 FERC ¶ 61,248 at 61,990. The Commission *rejected* WDG’s argument:

While ANR was to include the costs of the fuel use gas purchased under the ISP rate schedule in its GIC reconciliation, the GIC customers were to be charged for fuel use based on the fuel use percentage in ANR's tariff, not the actual amount of fuel used to transport their gas. Thus, we reject WDG's contention that ANR should be required to make refunds, to the extent the actual fuel used in connection with its GIC sales was less than the fuel use percentage reflected in the tariff.

ANR, 82 FERC ¶ 61,248 at 61,990.

43. Finally, regarding the second prong of Crowe's test – that ANR should be able to track the actual purchased gas from the date of purchase to the date of sale – Pollard correctly concluded that Crowe set up an impossible standard. Ex. ANR-24 at 1-2. Pollard aptly explained that it is not possible to track physically the gas because gas is a fungible commodity that is commingled with other gas injected in and withdrawn from ANR's storage complex. Ex. ANR-24 at 2. Moreover, Crowe acknowledged that it is not possible to trace gas in storage to a specific source in an answer to a data request. Ex. ANR-24 at 2, referencing Ex. ANR-25 at 2.

44. Pollard argues that ANR's ownership of gas is established through ANR's accounting treatment of the gas. Ex. ANR-24 at 2. As seen, ANR accounted for the 2.6 Bcf of excess gas as company-owned gas and tracked its gas separately from gas owned by customers. *Id.* at 3.

45. Based on the chronology and the matters just discussed, I find and conclude, on balance, that ANR owned the 2.6 Bcf of excess gas that was sold in 2006. ANR's accounting records establish that it purchased 8.4 Bcf of gas in October 1993, of which the 2.6 Bcf of excess gas was a part. From the time of the purchase of the gas in October 1993 until the time of the sale in the winter of 2006, ANR tracked the excess gas as company-owned gas in Account 164.1, Account 117, Account 117.2, and, finally, in Account 117.4.

46. I find unpersuasive CE witness Crowe's arguments that ANR has not shown that it owned the 2.6 Bcf of excess gas. I agree with ANR witness Pollard that the Commission's order on ANR's 1996 fuel filing indicates that ANR did not have significant fuel over-recoveries during the GIC period. *See ANR Pipeline Co.*, 78 FERC ¶ 61,920 at 62,267. Even if Crowe's conclusion that approximately 10 Bcf of the gas that ANR sold during the GIC period came from fuel over-recoveries was true, this conclusion is not relevant. Gas that was already sold by ANR during the GIC period could not have been sold again by ANR in 2006 as part of the 2.6 Bcf of excess gas. Finally, as the Commission has stated, and Crowe acknowledged, ANR was entitled to fuel over-recoveries during the GIC period. *ANR*, 82 FERC ¶ 61,248 at 61,990; Ex. CE-1

at 10. Thus, even assuming that some of the gas in ANR's storage facility at the time of ANR's restructuring was a result of fuel over-recoveries, ANR was the owner of the gas.

II. Do ANR's customers possess any ownership interest in the 2.6 Bcf of excess gas?

Finding

47. I find and conclude that ANR's customers do not have an ownership interest in the 2.6 Bcf of gas.

48. CE makes three main arguments that ANR's customers possess an ownership interest in the 2.6 Bcf of excess gas. Each is without merit.

49. First, applying Crowe's reasoning summarized above, CE asserts that 8-10 Bcf of gas not purchased by ANR was included as ANR's system balancing gas at the time of ANR's restructuring. ConocoPhillips PTB at 7; *see also* CE IB at 12-13. Thus, CE argues that ANR does not have an ownership interest in the 2.6 Bcf, and instead, ANR's customers have an ownership interest in the excess gas. ConocoPhillips PTB at 7; CE IB at 17.

50. In the discussion of Issue I, I rejected CE's first argument that ANR did not own the 2.6 Bcf of excess gas prior to the sale of the gas in 2006.

51. Second, CE asserts that the costs associated with the 2.6 Bcf of excess gas were included in the rates of ANR's transportation customers in ANR's last rate case, Docket No. RP94-43. ConocoPhillips PTB at 7-8; ExxonMobil PTB at 7-8; CE IB at 17-18. CE cites ANR's testimony that ANR maintained the 2.6 Bcf of excess gas as system balancing gas. ExxonMobil Brief PTB at 7-8; CE IB at 17, citing Ex. ANR-1 at 8. CE also cites an ANR data response in which ANR stated that it included the 2.6 Bcf in its System Balancing Account and that it used the 2.6 Bcf for system balancing. ExxonMobil PTB at 8; CE IB at 17, citing CE-5 at 1. CE argues that: "[T]he only reasonable and equitable conclusion is that the 'excess' gas was 'system balancing gas,' which ANR's customers paid for, and which ANR stored as part of system balancing capacity . . . in order to provide system balancing to ANR's transportation customers." CE IB at 17-18; *see also* ExxonMobil PTB at 8.

52. ANR witness Lovinger testified that the 2.6 Bcf of excess gas was not included in its rates in Docket No. RP94-43. Ex. ANR-5 at 8-9. Lovinger notes that in ANR's rate filing in Docket No. RP94-43, ANR included only 20 Bcf of working gas at a value of \$41,052,706 in rate base. Ex. ANR-5 at 9, referencing Ex. ANR-8 at 6. Lovinger asserts that this value clearly excludes the 2.6 Bcf of gas. Ex. ANR-5 at 9.

53. CE witness Crowe disagreed with Lovinger's conclusion that the 2.6 Bcf of excess gas was definitely not included in ANR's rates. Ex. CE-1 at 11-12. Crowe noted that ANR's rate case in Docket No. RP94-43 resulted in a black-box settlement which did not specify of the amount of working gas that ANR included in rate base. Ex. CE-1 at 11; *see also* Tr. at 325. Crowe concluded that ANR had no way of knowing whether the costs associated with the 2.6 Bcf of gas were included in ANR's rates. Ex. CE-1 at 11-12. CE argues that in light of the black-box nature of the settlement, ANR cannot rebut the assertion that ANR's customers have paid for the 2.6 Bcf of gas. ConocoPhillips PTB at 8; CE IB at 18-19.

54. With regard to CE's second argument, because the Stipulation and Agreement in Docket No. RP94-43 was a black-box settlement, CE (and Staff) cannot definitively demonstrate that the costs associated with the 2.6 Bcf *were in* ANR's rates. Because CE failed to make this showing, CE has not demonstrated that ANR's customers possess an ownership interest in the 2.6 Bcf of gas.

55. CE's assertion that the costs associated with the 2.6 Bcf of gas were in ANR's rates is implausible. As noted above, in ANR's restructuring proceeding, the Commission authorized ANR to include in its rates 20 Bcf of gas for system balancing and no-notice service. Ex. ANR-1 at 3. Further, in ANR's rate filing, ANR included 20 Bcf of working gas in rate base and ANR sought a total cost of service of \$683.2 million. Ex. ANR-10 at 5. The black-box settlement specified a total cost of service of \$572.7 million. *Id.* at 6. In these circumstances, there is no reasonable basis for assuming or implying that ANR would have included in the settlement the costs associated with an additional 2.6 Bcf of working gas in rate base, while at the same, reducing the total cost of service from the filed amount by over \$110 million.

56. Third, CE notes that between April and October of 1995, ANR made sales that totaled approximately 5 Bcf of gas. CE IB at 21-22, referencing Ex. WDG-8 at 152-162. CE argues that this 5 Bcf of sales came from the approximately 22.6 Bcf of ANR's system balancing gas and reduced ANR's actual system balancing account to around 17.6 Bcf. CE IB at 21-22, 24. Consequently, CE asserts that the 2.6 Bcf of gas at issue in this proceeding was part of ANR's remaining 17.6 Bcf of system balancing gas. *Id.* at 24. CE notes that ANR has alleged that its customers paid for the costs associated with 20 Bcf of system balancing gas in their rates. *Id.* Thus, CE concludes that ANR's customers paid for costs associated with the 2.6 Bcf of gas in their rates and have an ownership interest in the 2.6 Bcf. *See id.*

57. As noted above in the Section entitled "Other Gas Purchases and Sales," ANR's 1995 Storage Registers demonstrate sales of approximately 5 Bcf. Ex. WDG-8 at 152-162. CE argues that this 5 Bcf of gas must have originated from the 22.6 Bcf of ANR's system balancing gas, asserting that, "ANR's records do not include, or claim, any other sources of gas where ANR possessed an ownership interest." CE IB at 22. To further

support this conclusion, CE cites Exhibit No. ANR-26, ANR's Components of Gas in Storage for the Year 1995. CE IB at 22, citing Ex. ANR-26 at 1-4. CE points out that fn 2, which references several sales made in Account 117020 during 1995, states that the June 1995 balance was "[t]ransferred amt equal to 1/93 gain to a/c 117021."¹⁹ CE IB at 22, citing Ex. ANR-26 at 4. CE also points out that fn 4 states that the "[t]otal of FN 3 & 4 ties to gain booked 1/93, and transferred to 117021." CE IB at 22-23, citing Ex. ANR-26 at 4. CE argues that if the amount sold related to a gain in January 1993, then that amount must have been included in ANR's October 1993 system balancing account and, thus, also must have been part of the 22.6 Bcf of system balancing gas. CE IB at 22-23.

58. Further, CE cites the box at the bottom of page 3 of ANR's 1995 Components of Gas in Storage report. CE IB at 23, citing Ex. ANR-26 at 3. One of the entries listed in the box is "purchases" at a volume of 7,289,514 Dth.²⁰ Ex. ANR-26 at 3. CE notes the calculations in the box lead to a total of approximately 22.6 Bcf, which was the volume of gas in ANR's system balancing account in October 1993. CE IB at 23. CE argues that, "This shows definitively that all sales and purchases of storage gas ANR made in 1995 related directly to the October 31, 1993 system balancing gas account balance of 22.6 Bcf." CE IB at 23-24.

59. CE's arguments, however, fail to consider adequately ANR's purchase of approximately 7.09 Bcf of gas in 1994. As noted above in the Section entitled "Other Gas Purchases and Sales," the purchase of the 7.09 Bcf was recorded in ANR's revised 1994 Components of Gas in Storage Report with the label of "Purchase Replacement Gas." Ex. CE-12 at 2. ANR witness Pollard also testified that ANR purchased approximately 7.09 Bcf of gas in 1994. Tr. at 408. This purchase contradicts CE's assertion that there were no other sources of gas besides the 22.6 Bcf of system balancing gas where ANR possessed an ownership interest.

60. ANR's 1995 Storage Registers make clear that the source of the 5 Bcf of sales in 1995 was ANR's 1994 purchase of 7.09 Bcf of gas and *not* the 22.6 Bcf of ANR's system balancing gas. As noted above, the 7.09 Bcf was first recorded in the February 1995 Storage Register in a category labeled "Gas in Resv. & Pipelines – Noncurrent." Ex. WDG-8 at 162. The register lists "Gas in Resv. & Pipelines – Noncurrent" as a *separate*

¹⁹ These accounts are subaccounts in Account 117.

²⁰ As noted above, this amount was the estimated volume of ANR's 1994 "Purchased Gas Replacement Gas." Ex. CE-4. at 1-4. The actual volume of "Purchased Gas Replacement Gas" was 7,092,582 Dth, or about 7.09 Bcf. Ex. CE-12 at 2. Oversetting the estimated volume of 7,289,514 Dth by the entry "fuel to trans. purchases" at a volume of 197,000 Dth yields a volume of 7,092,514 Dth, which is very close to the actual volume. See Ex. ANR-26 at 3; see also Ex. CE-4 at 1-4.

category from ANR's System Balance. Ex. WDG-8 at 162. During April 1995 through October 1995, the 7.09 Bcf of gas was reduced by 5 Bcf to approximately 2.09 Bcf. Ex. WDG-8 at 154-160. As noted above, footnotes in ANR's Storage Registers for these months explain that the reduction was a result of sales during these months to Consumer Power, Gulf States Utilities, and Louisiana Power & Light. Id.

61. Moreover, regarding CE's discussion of the box in ANR's 1995 Components of Gas in Storage report, CE overlooks the fact that "purchases" are subtracted out from the "total value of all storage accounts" in the calculation of the 22.6 Bcf of system balancing gas account balance. Ex. ANR-26 at 3. This subtraction also demonstrates that ANR's gas purchase in 1994 was distinct from ANR's system balancing gas. For the foregoing reasons, on balance, I find and conclude that ANR purchased approximately 7.09 Bcf of gas in 1994 and that this gas was the source of ANR's 5 Bcf of sales in 1995. I further find and conclude that ANR did not have only 17.6 Bcf of system balancing gas when it sold the 2.6 Bcf of gas at issue in 2006. Thus, as noted above, there is no evidence that ANR's customers paid for the 2.6 Bcf of gas in their rates and there is no evidence that they have an ownership interest in the 2.6 Bcf.

III. Is ANR entitled to any of the proceeds from the sale of the 2.6 Bcf of gas?

Finding

62. In the above discussion of Issue I, I found that ANR owned the 2.6 Bcf of excess gas. In the discussion of Issue II, I found that ANR's customers have not shown that they possess an ownership interest in the 2.6 Bcf of gas. Thus, I find and conclude that ANR was the sole owner of the 2.6 Bcf of gas and, thus, is entitled to all of the proceeds from the sale of the gas.

IV. If ANR is not entitled to any of the proceeds from the sale of the gas, which customers should receive the proceeds?

63. I have found that ANR *is* entitled to all of the proceeds from the sale of the 2.6 Bcf of gas. Consequently, I further find and conclude that ANR's customers are not entitled to any of the proceeds from the sale.

V. Should ANR be required to compensate its customers for the use of the storage capacity utilized to store the 2.6 Bcf of gas?

Finding

64. In short, the answer is "No."

65. WDG witness Wilems and Staff witness Sosnick assert that ANR should pay restitution to its customers. They argue that during the 12-year period that ANR retained the 2.6 Bcf of gas, ANR received free storage service for the gas at the expense of ANR's customers. Ex. WDG-1 at 5; Ex. S-1 at 5. WDG and Staff note that in the restructuring proceeding in Docket No. RS92-1, the Commission authorized ANR to maintain 25 Bcf of storage capacity that was reserved for providing system balancing and no-notice service for ANR's customers. Ex. WDG-1 at 5; Ex. S-1 at 5; *see also* Tr. at 490-91. As stated above, part of this capacity was the 5 Bcf of headroom to accommodate overall system long positions. Ex. WDG-1 at 6. WDG witness Wilems notes that when ANR held the 2.6 Bcf of excess gas with the 20 Bcf of working gas in its system balancing account, ANR utilized for its own benefit slightly more than half of the 5 Bcf of headroom storage capacity. *Id.* From ANR's data responses, Staff witness Sosnick concluded that ANR did not allocate to itself any of the costs associated with the headroom capacity used to store the 2.6 Bcf of gas. Ex. S-1 at 5, citing Ex. S-3 at 1-70.

66. WDG witness Wilems asserts that ANR's use of the headroom at its customers' expense has created an increased rate impact on customers because the cost of this storage capacity was included in ANR's rates and, thus, paid for by ANR's customers. Ex. WDG-1 at 6-7. However, Wilems also recognizes that since ANR's rates are the product of a black-box settlement, it is not possible to calculate precisely the level of this increased rate impact. *Id.* at 7. Developing a proxy for the rate impact, Wilems opines that a fair measure of damages should be based on what ANR would have charged a third party to store the 2.6 Bcf of gas during the 12-year period ANR retained the gas. *Id.*; Ex. WDG-4 at 4. Using ANR's tariff rates established by ANR's restructuring proceeding in Docket No. RS92-1, from November 1993 through April 1994, and then by the black-box Stipulation and Agreement in Docket No. RP94-43, from May 1994 through March 2006, and accounting for interest through May 2008, Wilems calculated the amount of damages at \$53,944,076. Ex. WDG-4 at 9-10; Ex. WDG-11 at 1-4.

67. Staff witness Sosnick determined damages based upon the costs ANR would have incurred had it charged itself for storing the gas. Ex. S-1 at 5. Sosnick calculated the value of the storage service that ANR received at \$32,221,806.94. *Id.* Because this amount is greater than the approximately \$28.1 million in proceeds that ANR received from the sale of the 2.6 Bcf of gas, Sosnick recommends that ANR refund the entire proceeds of the sale to ANR's customers. *Id.* at 6.

68. WDG asserts additional reasons why ANR should be required to provide restitution to its customers. WDG argues, *inter alia*, that: ANR represented to its customers and the Commission that the headroom was necessary to provide system balancing and no-notice service; ANR knew it was receiving free storage during the 12-year period; and there is no evidence that ANR disclosed to its customers the existence of the 2.6 Bcf of excess gas or ANR's use of the headroom to store the gas. WDG IB at 24-28.

69. ANR witness Lovinger disagreed with the notion that ANR's customers paid for the storage capacity that was used to store the 2.6 Bcf of excess gas. Ex. ANR-10 at 4; *see also* Tr. at 240-41. Lovinger stated that to reach this proposition, one would have to find that ANR's customers paid for 100% of the costs of ANR's storage capacity. Ex. ANR-10 at 4. Lovinger stated that neither WDG nor Staff has provided any evidence or ratemaking theory to support their claim that ANR's customers paid for the headroom that ANR used to store the 2.6 Bcf. Ex. ANR-10 at 4. Further, Lovinger asserted that it cannot be concluded from the Stipulation and Agreement in Docket No. RP94-43 that ANR's customers paid for the 2.6 Bcf of capacity through ANR's rates. Ex. ANR-10 at 5, *see also* Tr. at 240-41. Lovinger noted that the rates were the product of a black-box settlement that represented a compromise between the parties. Ex. ANR-10 at 5; *see also* Tr. at 240-41. Lovinger also noted that ANR had filed for a cost-of-service of \$683.2 million and ultimately settled on a cost-of-service of \$572.7 million. Ex. ANR-10 at 5-6.

70. On brief, ANR further notes that, "While the Commission has the authority to fashion an equitable remedy for violations of the NGA, such a remedy must be based on the harm suffered." ANR IB at 33, citing *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986); *Southern Union Gas Co. v. FERC*, 725 F.2d 99, 102 (10th Cir. 1984). In this respect, ANR witness Lovinger argues that ANR's use of the 2.6 Bcf of storage capacity did not harm ANR's customers. Ex. ANR-10 at 11. Lovinger asserts that, even assuming that ANR's customers paid for capacity that ANR used for ANR's own benefit, paying for the capacity itself is not a harm. *See id.* Lovinger notes that ANR's use of the capacity did not prevent ANR from providing any service to its customers that it was obligated to provide. *Id.* Supporting this conclusion, Lovinger cites Ex. ANR-23. *Id.*, citing Ex. ANR-23 at 1. Ex. ANR-23 shows that ANR had substantial unsubscribed storage capacity for most of the 12-year period in which the 2.6 Bcf of excess gas was stored in ANR's storage complex. Ex. ANR-10 at 11, citing Ex. ANR-23 at 1. The exhibit also shows that the lowest amount of capacity that ANR's storage complex had in a winter season during the 12-year period was 25.2 MMDth in the 2002/03 season. Ex. ANR-23 at 1. In addition, Lovinger cites a data response provided by WDG witness Wilems. Ex. ANR-10 at 11, citing Ex. ANR-19 at 1-2. In the data response, Mr. Wilems stated he did not contend that ANR's customers would have utilized the 2.6 Bcf of capacity had ANR not used it. Ex. ANR-10 at 11, citing Ex. ANR-19 at 1-2.

71. Lovinger notes that it is quite common for a pipeline to use its unused capacity to sell additional firm or interruptible service. Ex. ANR-10 at 9. Lovinger explains that a pipeline's rates are based on projected costs and revenues. *Id.* at 10. If a pipeline sells more service than projected, the pipeline will receive more revenues than its costs. *Id.* Lovinger states it is understood that a pipeline will attempt to use its unused capacity to generate additional revenues. *Id.*

72. Lovinger asserts that ANR's use of the 2.6 Bcf of the headroom capacity was not improper. Id. at 9; *see also* Tr. at 243. He states that he is "not aware of any Commission policy or rule that would prohibit ANR or any pipeline from using capacity that is not being used and is otherwise unavailable." Ex. ANR-10 at 9. By storing gas in unused headroom capacity, ANR could not sell this capacity to generate additional revenues for itself. Id. at 10. Lovinger asserts that ANR's customers were not harmed by ANR's use of this capacity because they would have not been entitled to these potential revenues anyway. Id. at 10-11. Lovinger maintains that unless a pipeline has a revenue crediting mechanism in its tariff, the pipeline is entitled to keep additional revenues generated by the sale of unused capacity. Id. at 10. A customer of the pipeline can file a complaint that seeks a prospective reduction in the pipeline's rates to account for these revenues. Id. Lovinger notes, however, that a pipeline cannot be required to refund the past additional revenues. Id. Lovinger asserts that: "The notion that a pipeline should compensate its customers for the past use of its own capacity is contrary to ratemaking theory and policy at the Commission." Id. He asserts that the contention by WDG and Staff that the Commission should require ANR to pay for the storage capacity for the 2.6 Bcf of gas "is essentially an argument that ANR should have imputed more billing determinants or credited more revenues in the design of the rates agreed to in the settlement." Id. at 6. Lovinger argues that it is too late to redetermine the settlement rates for the 12-year period that ANR held the 2.6 Bcf of gas. Id.

73. In his rebuttal testimony, WDG witness Wilems argues that ANR cannot disprove that its customers paid for 100% of ANR's storage capacity. Ex. WDG-4 at 1. He notes that ANR has produced no documents from its filings in Docket No. RP94-43 to show that the costs of the 25 Bcf were not included in the rate design for system balancing and no-notice service. Id. at 3.

74. Wilems disagrees with Lovinger's contention that to reach the conclusion that ANR's customers paid for the 2.6 Bcf of capacity used to store the excess gas, one would have to find that ANR's customers paid for 100% of the costs of ANR's storage capacity. Id. at 1, referencing Ex. ANR-10 at 4. Wilems position is not premised on whether the customers paid for 100% of the costs of ANR's storage capacity. Ex. WDG-4 at 1. He notes that an allocable portion of ANR's as-filed storage cost of service was included in the rate design for system balancing and no-notice service. Id. at 1-2. Thus, despite the black-box nature of the settlement, he believed that it was reasonable to assume that ANR's customers paid for ANR's storage costs. Id. Wilems asserted that: "[W]hile the cost of the capacity may have been reduced as a result of the lower rates agreed to in the settlement that does not change the fact that the customers paid for the capacity." Id. at 2; *see also* WDG IB at 11.

75. WDG also disagrees with ANR witness Lovinger's assertion that ANR's use of 2.6 Bcf of the headroom capacity was not improper. WDG notes that according to ANR's testimony in the RP94-43 rate proceeding, ANR needed the headroom capacity

on an instantaneous basis to provide no-notice service. WDG IB at 20, citing Ex. WDG-5 at 14. WDG argues that unlike ANR's un-nominated or unsold firm capacity, which ANR could have sold on an interruptible basis, the headroom capacity should have been available at all times. WDG IB at 21-22. Thus, contrary to Lovinger's assertions, WDG argues that ANR could not have sold the headroom to generate additional revenues and that ANR should not have used it to store the 2.6 Bcf of excess gas. WDG IB at 22.

76. Further, WDG, Staff, and CE argue that ANR's use of the headroom capacity was improper because it violated Commission Order No. 636. *See* WDG IB at 15-18; Staff IB at 26-30; CE IB at 26-28. On brief, WDG notes that Order No. 636 required interstate pipelines to unbundle their transportation and sales services. WDG IB at 15-16. Additionally, WDG notes that Order No. 636 included storage service in the definition of transportation service and also required storage service to be provided on an unbundled and non-discriminatory basis. *Id.* at 16, citing Order No. 636 at 30,425. WDG concluded that pipelines are required to make all of their storage capacity available to shippers — the one exception being capacity necessary to provide customers with system management and no-notice transportation. WDG IB at 16, citing Order No. 636 at 30,426-427.

77. WDG asserts on brief that under Order No. 636 and the regulatory changes following it, a pipeline can only maintain two types of capacity: (1) capacity generally available on a firm and interruptible basis and (2) capacity specifically approved for withholding from the market solely to provide system balancing and no-notice service. WDG IB at 16-17. WDG argues that ANR's use of its storage capacity to store the 2.6 Bcf of gas did not satisfy either of these two alternatives. *Id.* at 17. It asserts that ANR's use of the headroom "was not in any way related to ANR's fulfillment of its obligation to provide system balancing and no-notice service." *Id.* at 18. Supporting this assertion, WDG cites ANR witness Lovinger's testimony that the 2.6 Bcf of excess was not reserved for any purpose. *Id.*, citing Tr. at 232-33. WDG also cites ANR's August 1, 2007 Supplemental Statement in which ANR stated that it only needed 20 Bcf of gas to provide system balancing and no-notice service and that the 2.6 Bcf of gas was "excess of its needs." WDG IB at 18, quoting IBR-E at 1. WDG argues that because the 2.6 Bcf of gas "was not associated with providing system balancing and no-notice service, ANR's storage of the Excess Gas in the 25 Bcf of reserved capacity was in violation of Order Nos. 636 and 636-A's instruction not to use capacity retained for system balancing and no-notice service for any other use." WDG IB at 18. WDG argues further that because ANR's violation of the Commission's orders led to its unjust enrichment in the form of free storage, ANR should pay restitution to its customers. *Id.*

78. Similarly, Staff argues that under Order No. 636 and in light of the *Starks* case, ANR should not have stored the 2.6 Bcf of excess gas in its storage capacity. Staff IB at 26-27. Staff notes that in *Starks*, the pipeline requested a waiver from the Commission of Order No. 636's unbundling requirement so that it could store its own merchant gas in its

storage field for future sale. Staff IB at 2, 27, 29, citing *Starks*, 111 FERC ¶ 61,105, at P 1. The Commission rejected this proposal as contrary to Order No. 636. Staff IB at 2, 27, citing *Starks*, 111 FERC ¶ 61,105, at P 51.

79. On brief, Staff asserts that one can easily conclude from the record that the 2.6 Bcf of gas was merchant gas because: (1) ANR purchased the 2.6 Bcf of gas while it was still in the merchant business; (2) ANR offered the gas for sale at the time of its restructuring; and (3) the 2.6 Bcf of gas was not needed for ANR's operations. Staff IB at 29. Thus, Staff argues that like *Starks*, ANR should have requested a waiver to store the 2.6 Bcf of gas, and that ANR never did. Staff IB at 30. Staff asserts that because ANR never had Commission authority to store the 2.6 Bcf for later sale, the \$28.1 million of sales should be disgorged to ANR's customers. Id.

80. On brief, CE argues that in the event that ANR did own the 2.6 Bcf of gas, this gas must have been merchant gas. CE IB at 26-27. CE asserts that Order No. 636 and *Starks* prohibit ANR from storing its merchant gas in its own complex, and, thus, ANR should not be allowed to retain the proceeds from the sale of the 2.6 Bcf of gas. Id. at 27-28.

81. On brief, WDG argues that ANR acted improperly because it engaged in discriminatory behavior in connection with the sales of the 2.6 Bcf of gas. WDG IB at 15-20 and n. 11; WDG RB at 11. WDG notes that all but one of the purchasers of the gas could have taken delivery of the gas starting in August or September of 2005 and ending in either February or March of 2006, which was an extended period of time. WDG IB at 19. WDG asserts that these were generous terms that gave the purchasers the ability to take advantage of price spikes. Id. at 20. WDG concludes that the delivery flexibility ANR offered to the purchasers gave ANR "the opportunity to reap the value of this market advantage via the price purchasers were willing to pay . . ." Id. WDG argues that ANR was able to offer this delivery flexibility and to give itself a market advantage because of its improper holding of the excess gas in storage. Id.

82. WDG disagrees with Lovinger's statement that ANR's customers were not harmed by ANR's use of the 2.6 Bcf of headroom. Id. at 23-24. WDG argues that by using the headroom, ANR did not meet its service obligation to provide the 5 Bcf of storage capacity. Id. at 24; *see also* Staff RB at 22. WDG asserts that ANR's customers "were shortchanged on the security and assurance of service that the 'headroom' capacity provided, and for which they paid." WDG IB at 24; *see also* Staff RB at 22. WDG likens ANR's position that its customers were not harmed by its use of the headroom to an insurance company which collects premiums from customers and then fails to maintain assets ready to sustain its coverage obligations. WDG IB at 24. WDG argues that the fact the customers make no claims is not relevant to the insurance company's obligation to maintain assets to provide coverage. Id. In addition, citing ANR testimony in Docket No. RP02-335-002, WDG witness Wilems notes that ANR withholds from its generally available system capacity the 25 Bcf of capacity for system balancing and

no-notice service, which includes the 5 Bcf of headroom. Ex. WDG-4 at 12, citing Ex. WDG-6 at 22, 29. Wilems asserts that, “Given that the 25 Bcf of capacity was not part of [ANR’s] generally available system storage capacity, it follows that the fact that ANR may have had unused general system capacity available from time to time is irrelevant.” Ex. WDG-4 at 12.

83. WDG witness Wilems asserts that the unsold storage capacity entries listed in Ex. ANR-23 are overstated by 25 Bcf or 25 MMDth because the entries also included the 25 Bcf of capacity that was dedicated to system balancing and no-notice service. Tr. at 502. I note, however, that even if one were to subtract each entry for unsold storage capacity by 25 Bcf to account for this overestimation, the lowest amount of capacity in ANR’s storage complex during the winter seasons of the 12-year period would still be .2 Bcf, a non-negative number. See Ex. ANR-23 at 1.

84. In its IB, Staff also addresses Ex. ANR-23. Staff IB at 20-21. Staff argues that ANR needed 27.6 Bcf of unsold capacity to meet the 25 Bcf requirement and to store the 2.6 Bcf of excess gas. Id. at 20-21. Staff notes that Ex. ANR-23 shows that ANR had less than 27.6 Bcf of capacity for the winter seasons of 2001/02 and 2002/03. Id. at 21, referencing Ex. ANR-23 at 1. In addition, Staff asserts that depending on the conversion factor of MMDth to Bcf, ANR may not have had 27.6 Bcf of capacity in the winter seasons of 2004/05 and 2005/06. Id.

85. WDG and Staff also argue that awarding restitution to ANR’s customers for ANR’s use of the headroom is not retroactive ratemaking. WDG IB at 28; WDG RB at 10; Staff IB at 21; Staff RB at 14. WDG argues that its request for relief is not grounded in Section 4 or Section 5 of the Natural Gas Act, and, thus, it asserts that “the claim that the WDG is seeking to re-open ANR’s settled rates under Section 5 of the Natural Gas is incorrect.” WDG IB at 29. Rather, WDG argues that its claim is grounded in Section 16 of the Natural Gas Act. WDG IB at 13. It argues that under Section 16 of the Natural Gas Act, the Commission “has broad authority to fashion remedies so as to do equity consistent with the public interest.” Id. at 13, citing *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984). In this respect, WDG adds that one of the remedies that the Commission can fashion under Section 16 is restitution to prevent unjust enrichment. WDG IB at 13, citing *Borden v. FERC*, 855 F.2d 254, 260 (5th Cir. 1988).

86. WDG witness Wilems also disagrees with Lovinger’s assertion that, by contending that ANR should be required to pay for the 2.6 Bcf of storage capacity, WDG is essentially making the argument that ANR should have imputed more billing determinants or credited more revenues. Ex. WDG-4 at 5, referencing ANR-10 at 6. Wilems states that WDG is not seeking to undo the settlement or re-determine the settlement rates. Ex. WDG-4 at 5; see also WDG IB at 29; Staff IB at 22. Rather, WDG is seeking compensation from ANR for ANR’s use of the 2.6 Bcf of storage capacity.

Ex. WDG-4 at 5; *see also* WDG IB at 29; Staff IB at 22. Wilems notes that to determine the appropriate level of compensation, he has used the settlement rates in his calculations. Ex. WDG-4 at 5.

87. Alternatively, on brief, Staff argues that even assuming the proposed restitution to ANR's customers amounts to retroactive ratemaking, “[N]either the settlement in Docket No. RP94-43 nor the rule against retroactive ratemaking is a bar” to equitable relief. Staff IB at 22. Staff cites the Restatement (Second) of Contracts for the proposition that when all the parties to a contract are mistaken as to basic assumptions that underlie the agreement and when this mistake is material, the contract is voidable by the adversely party unless that party bears the risk of the mistake. Staff IB at 22-23, citing Restatement (Second) of Contracts § 152 (1981). Staff also notes that in cases of a unilateral mistake, a contract is voidable by the party who is mistaken if the other party had reason to know of the mistake or caused the mistake. Staff IB at 23, citing Restatement (Second) of Contracts § 153(b) (1981). Staff argues that these principles should apply here. *See* Staff IB at 26. Staff asserts that at the time that the settlement in Docket No. RP94-43 was negotiated and executed, “Staff and WDG did not know (and were therefore mistaken) that ANR owned or possessed 22.6 Bcf of gas rather than the 20 Bcf of gas permitted by the Commission's restructuring proceedings and proposed by ANR in its rate filing.” *Id.* at 23. Staff asserts that had ANR's customers known of the 2.6 Bcf of gas, they would have insisted that ANR either allocate to itself the associated capacity costs to store the gas or that it remove the gas from the 25 Bcf of capacity reserved for system balancing and no-notice service. *Id.* at 24.

88. Staff also argues that the settlement and the rule against retroactive ratemaking are not bars to equitable relief because, as noted above, under Order No. 636 and *Starks*, ANR's storage of the 2.6 Bcf of gas in the headroom during the 12-year period was improper. *Id.* at 26-30. Staff argues that the Commission should go back in time to remedy ANR's impermissible use of the headroom “by making the customers at least partially whole for storage capacity costs that were higher than they should have been as a result of subsidizing ANR's storage use.” *Id.* at 27-28; *see also* at Staff RB at 14-15.

89. On balance, I find and conclude that the arguments that ANR should be required to compensate its customers for the use of the storage capacity used to store the 2.6 Bcf of gas are without merit. As a threshold matter, there is no evidence that ANR stored the 2.6 Bcf of gas at the expense of its customers. The Stipulation and Agreement in Docket No. RP94-43, IBR-A, was a black-box settlement. Additionally, the settlement's cost-of-service was over \$110 million less than the filed cost-of-service, which represents approximately a 16% reduction in the filed cost-of-service. Given this reduction, it is not gainsaid that ANR's customers paid for 100% of the costs associated with ANR's storage capacity. It also is not gainsaid that ANR's customers paid for the 2.6 Bcf of headroom.

90. A simple example can illustrate this point. Suppose, for instance, that the black-box settlement's 16% reduction in ANR's filed cost-of-service in Docket No. RP94-43 represented a 16% pro rata reduction in all of ANR's filed costs, including its capacity costs for system balancing and no-notice service. Under this regime, ANR would have recovered from its customers the costs associated with only 84% of its 25 Bcf of capacity, which equates to 21 Bcf of the 25 Bcf. Consequently, ANR's customers would not have paid ANR for the costs associated with 4 Bcf of capacity. This 4 Bcf could have included the 2.6 Bcf of headroom used to store the excess gas.

91. Given my finding that there is no evidence that ANR's customers paid for the costs associated with the capacity to store the 2.6 Bcf of gas, it is unnecessary to determine whether ANR represented to its customers and the Commission that the headroom was necessary to provide system balancing and no-notice service; whether ANR knew it was receiving free storage during the 12-year period; and whether ANR should have disclosed to its customers the existence of the 2.6 Bcf of excess gas or ANR's use of the headroom to store the gas.

92. I find that ANR's customers are not entitled to equitable relief because there is no evidence that ANR's customers were harmed by ANR's use of the storage capacity. I find unpersuasive WDG's argument that ANR's use of the headroom deprived ANR's customers of the security and assurance of capacity for system long positions. This argument fails to recognize that the 5 Bcf of headroom capacity was uncompartmentalized space within ANR's overall storage complex: "There is no specific 25 Bcf hole in the ground where system balancing gas is stored." ANR IB at 31. As noted above, although ANR accounted for the 2.6 Bcf of excess gas in the 5 Bcf of headroom, as a physical matter the excess gas was commingled with the other gas in ANR's complex. Ex. ANR-21 at 6; *see also* Ex. ANR-24 at 2. Ex. ANR-23 demonstrates ANR's storage complex had an adequate amount of unsubscribed capacity to accommodate system long positions as well as to store the 2.6 Bcf of excess gas for at least nine, and arguably 11 of the 13 winter seasons during the 12-year period. *See* Ex. No. ANR-23; Staff IB at 20-21. Further, there is no evidence that ANR's use of the headroom adversely affected ANR's obligation to provide system balancing and no-notice service to its customers. Indeed, on brief, WDG acknowledged that it has never contended that ANR's customers were denied system balancing or no-notice service on any particular occasion. WDG RB at 28.

93. WDG suggests that ANR engaged in discriminatory behavior when it sold the 2.6 Bcf of gas stored in the headroom over the course of several months between 2005-2006. However, there is no evidence that ANR would have received a lower price for the gas had it not used the headroom to store the excess gas and had it sold the gas over a shorter timeframe. Thus, it is not gainsaid that ANR had a competitive advantage over other sellers of gas in the market.

94. As amended and supplemented, in their briefs, CE, WDG, and Staff argue that ANR's storage and sales of the 2.6 Bcf of gas violated Order No. 636. All claim or imply that the sale of this gas was merchant gas and that such a sale required Commission approval, citing the *Starks* case. In *Starks*, the Commission denied a waiver sought by Starks to permit the sale of merchant gas. 111 FERC ¶ 61,105, at P 1. In this respect, ANR filed a motion on November 10, 2008 to strike those portions of CE's and Staff's IB which raise this argument. ANR argues that the issues raised by CE and Staff present genuine issues of material fact with regard to whether the gas sold was merchant gas and, as such, ANR is prejudiced and did not have the opportunity to address this in rebuttal testimony. However, in its RB, ANR addresses this issue "to ensure a complete record." ANR RB at 42. Consequently, there is no need to address the motion to strike.

95. During cross-examination, ANR witness Pollard testified that the 2.6 Bcf is *not* merchant gas. Tr. at 300-303. Pollard testified that merchant gas is bought and sold on a daily basis, while the 2.6 Bcf of gas was in ANR's storage complex for many years. *Id.* During cross-examination, ANR witness Lovinger also testified that the 2.6 Bcf of gas was *not* merchant gas. Tr. at 281. This testimony stands unrebutted on the record as made.

96. Equally telling, in its RB, ANR explains that the sales of the 2.6 Bcf of gas "were made on an unbundled basis as required by its tariff through in-field storage transfers" ANR RB at 44, citing Ex. ANR-21 at 2; that the "purchasers of the gas transported the gas away from the ANR storage point through their own transportations arrangements" *Id.* citing Tr. at 366; and that the "sale complied with the requirement in ANR's tariff that operational sales must be made on an unbundled basis at a Receipt Point." *Id.*, citing ANR tariff §§ 38.1, 1.51, and 1.44. ANR's tariff sheets on file with the Commission under General Terms and Conditions at Section 38 (Operational Purchases and Sales of Gas) and the definitions included within Sections 1.44 and 1.51 confirm that the sales of the 2.6 Bcf of operational gas were in compliance with these tariff provisions.

97. In these respects, ANR further explains that the Commission has allowed all pipelines, including ANR, to make such operational sales. ANR RB at 43, citing *ANR Pipeline Co.*, 110 FERC ¶ 61,069, at P 57. In accordance with the Commission's request in that case, the tariff provisions, and in particular Section 38.1 permitting the sales of non-merchant gas, were revised and filed with the Commission. Within this tariff section there are several situations which allow for the purchase and sale of gas for operational purposes including provisions for storage services.

98. Upon consideration of these facts and circumstances, I find and conclude that ANR appears to have complied with the requirement in its tariff that operational sales must be made on an unbundled basis at a Receipt Point, *which is defined under ANR's tariff as including storage.*

99. Additionally, none of the interveners or Staff has rebutted by expert witness testimony or otherwise the evidence elicited from ANR witnesses Lovinger and Pollard that the sales of the gas were not sales of merchant gas. As just noted, ANR has demonstrated that the storage and sales of the 2.6 Bcf of excess gas are consistent with the terms and conditions of its tariff. In these circumstances, arguments to the contrary are found to be without merit.

100. Even if it was assumed for the sake of argument that ANR violated Order No. 636 by storing the 2.6 Bcf in the headroom without Commission authorization, it does not necessarily follow that ANR's customers should receive restitution. As to this hypothesis, I do not agree with Staff's argument on brief that ANR's customers need to be made whole as a result of ANR's storage of the 2.6 Bcf of gas in the headroom. As found above, there is no evidence that customers paid for the headroom or were actually harmed in the first place. Thus, awarding ANR's customers \$28.1 million or more would be giving them a windfall.

101. I further find and conclude that the Stipulation and Agreement in Docket No. RP94-43 and the rule against retroactive ratemaking bar the imposition of restitution. As a preliminary matter, I find unavailing WDG and Staff's argument that they used the settlement rates to calculate a fair measure of damages and, thus, that they do not seek to undo the settlement. As noted above, WDG witness Wilems asserts that ANR's use of the headroom capacity to store the excess gas created an *increased rate impact* on customers. Ex. WDG-1 at 6-7. The calculations of Wilems and Staff witness Sosnick developed using the settlement rates were intended to serve as a proxy for the increased rate impact. See WDG-1 at 7. The most logical interpretation of the phrase "increased rate impact" leads to the conclusion that through their calculations of damages, WDG witness Wilems and Staff witness Sosnick have attempted to quantify the purported increase that ANR's use of the headroom caused to the settlement rates. Therefore, despite WDG and Staff's protestations to the contrary, requiring ANR to compensate its customers for this increase would, in essence, retroactively lower ANR's rates, undo a Commission-approved settlement, and provide a disincentive to long-established Commission policy that encourages and fosters the amicable and informal resolution of disputes in the interest of administrative and judicial economy.

102. Moreover, I find that Staff's justifications for reopening the settlement and permitting retroactive ratemaking are unpersuasive. Staff's argument that the lack of knowledge of ANR's customers and Staff regarding the existence and storage of the 2.6 Bcf of gas makes the Stipulation and Agreement voidable is beyond absurd. Staff's citation to the Restatement (Second) of Contracts is inapposite. The Stipulation and

Agreement is not a contract but a settlement that resulted in a rate that was approved by the Commission.²¹

103. Further, as noted above, Staff's argument that the Commission should go back in time to lower ANR's rates because ANR allegedly violated Order No. 636 is unavailing because it would result in a windfall to ANR's customers.

104. Last, it must be noted that much has been discussed about the 20 Bcf of working gas. A review of Ex. ANR-3 (ANR System Balancing Account) reveals the actual varying monthly levels of working gas over the period October 31, 1993 through September 1998. Ex. ANR-3 at 1. For this five year period of time the working gas levels range from a low of 8.2 Bcf (February 1994) to a high of 23.2 Bcf (December 1994). *Id.* The monthly balances are less than 20 Bcf (even when the 2.6 Bcf at issue here is included in the total) more than 75 percent of the 60 month period. *Id.* Also over this five month period of time, in no other month than the first month, October 1993, is the working gas storage level ever exactly 22.6 Bcf. *Id.* Working gas by its nature varies month to month because its use is needed to provide the storage services that system balancing and no-notice customers desire. Understanding that even though ANR and certain parties entered into a black box settlement that was filed in Docket No. RP94-43 on October 17, 1997, IBR-A, with certain levels of working gas and head room capacity, no one knew at the time of the settlement precisely what levels of working gas and related capacity would in fact be required in future months and years to perform the system balancing and no-notice storage services. When looking at these facts which show greatly varying levels of working storage, as well as the understanding that ANR never failed to provide the services needed by the system balancing and no-notice storage service customers, purported equitable relief that would require ANR to disgorge itself of the proceeds from the sale of the gas it labels working gas appears to be anything but equitable or appropriate.

VI. If it is determined that ANR should compensate its customers for the use of its storage capacity, how should such compensation be determined and which customers should receive the compensation?

Finding:

105. This issue is moot. I determined in the discussion of the previous issue that ANR should not be required to compensate its customers for the use of the storage capacity.

²¹ As an aside, I note that Staff's argument on brief regarding mutual or unilateral mistake of fact is particularly troubling because it appears to intrude into and breach the privileged and confidential settlement negotiations in Docket No. RP94-43.

106. In sum, contrary to CE, ANR has established that it owned the 2.6 Bcf of excess gas which it sold in 2006. Also, contrary to CE, ANR's customers, and particularly CE, do not possess any ownership interest in the 2.6 Bcf of excess gas. Contrary to CE, WDG, Proliance, and Staff, on the record as made, ANR is entitled to the proceeds from the sale of the 2.6 Bcf of excess gas.

ORDER

107. Wherefore, **It is Ordered**, that subject to review by the Commission on appeal or on its own motion, consistent with the findings and conclusions of this Initial Decision, ANR is entitled to retain the proceeds from the sales of 2.6 Bcf of excess gas.

Bruce L. Birchman
Presiding Administrative Law Judge

Document Content(s)

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