

ISSUE DATE: January 26, 1999

DOCKET NO. G-999/AA-98-332

ORDER EXTENDING VARIANCE

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayner
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Request to Vary Supplier
Refund Rules Regarding a Kansas Ad
Valorem Production Tax Refund Made by
Mobil Oil Corporation

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PROCEDURAL HISTORY

On March 13, 1998, the Minnesota Department of Public Service (the Department) requested a variance to the supplier refund rules for all Minnesota gas utilities.¹ The requested variance would allow the utilities to defer refunding the Kansas ad valorem production tax refund received in January 1998.

On June 2, 1998, the Commission issued its ORDER GRANTING VARIANCES, REQUIRING INTERIM REPORT AND REFUND PLANS in this docket. The Order granted a variance for nine months from the date of the meeting (i.e. until January 23, 1999) and required a report due October 23, 1998.

On October 23, 1998, the seven Minnesota gas utilities (referred to hereafter as the Industry) filed a combined report requesting an extension of the variance.

On November 13, 1998, the Industry filed updated information on FERC proceedings.

On November 30, 1998, the Department filed comments recommending approval of the Industry's request with modifications.

On November 30, 1998, the Residential Utilities Division of the Office of the Attorney General (the RUD-OAG) filed comments recommending denying the extension of the variance and requiring a refund.

¹ The seven Minnesota gas utilities (local distribution companies or LDCs) are: Great Plains Natural Gas Company, Interstate Power Company, Minnegasco, a Division of Houston Industries, Northern States Power Company, Peoples Natural Gas Company and Northern Minnesota Utilities, Divisions of UtiliCorp United, Inc., and Western Gas Utilities. These companies are also referred to in this Order as the "gas utilities" or "the Companies".

On December 10, 1998, the Industry filed reply comments disagreeing with the Department in part and with the RUD-OAG's recommendation.

On December 10, 1998, the RUD-OAG filed reply comments updating its original comments.

The Commission met on January 5, 1999 to consider this matter.

FINDINGS AND CONCLUSIONS

I. INTRODUCTION

In this Order, the Commission will consider 1) whether to grant the Industry's request to continue the variance granted in the Commission's June 2, 1998 Order in this matter to allow the utilities to defer refunding the Kansas ad valorem production tax refund received in January 1998 for an additional 18 months and 2) whether to approve, modify or take other action regarding the Industry's proposed refund plan.

II. VARIANCE

A. Background

In its June 2, 1998 Order, the Commission granted the Industry a variance until January 23, 1999. At the Department's request, the Commission varied (in effect suspended) the requirement of Minn. Rules, Part 7825.2700, Subpart 8 that supplier refunds exceeding \$5.00 per customer be made within 90 days of the date the refund is received from a supplier or transporter. In granting this variance, the Commission relieved the gas utilities of their obligation under the cited rule to make supplier refunds related to the Kansas ad valorem tax refund within the 90 day period.

The Commission granted the variance because, due to ongoing disputes between Northern and its suppliers over the total dollar amount and between Northern and its customers over the allocation of the refund, the final amount of the refund could not be reasonably determined. As a consequence, if the refund had been made as required by the rule, there was a real possibility that the gas utilities would have to either surcharge their customers for any amount they were overpaid or absorb the difference. To avoid the potential for customer confusion, then, as well as the real possibility of an unnecessary expenditure of time and money due to a surcharge, the Commission granted the variance.

Now, as the variance granted in the June 23, 1998 Order is about to expire, the Commission must consider whether to extend the variance or let it lapse and order an immediate refund. The Industry and the Department favored extending the variance, citing no basic change in the conditions that led the Commission to grant the initial variance.

B. The RUD-OAG

The RUD-OAG opposed the Industry's request for an extension of the variance. The RUD-OAG based its opposition on the considerations it placed before the Commission prior to the June 23,

1998 Order. In addition, the RUD-OAG argued that the Federal Energy Regulatory Commission's (FERC's) sending a copy of its October 2, 1998 Order (approving Northern's refund of Kansas ad valorem tax reimbursements to LDCs) to state public utility commissions was the equivalent of FERC telling state commissions that they (the state commissions) should ensure that this money is returned to consumers expeditiously. Further, the RUD-OAG cited decisions by state commissions in Missouri and Colorado to proceed with refunds. Finally, the RUD-OAG downplayed the possibility of any Congressional or legal action that would require the refund (recovery by surcharge) of any amounts paid by Northern.

C. Commission Analysis and Action

The Commission is not persuaded by the RUD-OAG to abandon what it believes is a prudent approach, to defer the refund until it is reasonably clear that a surcharge is not a substantial concern.

- ▶ The Commission does not find reasonable the RUD-OAG's speculation that FERC's action in sending a copy of its Order approving Northern's refund is FERC's way of signaling its desire that this Commission should order a refund of this money. The fact that FERC continues to authorize producers to escrow amounts owed pending resolution of the various disputes cancels that interpretation.
- ▶ The RUD-OAG's suggestion that the Commission should follow the example of the Missouri Commission and order refunds will not be accepted. The fact that the Missouri Commission decided to proceed with refunds in the circumstances before it does not argue for the same decision given the situation facing this Commission. The amount to be refunded in Missouri is approximately \$1 million, much smaller than the \$15 million at issue in Minnesota. In addition, none of the Missouri refund amount came from Northern, whose refund claims appear to have been somewhat aggressive and, hence, possibly larger than the actual refund it was actually owed, thereby increasing the chances that a surcharge would be found necessary when all is said and done.
- ▶ The RUD-OAG's minimization of the legal controversies surrounding the money in question is not accepted. The record shows substantial on-going contentions that justify a wait and see approach at this time. In the event that the claims now pending before the DC Circuit Court are dismissed (as the RUD-OAG argued is likely) this could be, as the Industry acknowledged, a triggering event justifying a reevaluation of whether to continue the waiver.

The Commission notes that the potential refund amounts are securely held for customers, with interest accruing upon them, and at no benefit to the utilities. Meanwhile the costs of refunding and surcharging are substantial and legal controversies continue to swirl around this money. In these circumstances, the Commission continues to believe that the most responsible approach is to defer requiring a refund until the Commission can be reasonably sure that a later surcharge will not be necessary.

In short: the three prerequisites for a variance (Minn. Rules, Part 7829.3200; see June 2, 1998 Order at pages 2-4) exist at this time as well. In these circumstances, the Commission will extend the variance for an additional 18 months, requiring the Industry to file a status report on Congressional and legal proceedings, along with the investment status of the funds three months prior to the expiration of that variance.

III. REFUND PLAN

A. The Industry's Proposal

The Industry recommended that the Commission require no effort to return the amounts overcollected due to the Kansas ad valorem tax to the individuals who were Minnesota sales customers during the years 1983 to 1988. The Industry stated that its members lacked the usage and customer information needed to determine the amount that individual customers may have overpaid. The Industry argued that their members' inability to match usage occurring more than ten (10) years ago with specific customers must have been anticipated (and viewed as acceptable) since the Commission's rules require that billing information be kept for three years.²

Instead, the Industry recommended that all current customers (including transportation customers) receive refunds and that customers who have left the system should not receive a refund.

The Industry asserted that its recommendation was fully consistent with the procedures provided for refunds in Minn. Rules, Part 7825.2700, subd. 8. The Industry stated that there was no reason to vary these long-established practices and noted that the Department already had the necessary records to calculate the customer class proportion for the 1983 to 1988 time frame.

B. The Department

The Department objected to the Industry's request for Commission approval of its refund plan at this time. The Department reiterated its desire to achieve substantial matching between those from whom the ad valorem tax was inappropriately collected and those who would receive the refunds. The Department did not accept the Industry's statement that it is not possible to match a refund to the customers who were overcharged simply because the companies' customer billing records are only retained for three years.

The Department requested authority to postpone its comments on the Industry's refund plan until it has had an opportunity to investigate the Industry's various records to determine (at a minimum) the larger customers' usage during the period 1983 to 1988 and analyze refund amounts.

The Department stated that it would file its investigative report with the Commission before the next Industry status report. To assist its investigation, the Department asked the Commission to order the gas utilities to retain, until this proceeding has been concluded, company records

² Minn. Rules, Part 7820.4800 requires that the utility retain certain customer records (including customer billing records) for at least 3 years, longer if "necessary to permit the utility to comply with the commission's rules." No party in this matter has suggested that the utilities have been required to retain customer billing records beyond the three year time period in order to comply with one of the Commission's rules.

referencing all or part of the period 1983 to 1988, including plant records, easement records, mapping records, maintenance records, and customer contracts.

C. The RUD-OAG

The RUD-OAG objected to the Industry's plan to refund a portion of the refund amount to transportation customers. The RUD-OAG agreed with the Industry that refunds should be made following the procedures outlined in Minn. Rules, Part 7825.2700, subp. 8. However, the RUD-OAG argued, Minn. Rules, Part 7825.2700, subp. 8 applies solely to refunds made through the Purchased Gas Adjustment (PGA) and, therefore, does not appear to countenance refunds to transportation customers.

The RUD-OAG noted that the rule states in relevant part:

Within classes, the refund amount **per unit** must be applied to bills on the basis of individual 12-month **usage**. [Emphasis added.]

The RUD-OAG argued that transportation customers cannot receive refunds through the PGA because they do not purchase gas from the gas utilities and their bills are not determined, in part, by the PGA. Stated differently, since transportation customers buy no "units" or "usage" to which a "refund amount" may be applied, the cited rule provides no mechanism for refunds to transportation customers.

D. Commission Analysis and Action

The Commission believes that in light of the extension granted in this Order it is premature to approve, reject, or modify the Industry's refund plan at this time.

The Commission will direct the Industry to start the Commission's review of this matter three months in advance of the expiration of the extension granted in this Order by filing with the Commission (and serving on the parties) a refund plan and status report on 1) the Congressional and legal proceedings, and 2) the investment status of the funds (principal, interest, specific investments). This should provide the parties ample time to discuss with each other the various points of contention regarding the refund plan and perhaps develop a joint proposal.

During the period of the variance, the Commission will prohibit the utility companies from destroying records relevant to this process, thereby ensuring the availability of all relevant information.

ORDER

1. The variance granted in the Commission's June 2, 1998 Order in this matter, which was set to expire on January 23, 1999, is hereby extended an additional 18 months, i.e. until July 23, 2000.
2. Three months prior to the expiration of the variance extension granted in Ordering Paragraph 1, the seven (7) Minnesota gas utility companies referred to in this Order as the

Industry shall file with the Commission and serve upon the parties

- a status report on the Congressional and legal proceedings and the investment status of the funds (principal, interest, specific investments); and
 - a refund plan.
3. During the term of the variance granted in this Order, Minnesota's gas utility companies (the Industry) are hereby prohibited from destroying any records relevant to this process.
 4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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