

KANSAS AD VALOREM TAX REFUND LEGISLATION

HEARING
BEFORE THE
SUBCOMMITTEE ON ENERGY AND POWER
OF THE
COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTH CONGRESS
FIRST SESSION
ON

H.R. 1117

JULY 29, 1999

Serial No. 106-74

Printed for the use of the Committee on Commerce



U.S. GOVERNMENT PRINTING OFFICE

58-499CC

WASHINGTON : 1999

COMMITTEE ON COMMERCE

TOM BLILEY, Virginia, *Chairman*

W.J. "BILLY" TAUZIN, Louisiana	JOHN D. DINGELL, Michigan
MICHAEL G. OXLEY, Ohio	HENRY A. WAXMAN, California
MICHAEL BILIRAKIS, Florida	EDWARD J. MARKEY, Massachusetts
JOE BARTON, Texas	RALPH M. HALL, Texas
FRED UPTON, Michigan	RICK BOUCHER, Virginia
CLIFF STEARNS, Florida	EDOLPHUS TOWNS, New York
PAUL E. GILLMOR, Ohio	FRANK PALLONE, Jr., New Jersey
<i>Vice Chairman</i>	SHERROD BROWN, Ohio
JAMES C. GREENWOOD, Pennsylvania	BART GORDON, Tennessee
CHRISTOPHER COX, California	PETER DEUTSCH, Florida
NATHAN DEAL, Georgia	BOBBY L. RUSH, Illinois
STEVE LARGENT, Oklahoma	ANNA G. ESHOO, California
RICHARD BURR, North Carolina	RON KLINK, Pennsylvania
BRIAN P. BILBRAY, California	BART STUPAK, Michigan
ED WHITFIELD, Kentucky	ELIOT L. ENGEL, New York
GREG GANSKE, Iowa	THOMAS C. SAWYER, Ohio
CHARLIE NORWOOD, Georgia	ALBERT R. WYNN, Maryland
TOM A. COBURN, Oklahoma	GENE GREEN, Texas
RICK LAZIO, New York	KAREN MCCARTHY, Missouri
BARBARA CUBIN, Wyoming	TED STRICKLAND, Ohio
JAMES E. ROGAN, California	DIANA DEGETTE, Colorado
JOHN SHIMKUS, Illinois	THOMAS M. BARRETT, Wisconsin
	BILL LUTHER, Minnesota
	LOIS CAPP, California

JAMES E. DERDERIAN, *Chief of Staff*

JAMES D. BARNETTE, *General Counsel*

REID P.F. STUNTZ, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON ENERGY AND POWER

JOE BARTON, Texas, *Chairman*

MICHAEL BILIRAKIS, Florida	RALPH M. HALL, Texas
CLIFF STEARNS, Florida	KAREN MCCARTHY, Missouri
<i>Vice Chairman</i>	THOMAS C. SAWYER, Ohio
STEVE LARGENT, Oklahoma	EDWARD J. MARKEY, Massachusetts
RICHARD BURR, North Carolina	RICK BOUCHER, Virginia
ED WHITFIELD, Kentucky	FRANK PALLONE, Jr., New Jersey
CHARLIE NORWOOD, Georgia	SHERROD BROWN, Ohio
TOM A. COBURN, Oklahoma	BART GORDON, Tennessee
JAMES E. ROGAN, California	BOBBY L. RUSH, Illinois
JOHN SHIMKUS, Illinois	ALBERT R. WYNN, Maryland
HEATHER WILSON, New Mexico	TED STRICKLAND, Ohio
JOHN B. SHADEGG, Arizona	PETER DEUTSCH, Florida
CHARLES W. "CHIP" PICKERING, Mississippi	RON KLINK, Pennsylvania
VITO FOSSELLA, New York	JOHN D. DINGELL, Michigan,
ED BRYANT, Tennessee	(Ex Officio)
ROBERT L. EHRLICH, Jr., Maryland	
TOM BLILEY, Virginia,	
(Ex Officio)	

(II)

CONTENTS

	Page
Testimony of:	
Albright, James D., Associate General Counsel, New Century Services, Inc	15
Moran, Hon. Jerry, a Representative in Congress from the State of Kansas	3
Stovall, Hon. Carla J., Attorney General, State of Kansas	9
Material submitted for the record by:	
Shooh, Hardy & Bacon L.L.P., letter dated August 13, 1999, to Hon. Karen McCarthy, on behalf of Carla J. Stovall	41
Smith, Douglas W., General Counsel, Federal Energy Regulatory Commission, letter dated June 30, 1999, to Hon. John Shimkus, enclosing material for the record	41
Yeager, J. Michael, President, Mobil Exploration & Producing U.S. Inc., letter dated August 17, 1999, to Hon. Joe Barton	40

(III)

KANSAS AD VALOREM TAX REFUND LEGISLATION

THURSDAY, JULY 29, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON ENERGY AND POWER,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2322, Rayburn House Office Building, Hon. Joe Barton (chairman) presiding.

Members present: Representatives Barton, Shimkus, Pickering, Bryant, Hall, and McCarthy.

Staff present: Cathy Van Way, majority counsel; and Rick Kessler, minority professional staff member.

Mr. BARTON. The subcommittee will please come to order.

I would like to welcome everyone to today's hearing on H.R. 1117 introduced by my colleague from Kansas, Congressman Jerry Moran. H.R. 1117 would waive unfair interest payments related to the refund of the Kansas ad valorem tax ordered by the Federal Government.

Earlier this year, we held an oversight hearing on this topic. Today's hearing is the last step before we schedule or at least consider scheduling legislation for markup. I would encourage our witnesses and the members to tell us specifically what should be included in a markup of H.R. 1117.

At our hearing in June, we heard about the impacts the Kansas ad valorem tax refund would have on natural gas producers and royalty owners located in Kansas and elsewhere. They made a compelling case, at least in my opinion. This issue, which originates from the days of Federal price controls on natural gas, is an unfortunate example of the Federal court system and the bureaucracy at its worst.

Years after the Federal Energy Regulatory Commission determined that Kansas natural gas producers could pass through the cost of the Kansas tax, they changed their mind. Now producers and royalty owners have been sent a bill for not only the tax but the interest as well. In fact, the interest is now two-thirds of the amount producers and royalty owners are being asked to pay. As a result, many producers and royalty owners are facing a huge liability they were unaware of until recently.

H.R. 1117 seeks to at least partially remedy this unfair situation by waiving the interest payments. In my opinion, this is a very fair solution. I am interested in learning whether today's witnesses

agree that Congressman Moran has the right approach to resolving the issue or if we need to modify this bill at any point.

Again I welcome everyone, especially our witnesses, to today's hearing.

With that, I would be happy to welcome my ranking member for an opening statement.

Mr. HALL. Mr. Chairman, I thank you; and thank you for calling this hearing to see what, if anything, can be done to help bring a just resolution to what I think is a pretty unfortunate situation. It is an unfortunate case of some kind of a litigation fumble.

What really makes this litigation fumble so outrageous is the fact that the parties themselves seem to have acted with due diligence, but it was a government agency, FERC, who dropped the ball and mysteriously ignored this case for 5 or 6 years, from 1983 to 1988. No one, Mr. Chairman, benefited from this injustice, and the parties still need to resolve the case so they can move forward.

The reasonableness of refunding various amounts of money to people who in a 15-year period have relocated, they are dead, many of them, or otherwise it has become impractical to locate these folks, raises a real, valid question about the enforceability of such a judgment. Furthermore, the inequity seems rather glaring in a finding that producers pay interest for a 5-year time period in which FERC seems to have lost the case from its radar screen. It doesn't make sense to me. It seems that the parties would resolve this question. I am surprised the Congress is called upon to do so.

Mr. Chairman, it is with some hesitance that many of us would approach a bill that would, in the view of some, impose a political settlement on the parties, however well-intended and however helpful it is. That gives me some problem, because I don't—I think it is a wonderful step in the right direction, but the problem is that the parties have been given good reason to lose faith in the ability of FERC to deliver and enforce a fair judgment in this case.

I come here, again, to listen and to try to decipher both the best course for resolving this case and the best way to ensure that similar situations don't arise in the future.

I thank you, and I thank Mr. Moran for his good work and his efforts, and I am willing to listen. And I yield back the balance of my time.

Mr. BARTON. Well, I thank the gentleman for that statement. I would say that I agree with the intent of it and the content of it. It would be best if this could be settled by the parties or out of court or at the FERC, but it doesn't appear that that has been much progress made on that front. So there is a legislative solution, and we want to take a look at the legislative solution also.

The gentleman from Tennessee, Mr. Bryant, is recognized for an opening statement.

Mr. BRYANT. Thank you, Mr. Chairman. I am going to associate myself with both of your remarks. I agree strongly with both of you.

I yield back my time.

Mr. BARTON. That is not the normal situation in the great State of Tennessee. You all usually have a position and stick to it.

Mr. BRYANT. If the gentleman would yield, I was looking at the chart, we have about \$3,000 in this, so we are willing to listen very closely to what Mr. Moran has to say.

Mr. BARTON. Well, \$3,000 is \$3,000.

Mr. BARTON. Mr. Moran, you are welcome to the subcommittee, again, and you are recognized for such time as you may consume. But this is a legislative hearing, so we would hope your opening statement is not too lengthy. But you are recognized.

**STATEMENT OF HON. JERRY MORAN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF KANSAS**

Mr. MORAN. Thank you for recognizing me, Mr. Chairman. Thank you for, you and Mr. Hall, your opening statements.

\$3,000 in an agricultural district is still a lot of money, Mr. Bryant; and I appreciate being back again for this second hearing. I will be brief, as you requested.

As you recall, this issue before you is the treatment of the Federal Energy Regulatory Commission's treatment of natural gas taxes back in the early 1980's. Throughout this time, Kansas producers treated Kansas taxes in accordance with the Natural Gas Policy Act and the regulations as ordered by FERC. The taxes were questioned and FERC ruled on three separate occasions, 1983, 1986 and 1987, the taxes were correctly applied.

Then, in 1993, FERC changed its ruling and retroactively ordered refunds, plus interest, over a 15-year period of time. That brings us to where we are today, when producers and royalty owners unexpectedly received bills for taxes and interest from wells that may not even—they may no longer even own, and on wells that may no longer be in production.

From the last hearing I believe there were four points that were established, and these four points set forth the basis for the congressional action that you are considering today.

No. 1, the court-ordered refunds are not going back to the people who were supposedly treated unfairly. This refund is basically a penalty for following the laws as interpreted by a Federal agency. It was stated by Mr. Albright from the Public Service Company of Colorado that there has been no attempt to find original customers, it is too expensive to find original customers, and they are not, except by happenstance, going to receive any of the refunds.

No. 2, FERC's 5-year inaction, as mentioned by Mr. Hall, unnecessarily added to the cost of the penalty. FERC was unable to explain in any way at last hearing why they failed to act for over 5 years.

No. 3, all producers followed the law and regulations the entire time. As the independent oil and gas producers testified at the last hearing, producers and land owners were following FERC's orders in effect at the time.

No. 4, the windfall for the new pipeline customers is minimal. While the cost to the producer—the natural gas producer and the royalty owners are tremendous, the amount of money that an actual customer might receive is very minimal. I think many individuals thought they were winning the Powerball lottery or the Publisher's Clearinghouse. As is often the case, the details suggest that is not the case. It appears that it is about \$1.25 a month for 1 year

that customers will receive, enough for a grilled cheese sandwich each month back home in Kansas. Yet the burden upon the producers and royalty owners is tremendous.

There is still a great amount of misinformation out there around this issue. I recently learned that there is some solace in the fact that Kansas is no longer alone. Originally, Colorado thought that they were winners in this game, but it now appears that Coloradans also owe more money in penalties than they will receive in refunds.

I was appalled by this situation when I first learned about it; and, unfortunately, the more I have heard and read and the more I have learned, the worse it becomes. A penalty from—taking it from unsuspecting, law-abiding people, and even last month we learned universities, given to unsuspecting third parties? It just doesn't make sense.

As I stated in my testimony from the first hearing, Kansas is the largest recipient State in this case. I appreciate and understand the voice of both sides of this issue. That is why I proposed the legislative solution before you today. While I believe no refund should be ordered, H.R. 1117 attempts to strike an appropriate balance and relieve producers simply of the interest, while at the same time allowing the base amount of the tax in question to be refunded.

On a final point, I would like to reiterate the importance of this legislation, a legislative remedy in this case is awfully important to Kansans, and also restate my willingness to work with you and members to see that the right kind of solution is achieved.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Jerry Moran follows:]

PREPARED STATEMENT OF HON. JERRY MORAN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF KANSAS

Mr. Chairman, members of the committee, I again thank you for holding this second hearing. Your concern is appreciated. Since the previous hearing was just last month, I will keep my remarks brief.

You will recall, the issue before you is the treatment by the Federal Energy Regulatory Commission of natural gas taxes back in the mid-1980's. Throughout this time, Kansas producers applied the taxes in accordance with the Natural Gas Policy Act and the regulations as ordered by FERC. The taxes were questioned and FERC ruled three separate times, in 1983, 1986, and in 1987, that the taxes were correctly applied.

Then in 1993, FERC changed its ruling and retroactively ordered refunds plus interest for over a fifteen year period. And that brings us to where we are today, when producers and royalty owners unsuspectingly receive a bill for taxes and interest from wells they may not even own anymore and on wells that may be no longer in production.

From the last hearing, I believe there were four important points established, and that these four points set the basis for the Congressional action you are considering today.

1.) The court-ordered refunds are not going back to the people who were supposedly taxed unfairly. This refund is basically a penalty for following the law as interpreted by FERC. It was clearly stated by Mr. Albright from the Public Service Company of Colorado that there has been no attempt to find the original consumers, it is too expensive to find the original consumers, and that they are not, except by happenstance, going to receive any of the refunds.

2.) The Federal Energy Regulatory Commission's five years of inaction unnecessarily added to the cost of the penalty. FERC was unable to explain at the last hearing why they failed to act on this case for five years.

3.) All producers followed the law and regulations the entire time. As the independent oil and gas producers testified last time, producers and land owners were following FERC's orders.

4.) And, finally, the windfall for the new pipeline customers is minimal—while the cost to the producer is tremendous. I think many individuals thought they were winning the powerball lottery or Publisher's Clearinghouse. But, as is often the case, the details are in the fine print, and in this case the winnings for the new customers are about a \$1.25 per month for one year, enough for a grilled-cheese sandwich back in my hometown in Kansas.

There is still a great deal of misinformation floating around on this issue. I have recently learned that at least Kansas is not alone. Originally, Colorado thought that they were also "winners" in this game, but it now appears that Coloradans owe as much in penalties as they will receive.

I was appalled by this situation when I first heard about it and, unfortunately, the more I learn, the worse it becomes. A penalty taken from unsuspecting—law abiding—people and even universities, given to unsuspecting third parties? It just doesn't make sense.

As I stated in my testimony from the first hearing, Kansas is the largest recipient state in this case. I appreciate and understand the voices on both sides of this issue. That is why I proposed the legislative solution you have before you today. While I believe no refunds should be ordered, H.R. 1117 attempts to strike a balance and relieve producers of interest, while at the same time allowing the base amount of tax in question to be refunded.

On a final point, I would just like to reiterate the importance of a legislative remedy in this case and my willingness to work with all parties to achieve this goal.

Mr. BARTON. The Chair recognizes himself for 5 minutes for questions.

Congressman, why don't you start by explaining what your bill actually does?

Mr. MORAN. Mr. Chairman, as indicated just briefly in my testimony, the overall picture is that FERC has required the payment of past-due taxes, plus what we call penalty and interest. Basically I think it is interest, going back a long period of time. All that H.R. 1117 does is say the interest will not be collected and not be refunded.

Mr. BARTON. So if your bill were to become law, the principal would still have to be repaid?

Mr. MORAN. Yes, Mr. Chairman.

Mr. BARTON. Does your bill stipulate the allocation formula for repayment of the principal?

Mr. MORAN. It does not, Mr. Chairman.

Mr. BARTON. That would be up to the pending FERC order or any negotiations that have been agreed to between the States and the interested parties?

Mr. MORAN. That would be my impression.

Mr. BARTON. So you are simply trying to eliminate the interest. Is the primary reason you are trying to eliminate the interest penalty because it has been so long since—I mean, FERC dillydallied on this for a number of years. Is that the primary reason?

Mr. MORAN. I think that is a reason. Certainly FERC—this issue was out there for a long time. We have individuals who were abiding by the law at the time, as reiterated on three occasions, actually five over a longer period of time, that they were doing the proper treatment. So part of it is simply the unfairness of the Federal agency changing its mind.

The second aspect is what you mentioned, that it took them so long to make that change. And so it seems to me in this circumstance, in my testimony last month, it is like you follow the laws in paying your income taxes, but the IRS changes its rules

and regulations and said, oh, we made a mistake in the way we interpreted the Internal Revenue Code, and you now owe us more money, and you owe us not only the amount of the tax that you didn't pay, but you owe us interest going back 15 years. That would be patently unfair to us and our taxpayers, and we would react strongly against that. This is the same kind of concept that has happened to a smaller segment of the population.

Mr. BARTON. Your bill is silent on the principal, how it is to be refunded, but what would you feel if we amended your bill so that the principal that was refunded at a minimum had to be refunded to the consumer who paid initially, No. 1, a good-faith effort? Because some records do exist and some existing customers are still using natural gas in affected areas.

So if we amended it to say an effort had to be made to pay back the principal to the people who paid it, No. 1; and, No. 2, that in no event could any of the moneys be accepted by the pipelines, that it either went to the consumers or went to some public use fund in the affected States, how would you react to that kind of an amendment?

Mr. MORAN. I would react very favorably to that concept.

Until last month's hearing, I was unaware that the money was not going back to the consumers, to the customers that were the original customers at the time the mistreatment occurred. I was surprised to learn that the testimony was what it was.

I thought the money was going to those way back in those dates through records. They are certainly using the records to try to find people they think should pay the money. It seems to me they ought to be—it would be fair to use the records to find the people they owe the money to.

Mr. BARTON. Have you had any discussions with the commissioners or senior staff at FERC about that last issue, using the existing records to try to find out who should get the refunds?

Mr. MORAN. Mr. Chairman, we have had a very difficult time having conversations with FERC about this issue, because it is considered a pending case.

Mr. BARTON. Oh, I see. Okay.

What kind of a timetable, if we could get a bipartisan consensus, would you like to see in terms of a markup on this bill?

Mr. MORAN. Mr. Chairman, there is a lot of consternation in Kansas. People who have received bills are struggling to know what to do. They don't have the money to pay them. They are worried about the legal consequences of ignoring them. They are seeking legal advice, which is costly.

As you would know, the oil and gas economy, certainly for small domestic producers, it is a struggle in today's economic environment. Any solution that is sooner rather than later would be awfully beneficial for peace of mind and for economic reasons.

Mr. BARTON. My last question, at our oversight hearing it was brought out that a number of very small royalty owners or producers had petitioned to the FERC for relief because of some sort of a hardship situation or de minimis impact. The representative from the State of Missouri seemed somewhat surprised that that State had been objecting to those hardship petitions on what seemed to me pretty technical grounds and certainly inhumane

grounds. What if anything has been done on some of those pending hardship petitions, to your knowledge?

Mr. MORAN. I do not know whether anything has changed since the 3 or 4 weeks ago at which time we had the hearing. It is my understanding the State of Missouri has objected to every application for a hardship waiver.

Mr. BARTON. If we were to put into your bill, again to amend an already good bill, to make it somewhat better, and put in some de minimis standards and some hardship standards into the statute, if that were to be shown there was no need for an appeal, if you could certify these conditions were met, that those interest and penalties and perhaps even principal amounts would be waived, how would you react to that?

Mr. MORAN. I would react very favorably. People are spending money and time trying to obtain a hardship waiver. If they are deserving of a hardship waiver, they don't have certainly the money to pursue that remedy in the first place.

Mr. BARTON. Well, I don't know that we have shown this to the other members yet, but we are going to show it to the members of the minority and majority. But if there is no objection we are going to put into the record some information that appears to me to be from a credible source. And it shows that of the 750 claims, if you take the 10 percent of the smallest, the average claim is less than \$25,000, including interest. So there are obviously some very large claims, but there are also several hundred very small claims that could be wiped off the books and there wouldn't be any material harm to anybody.

I yield to the gentleman from Texas, Mr. Hall, for questions.

Mr. HALL. Thank you, Mr. Chairman. I think I asked most of the questions of the Congressman when he was here before.

It seems to me that the person that paid the tax ought to be eligible for the refund. The bill appears to assume that, in all instances, that consumers of the gas paid the tax, and therefore only consumers of the tax ought to be eligible to receive refunds. I don't think you disagree with that. Yet this is not true, though. In some instances, at least, the tax was paid by the purchaser of the gas and not passed on to the consumer. Why shouldn't the person that paid the tax be eligible for the refund?

Mr. MORAN. I think that is accurate. I would consider a consumer, the customer, the person who paid the tax.

Mr. HALL. It ought to be a fact question as to who that person is.

Mr. MORAN. I don't know how to differentiate between whether or not the customer was an individual homeowner or an individual pipeline that paid the tax. They both would have the same entitlement.

Mr. HALL. Some people question the constitutionality of your bill. What do you have to say about that?

Mr. MORAN. Well—

Mr. HALL. What constitutional problems do you see in it?

Mr. MORAN. I really foresee little or no constitutional problems. I would be willing to defer to the attorneys that will testify.

Mr. HALL. I think she is going to testify in a little bit. I think she already answered that, also. I think it discriminates some be-

tween those that are eligible to receive the refund and those that aren't. But those are things that, once again, that—I have not been briefed—that I just want to ask about.

I think you have covered everything that I wanted to hear, Mr. Chairman. I thank you for your questions. I yield back my time.

Mr. BARTON. Then we recognize the gentleman from Tennessee for questions for 5 minutes.

Mr. BRYANT. Thank you.

Jerry, I think I am in the same boat as our ranking member. We have asked questions at the earlier hearing. I would simply ask, in closing, do you have any comments you would like to make? And after you make your comments, I yield back my time.

Mr. MORAN. Mr. Bryant, thank you very much. I have tried to express my concern with this issue on two occasions, and I would not want to take the committee's time beyond that.

What I am appreciative of is the fact that you and other members, as well as the ranking member and Mr. Barton, have been so willing to address an issue that impacts clearly a minor set of people who generally happen to be Kansans. It is pleasing to me to know that Congress and people who may not have a lot at stake in this issue directly are willing to try to fashion a legislative solution.

I also think that we could take this issue a step beyond who wins and who loses in this particular setting, and none of us at whatever Federal agency would expect our own constituents to accept the treatment that has been forced upon mine in what I think is a very unjust and unfair way.

So it is a broad issue, I think, of how Federal agencies treat the people that they regulate and their power. But I also am appreciative of the fact that a small group of people are affected by this legislation. It is very kind of you to take an interest in it.

Mr. BARTON. Well, this committee likes to seek truth and justice for all Americans, Congressman.

Mr. MORAN. Thank you, Mr. Chairman.

Mr. BARTON. We figure you are on the side of truth and justice, so we are on your side. At least the subcommittee chairman is on your side. I can't speak for everybody.

We would like to call the second panel. We have the distinguished Attorney General for the State of Kansas, the Honorable Carla Stovall; and we have the distinguished gentleman representing the New Century Services, Incorporated, Mr. James D. Albright. If you would come forward, sir.

Good to see you back.

Ms. STOVALL. Thank you.

Mr. BARTON. We have heard from you, Madam Attorney General. We are going to give you about 5 minutes one more time and then give Mr. Albright 5 minutes, and then we will ask some questions for each of you.

So, both of you, welcome to the subcommittee.

Madam Attorney General, you are recognized for 5 minutes.

STATEMENTS OF HON. CARLA J. STOVALL, ATTORNEY GENERAL, STATE OF KANSAS; AND JAMES D. ALBRIGHT, ASSOCIATE GENERAL COUNSEL, NEW CENTURY SERVICES, INC.

Ms. STOVALL. Thank you very much, Mr. Chairman, and members. I appreciate the opportunity to be here and present the position of the State of Kansas on House bill 1117. We are very grateful to Congressman Moran and our entire delegation for support.

I was here to testify on June 8, and I would ask that my prior testimony be incorporated by reference into the record.

Mr. BARTON. Without objection.

Ms. STOVALL. When I was asked last time, I was asked to talk about the legislative history in this whole area. I won't do that this time, with the exception of encapsulating the history enough to say that, for 19 years, the FERC ruled natural gas producers could pass through the pipelines an ad valorem tax, and after 19 years of saying that, they changed their minds and applied it retroactively. So now the situation that Congressman Moran has described to you is what we are facing.

I will tell you this is not the first time I have disagreed with an agency decision, nor the first time I have disagreed with a court decision, but it is the first time I have come to Congress and asked for relief from those, because in the past I have at least been able to understand what either the statutory, constitutional or common law basis for the decisions were, and, folks, I can't do that when we have this situation.

FERC affirmed six times the pass-through of this tax over 13 years and then changed their mind and made retroactive application apply.

Well, my preference would be, as Congressman Moran's, and that is that this whole issue would go away and no refunds would be owed. I understand that that is probably not feasible. So, because of that, I do strongly support the Congressman's bill.

No. 1, it waives the interest, and I think equity demands that, because it recognizes that nobody was acting in bad faith here. The producers and the royalty owners the entire time were operating pursuant to the law.

Five years of the interest accrued during the time, as has been indicated, that FERC held the case and had no action on it. In addition, the DC Circuit is the one who said it should go back to 1983. FERC itself said it should only be retroactive to 1988, and the circuit went back 5 years beyond that.

Then because now 160 percent of the total obligation is interest and it is still accruing for those people who can't afford to pay 100 percent of what the pipelines say is owed, it still continues to grow.

Second, his part of the bill that says that ultimately consumers must benefit before the refunds are to be paid is important, because I don't think either FERC nor the DC Circuit intended this to be a pipeline enrichment ruling. If we put the second part of Congressman Moran's bill on to the legislation, then we are assured that that will not happen for those of us that maybe are a little skeptical of the motivation of folks fighting against what Kansas is trying to do here.

There clearly has been detrimental reliance, contrary to the DC Circuit opinion. When my legislature enacted a severance tax, it

was with specific testimony that the ad valorem tax would be passed through, as would the severance tax. Had we known at any time that this ruling would be changed, the Kansas legislature could and I believe would have changed the law so that the producers did not face a tax that they had to pay and that could not be passed through. The legislature could have repealed the ad valorem tax. They could have amended it to make it like Colorado or Wyoming's, which is passed through. They could have done other tax relief if they wanted.

In addition to the State having detrimental reliance on decisions of the Federal Government, certainly the producers did, too. They could have made decisions had they known what was going to happen to not drill wells, cap existing wells, alter production or deposit the ad valorem tax payments they were receiving in accounts so when they were finally ordered to pay them, they would have had the money to pay them.

But nobody had the benefit of a crystal ball in those days. Nobody had an inkling that those decisions would be changed. Not only did the DC Circuit change FERC's mind and the FERC went along with it, I believe FERC and the DC Circuit has overruled Congress. That is what I would bring to your attention. What the decisions have done is to throw out the window any price certainty, any guarantee that the producers had relied on for 19 years.

Second, you said that there should be no stays of FERC decisions by courts. Essentially, that is exactly what the DC Circuit has done, is stayed the situation so that the decisions of FERC are not final, binding or controlling.

Then, last, in section 110 of the NGPA you specifically authorized that the taxes should be passed through. So I would ask that your intentions be reasserted, your authority be reasserted and upheld by passing and supporting Congressman Moran's bill.

Mr. BARTON. Don't let the bell scare you. You have come a long way.

Ms. STOVALL. Thank you. I thought this was the Chair that ejects if that happens.

Let me just add then the concern I have as the Attorney General of the State of Kansas. Clearly, the producers and royalty owners have great amounts of concern here. But my State will experience a shortage, we believe, of any new drilling. 85 percent of the new drilling in Kansas comes from Kansas folks, Kansas companies. If our folks, though, have to pay these amounts back, that is our entire drilling budget for 3 consecutive years. So for 3 years there will not be money to do drilling when 85 percent of the drilling is from our companies anyway.

Second, we have the Hugoton gas field in Kansas, the largest gas field in the United States of America. The large producers probably are not going to be hurt a lot, although this ruling is as unfair to them as it is to the small folks. They may be able to survive financially if they have to pay these refunds and interest. A lot of our small producers simply will go bankrupt. What we will be left with is that the largest natural resource in the State of Kansas will not be able to be utilized by Kansas small businesses because they will have been bankrupted by the obligation to pay this \$365 million

back, and so the majors, the non-residents, will be the ones to benefit from our natural resource.

So because of those issues, it is my hope that you are able to support Congressman Moran's bill. If not for the effect it has on Kansas, then for the effect of what could happen to individuals or groups within your States that have relied on decisions of the Federal Government and then had those flip-flop. Think of all the regulations or decisions that you support, either that FERC or EPA or OSHA, HUD, HHS, any Federal agency has made, and then imagine those being changed on your constituent groups and have no recourse, because that is exactly what has happened here.

So for your own sakes, I hope that you are able to support this bill and send a message to the DC Circuit as well as to the Federal agency that we don't play like this in America. We play by the rules, and we give folks fair chances and shots at due process.

Thanks very much for the opportunity to be here.

[The prepared statement of Hon. Carla J. Stovall follows:]

PREPARED STATEMENT OF CARLA J. STOVALL, ATTORNEY GENERAL, STATE OF KANSAS

INTRODUCTION

Chairman Barton, Vice-Chairman Stearns, members of the Committee. I am Carla J. Stovall, Attorney General for the State of Kansas. Thank you for the opportunity to appear before your subcommittee in support of H.R. 1117 introduced by Rep. Moran of Kansas and supported by Congressmen Tiahart, Ryun, and Moore. Before detailing Kansas' support of this bill, I have been asked to give a brief overview of the laws and legal decisions which have brought us to the current situation. I would also like to incorporate by reference the testimony I previously presented to the Committee on June 8, 1999.

HISTORIC REVIEW

In 1954, the United States Supreme Court held that the Natural Gas Act (allowed the Federal Government, under the Commerce Clause, to control the price paid for natural gas at the wellhead if such gas was sold to an interstate pipeline. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). From that time to 1993, the Federal Government, through the Federal Power Commission (FPC) and its successor agency, the Federal Energy Regulatory Commission (FERC), established substantially all of the rates that could be recovered by natural gas producers across the nation.

In 1974, in Opinion No. 699, the FPC authorized producers to recover "production, severance, or other similar taxes." Later in 1974, the Kansas Corporation Commission filed a request with FPC seeking clarification of Opinion No. 699, concerning the right of producers to recover the Kansas *ad valorem* tax over and above the maximum lawful price (MLP). The FPC responded by issuing Opinion No. 699-D which affirmed that Opinion No. 699 allowed producers to recover the Kansas *ad valorem* tax in excess of the MLP.

Four years later in the Natural Gas Policy Act of 1978, Congress codified (in Section 110) the FPC's earlier decisions allowing reimbursement of State "production-related" taxes. While Section 110 did not mention any specific state tax, the legislative history made it clear that the Kansas *ad valorem* tax was intended to be included as a tax allowed to be passed through. The NGPA Conference Report noted that this included "an *ad valorem* tax or a gross receipts tax."

In reliance upon FPC Opinion Nos. 699 and 699-D, and the Natural Gas Policy Act affirming those opinions, the Kansas Secretary of Revenue testified in 1981 before the Kansas Senate Tax Committee that the FPC had ruled that Kansas' current *ad valorem* tax, as well as a severance tax if enacted, could be passed through to allow producers to recover both taxes. In reliance on the FPC ruling and previous Congressional action, the Kansas Legislature in 1983 passed a severance tax, justifiably believing that Kansas producers could recover their payments of both the severance tax and the *ad valorem* tax.

In that same year, however, Northern Natural Gas Company filed an application with the FERC to "reopen, reconsider and rescind" Opinion No. 699-D. Three years later, in 1986—a full twelve years after FERC issued Opinion No. 699-D authorizing

“pass through” of the Kansas *ad valorem* tax—FERC rejected Northern’s request stating that it was “**clear beyond question**, that the Kansas *ad valorem* tax is based, in large part, on gas production” (emphasis added), and reaffirmed its prior opinion which allowed the tax to be passed through. FERC denied Northern’s request for rehearing, once again confirming Opinion No. 699-D and assuring Kansas and Kansas producers that *ad valorem* taxes could lawfully be passed through.

Shortly thereafter, the Northern decision was appealed to the D.C. Circuit which, on June 28, 1988, held that FERC had not adequately explained its order. *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769, 773 (D.C. Cir. 1988). The case was remanded to FERC where it sat idle on FERC’s docket for a period of five years, from 1988 to 1993. (This delay is significant because a subsequent FERC decision would cause interest claims amounting to millions of dollars to accrue during this period, through no fault of the producers, royalty owners, or the State of Kansas.)

Finally, in 1993, FERC issued an Order on Remand reversing Opinion No. 699-D and ordering refunds retroactive to June 28, 1988, the date the Court of Appeals had first remanded the case to FERC. This ruling was also appealed to the D.C. Circuit and in 1996, the Court affirmed FERC’s decision that Kansas’ *ad valorem* tax did not qualify under Section 110, but held that refunds would be retroactive to October of 1983 when the notice of Northern’s petition had been published in the *Federal Register*—expanding by five years the period for which refunds were due. *Public Service Company of Colorado v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996).

By this decision, the D.C. Circuit essentially held that all producers should have known that Northern’s 1983 petition would be granted thirteen years later, notwithstanding that the notice of the petition mentioned nothing about potential refunds. The Court went so far as to say the producers were “foolhardy” to think that they could have relied on a final, non-appealable order of FERC, notwithstanding the administrative finality provisions of the NGPA. FERC not only has refused to grant hearings, but has refused to waive interest on these retroactive refunds, interpreting the Court’s decision to require the imposition of interest on *ad valorem* tax refunds, even though the court’s decision was silent on this issue.

JUSTIFICATION FOR LEGISLATIVE RELIEF

Against this background, Congress has a range of alternative legislative remedies available. My preference would be that Congress waive the refunds in their entirety. The refunds at issue here are contrary to due process and the legislative history of the NGPA—not to mention my concepts of fairness and justice and the integrity of the Federal Government.

The decision of the Court of Appeals effected a retroactive change in the law. That change was a complete reversal of the state of the law at the time the *ad valorem* taxes were being paid to the sovereign State of Kansas. Had there been any warning of the impending change in federal policy, **the Kansas legislature could have amended the Kansas *ad valorem* tax statute to assure that the tax would qualify for continued treatment under the NGPA** in the same manner as the tax had been treated under the Natural Gas Act and as similar taxes in other producing states are treated, notably that of Colorado. The only reason the Kansas legislature did not do so was that it relied on the FPC’s and the FERC’s several decisions that the Kansas *ad valorem* tax was a permissible add-on to the maximum lawful price both under the NGA and under the NGPA.

The point is that it is not just the producers who relied on FERC’s assurances. **The government of the State of Kansas relied on FERC’s rulings.** Our producers, royalty owners and domestic economy are now disadvantaged by reason of a retroactively effective Court ruling. Under the unique circumstances presented by the history of the FERC rulings at issue and the legislative history of the NGPA that contemplated building on the framework of NGA regulation, I believe that the only just and equitable remedy for the State of Kansas and Kansas producers and royalty owners is for Congress to waive refunds in their entirety.

It should be noted that this is not an area where consumers have been harmed in any sense. Indeed, consumers were the primary beneficiaries of the abundant gas supplies and lower gas prices which resulted from the NGPA. After Congress enacted section 110 of the NGPA, consumers had no reasonable expectation that the production-related taxes of producing states would not be passed on to consumers. Additionally, consumers have also received the benefit under the NGPA of regulated prices often below the MLP and in many instances well below the market price. The opponents of legislative relief are hanging onto a windfall bestowed on them by a scheme. Had there been fair warning of the infirmity of the Kansas statute, I assure you the legislature would have acted swiftly to obviate the problem we face today. But the FERC’s dilatory actions and the revisionist ruling of the Court of Appeals

conspired to impose a harsh burden on the State of Kansas, Kansas producers, and royalty owners.

I would note that neither the producers nor the royalty owners are the J.R. Ewings we remember from the television show, living in mansions and driving expensive automobiles. The royalty owners are retired farmers who have come to rely on the little "gas check" each quarter to supplement their Social Security. The royalty owners are school teachers whose grandparents may have bequeathed them a $\frac{1}{8}$ share of the gas well on the family farm. The royalty owners may be constituents of yours, not Kansas residents, who inherited or purchased an interest in a gas well in Kansas. The "bills" the royalty owners are receiving are beyond the means of most of them and will ruin them financially. The interest the pipelines claim is due is now more than 160% of the principal calculated at prime compounded quarterly!

And why are they being made to pay these exorbitant "bills"? Not because they were cheating on their taxes. Not because they hid their interest in a gas well from government officials. Not because they thought of a scheme to overcharge the pipelines and ultimately consumers, but because they were following the law as it had been interpreted consistently for nineteen years by a federal agency!

THE NGPA ITSELF SUPPORTS LEGISLATIVE RELIEF

The Natural Gas Policy Act achieved its objective admirably. Congressman Dingell is to be commended for his role in that legislation. As you know, the NGPA did not accomplish its goal merely through price increases (though people generally think incorrectly that that is how it achieved its goals). Although the NGPA did create price incentives, what really made the NGPA effective was the **elimination of regulatory uncertainty**.

Consider the fact that, in real dollar terms, the average wellhead prices of gas today, more than 20 years after the shortages of the 1970s to which the NGPA was a response, are **well below** the regulated prices existing prior to enactment of the NGPA. Thus, it is apparent that the regulatory uncertainty eliminated by the NGPA contributed greatly to the supply-demand balance we enjoy today.

The Court's decision retroactively changing the status of the Kansas *ad valorem* tax **flies in the face of the statutory provisions of the NGPA designed to foster regulatory certainty**. Section 506(b) of the NGPA specifically provides for judicial review of FERC rules pursuant to the Administrative Procedure Act. However, Section 506(b) also states that the "second sentence" of Section 705 of the APA "shall not apply."

What is the second sentence of Section 705? That sentence authorizes a reviewing court to issue a "stay" of an agency rule pending judicial review. The significance of omitting the power to issue a stay with regard to orders under the NGPA is that, in the absence of a stay, Commission orders are final, binding, and controlling, and producers are entitled to rely on them.

I understand that Congressman Dingell was responsible for inclusion of this and other provisions of the NGPA that were intended to provide regulatory certainty as a means to foster greater gas supplies.

The retroactivity of the Court's order here has the **practical effect of granting a stay in contravention of the prohibition in Section 506(b) of the NGPA**. Therefore, the Court's retroactive order is unlawful and contrary to the NGPA itself.

H.R. 1117

I do not appear on behalf of the State of Kansas to allege that FERC should be precluded from changing its position regarding the definition of the "pass through" of *ad valorem* taxes or to challenge that authority. Clearly, such authority lies within the sound exercise of FERC's jurisdiction when applied on a prospective basis.

I appear here to object to the inequity which arises from that part of FERC's ruling which held that interest must be paid on the retroactive refund obligations resulting from a reversal of 19 years of agency policy. If this change were applied on a prospective basis only, I would not be here objecting. However, the D.C. Circuit's decision contended that the producers' allegation of detrimental reliance on FERC's nineteen-year practice allowing the pass-through of the *ad valorem* tax was "purely notional; if it were real it would not have been reasonable." Incredibly, how could the Court say it was not reasonable to rely on a nineteen-year history of consistent rulings by a federal regulatory agency? I agree something is not reasonable—but it is not the actions of natural gas producers!

After Northern initially challenged the applicability of the ruling to the Kansas' *ad valorem* tax, in 1986 FERC stated that the pass-through was "clear beyond question." How could the producers' reliance on FERC's rulings be unreasonable when FERC itself continued to reaffirm those rulings? Perhaps you could help me explain

this to my constituents because I am absolutely at a loss as to how to do so. As my state's chief lawyer, I am unable to understand for myself—much less explain to anyone else—how our system of government and jurisprudence allows a nineteen-year ruling to be reversed overnight and applied retroactively causing citizens to owe hundreds of millions of dollars in principal and interest.

The “bills” being sent by the pipelines to small natural gas producers have caused those producers to teeter on the brink of bankruptcy. Such adverse financial consequences, in a period of historic low prices, has spelled doom for the natural gas industry in my state—home of the Hugoton gas field, the largest in the continental U.S. Not only do the owners, employees, and suppliers of the production companies suffer financially—the State of Kansas suffers as revenue from income, property, severance, *ad valorem*, conservation and anti-pollution taxes declines, including the income tax effects to the state of the refunds being ordered of major out of state producers.

The procedures outlined by the FERC to accomplish the refund procedure called for the pipelines to submit “bills” to the producers and required the producers to pay 100% of the “bill” into escrow or to post a bond in the amount of the “bill.” Subsequent to payment of the “bills,” FERC would then determine the liability of the producers if they requested a hearing or sought adjustment relief. To date FERC has not granted any hearings, although 20 requests for hearing on the accuracy of the claims have been filed. In my view, requiring payment **before** any determination of whether the refund is actually owed is backwards and reflects the procedural irregularity in the refund process.

Congress should waive the interest on the refunds as proposed in H.R. 1117. There is ample reason for this. The extended delay involved in resolving the Kansas *ad valorem* tax refund issue is not the fault of producers or royalty owners on whom the burden of refunds falls. In fact, it is the fault of FERC. FERC delayed its decision on remand of the Court's decision for a period of **five** years, adding insult to injury. During this period of unconscionable delay, interest was accruing. Indeed, fully two-thirds of the entire Kansas *ad valorem* tax refund claims is made up of **interest** on the principal amounts. Had there not been significant delay by FERC, the interest would have constituted a much lower portion of the refund claims. The equities demand a waiver of the interest.

Although H.R. 1117 would not grant relief from the requirement for retroactive refunds that I wish would be legislatively overturned, H.R. 1117 would at least provide a much needed remedy—albeit on a limited basis—to natural gas producers and royalty owners by barring assessment of any interest or penalties on those refunds.

Under FERC's regulations, no government agency is required to pay interest or penalties on refunds. See 18 C.F.R. Part 154. Thus, the State of Kansas will owe a refund of the *ad valorem* tax that the Department of Parks and Wildlife passed through, although it will not owe interest. Yet the elderly, widowed royalty owner will owe a refund of the taxes AND interest on the refund. What justifies this disparate treatment? H.R. 1117 would eliminate this irrational disparity.

Another concern addressed by H.R. 1117 is the risk that a large portion of the refunds and claimed interest will not flow through to the consumer. H.R. 1117 would provide protection to the consumer by requiring that all amounts refunded be passed through to the ultimate consumer.

Large utilities opposing H.R. 1117 claim that, if passed, H.R. 1117 would adversely impact the property rights of ultimate gas purchasers in violation of the Takings Clause of the Fifth Amendment. That is simply not the case. Opponents of H.R. 1117 rely on *Phillips v. Washington Legal Foundation* for the proposition that interest is “property” for the purpose of a Fifth Amendment takings claim. 524 U.S. 156 (1998). In *Phillips*, interest accrued on money being held in a special fund for clients. The Court held that interest thus generated belonged to the client. (The Court specifically did **not** address whether those funds were “taken.”)

Unlike the clients in *Phillips*, the large utilities seeking refunds here do not have a cognizable property interest in receiving interest on the retroactive refunds. Property interests are not created by the Constitution. Rather, they are created by “existing rules or understandings that stem from an independent source, such as state law.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (cited in *Phillips*, 524 U.S. at 156).

The NGPA and the FERC's regulations thereunder did not create constitutionally vested “property rights” accruing to the benefit of gas purchasers. No private rights of action were created for purchasers under the NGPA. See, e.g., *In re Texaco*, 89 Bankr. Rep. 382, 84 Bankr. Rep. 911 (Bankr. S.D.N.Y. 1988). Neither the FERC nor the federal courts have treated past regulatory policies of the FERC as creating “property rights” for gas purchasers. No party has disputed that the FERC also has

the equitable power to deny refunds or interest on refunds in the exercise of its statutory jurisdiction.

Opponents further argue that passage of H.R. 1117 would amount to retroactive legislation and would infringe on the due process rights of the customers by "depriv[ing] citizens of legitimate expectations and upset[ting] settled transactions." This argument is unsustainable. In reality, it is the **producers** that are being deprived of their legitimate expectations and the **producers'** transactions that are being unsettled. Producers entered into gas purchase contracts, passing through the cost of the Kansas *ad valorem* tax in accordance with the law from 1974 until 1993. To now obligate those same producers to refund those dollars seriously undermines the established contractual obligations between the parties and upsets transactions that were well-settled for nineteen years. Although H.R. 1117 is not a complete remedy, it nevertheless provides an equitable measure of relief for producers, royalty owners and the State of Kansas.

CONCLUSION

I urge you to support this bill. It redresses an unjust ruling having detrimental effects on a significant sector of the Kansas economy. I also urge you to support this bill to correct the effects of an unjust and unreasonable decision by a federal administrative agency against a sovereign state—if not because of the merits, then to stop FERC or some other federal agency or court from imposing similar, albeit unrelated, but equally devastating consequences on individuals or businesses in your states. Finally, Congress must consider the interests of the royalty interest owners and small producers and devise some means to grant these people and the State of Kansas relief.

Mr. BARTON. Thank you, Madam Attorney General.

Mr. Albright, I was impolite when I said that the Attorney General had been here before. You have also been here before.

Mr. ALBRIGHT. That is correct, Mr. Chairman.

Mr. BARTON. You have my apologies for not making that announcement simultaneously with the lady to your right. You are recognized. We are going to set the clock for 5 minutes, but you, too, will be given some discretion if you need a little extra time.

STATEMENT OF JAMES D. ALBRIGHT

Mr. ALBRIGHT. Thank you, Mr. Chairman. As with Ms. Stovall, I would request that my testimony from the June 8 oversight hearings be incorporated by reference into this record.

Mr. BARTON. Without objection.

Mr. ALBRIGHT. Just to familiarize yourselves with whom I represent, I am an attorney for Public Service Company of Colorado and Cheyenne Light, Fuel and Power. I am not here representing their interests as much as the interests of the over 1 million customers that we serve. We are entitled to approximately \$20 million based on estimates of information filed with the FERC, and just to place a hold who is actually going to receive these refunds, I would like to address Congressman Moran's comments as to that issue after I go through my opening statement, as part of my opening statement.

In my prior testimony, I reviewed the history of the litigation surrounding the Kansas *ad valorem* tax issue as well, and I don't need to review it at this time, but I provided the viewpoint of the customers that were in line to receive these refunds and whether the legislation such as that proposed by Congressman Moran was warranted.

The record developed at the oversight hearing revealed the following which paints a somewhat different picture than that presented so far today.

The consumers were unjustly overcharged during the 1980's as a result of the producers' unlawful collection of these taxes under the Natural Gas Policy Act. In fact, the producers did appropriate windfall profits during this time at consumers' expense.

The interest portion of these refunds is merely to compensate the consumers for the money that was deprived them during the up to 16 years of time that it took to litigate this case, and this compensation is not insubstantial because of the amount of time that has transpired.

It is important to note that there has been no retroactive application of the law. FERC was found to have misapplied Congress' law, the Natural Gas Policy Act, as to whether or not the Kansas ad valorem tax should have been recovered through the maximum lawful prices set forth in the act.

FERC misinterpreted the law and the court so found.

The litigation concerning this was transpired over 15 years. The tax was in dispute during that time. These producers, especially if you look at the sheets that show who is entitled or who has the liability for these refunds, are major producers who are not unsuspecting but, rather, were involved in the litigation and were well aware of the consequences of collecting this tax. In fact, FERC had a regulation on the books under the Natural Gas Policy Act which required that all collections under the Natural Gas Policy Act would be collected subject to refund and that those refunds would require the payment of interest. So this isn't something new, something unsuspecting that was out there. In fact, the only thing that the producers may have miscalculated was that they could lose this litigation.

In fact, the courts have completely rebuffed any claim of unfairness of detrimentally relying on FERC's orders as to the Kansas ad valorem taxes. In fact, the court noted that such claim was "purely notional, and that if it was real, it was unreasonable and foolhardy."

FERC has adequate authority to deal with the claims of undue hardship in the majority of the cases under section 502. 502 gives FERC the authority to prevent special hardship, inequity or unfair distribution of burdens.

The record also reflected from the oversight hearing that 86 percent of the total liability for these refunds falls on the top 24 producers on the list, and that list would be Exhibit E to Ms. Lumpe's testimony in that oversight hearing. These 24 producers are mostly large, multibillion dollar companies.

As to Mr. Moran's statement that the customers that actually paid the tax—and, in fact, it wasn't the tax they paid, they were charged for natural gas service by local distribution companies—those customers are still the same general body of customers that will receive the refunds.

It is somewhat different to say that the 700 or so parties that unfairly collected these taxes, that these producers that are within the pipelines' records that must pay this tax can be compared to the millions and millions of consumers that actually were overcharged in their rates. Practically speaking, refunds at a local distribution company level just cannot be made on a person-by-person basis. It is the general body of consumers within the service terri-

tory that contributed to these, that paid these taxes, that must now be refunded. That is what would happen in the majority of the cases under the State laws.

At the same time, however, there is no denying that hardship exists in some cases and FERC has been somewhat dilatory in processing the over 100 hardship cases before it. Even this process is not practical for some parties. Some royalty owners and producers have such a small liability that even processing their hardship case would cost them so much in attorneys' fees that it just doesn't pay to fight it.

We do have certain problems with House bill 1117. As I indicated, it is overbroad, because it forgives interest for everyone, not just those who may credibly claim a hardship. Why should the Amocos and Mobils and Oxys and Union Pacific Resources of the world be entitled to relief when they were fully aware of this litigation from the beginning, and certainly it doesn't cause any hardship on them?

There are also some technical difficulties, if the bill is going to require that the individual consumers within the State regulated local distribution companies' service territories must be located and found. That will eliminate the refunds, because it will cost too much for local distribution companies to go back and resurrect records, whether it is through telephone listings or what have you, to find the exact customers.

As I indicated in my testimony on June 8, Public Service Company experiences 20,000 name changes and address changes each month, and over a course of years, that is over 1 million changes on 1 million customers. It is just too impractical to process.

In fact, it is the States who regulate the distribution. In our State, in Colorado, there is a statute which allows the Public Utilities Commission of the State of Colorado to fund an energy assistance fund to provide assistance to low-income customers. So the customers that would most need it would also get a portion of these refunds, at least in the State of Colorado.

Mr. BARTON. Could you summarize? I don't want to cut you off. Again, you have come a long way, too.

Mr. ALBRIGHT. There are other technical issues that we have with the bill. Constitutionality is one.

Mr. BARTON. Elaborate on the constitutionality, because Congressman Hall asked about that.

Mr. ALBRIGHT. There are vested rights as a result of the Supreme Court's denial of certiorari in the case where the DC Circuit found the refunds are due and, in fact, mandated FERC to order those refunds. Those vested rights relate, obviously, to the principal. The question is, is it a vested right to be compensated for the loss value, for the time value of money that was deprived these consumers? Is that also a vested right? I think that would be an issue that would likely get litigated under this bill.

Also, there is an issue of the 97 or so million dollars that have already been refunded to customers because of these refunds. How is this bill going to deal with that? Is it going to retract that? Are the pipelines and the local distribution companies now going to have to turn around and go find the refunds that were actually made and try to get those dollars? That is just as inequitable as

what Mr. Moran is talking about. A little residential customer receives a check for \$12 or what have you. Now all of a sudden it is told they have to pay it back a year or 2 later.

But there is room for compromise. I suggest in my written statement, which has been submitted, that, similar to Mr. Chairman's suggestions at the beginning of these hearings, that there could be a cutoff, a de minimis cutoff, that all liabilities for royalty owners or small producers that are under \$500 may be forgiven through legislation, and that perhaps even at the \$25,000 limit a reduced evidentiary standard where only sworn affidavits can be submitted, and if it establishes the necessary criteria, that will resolve the hardship standards in that case.

Thank you, Mr. Chairman.

[The prepared statement of James D. Albright follows:]

PREPARED STATEMENT OF JAMES D. ALBRIGHT, ASSOCIATE GENERAL COUNSEL, NEW CENTURY SERVICES, INC.

INTRODUCTION

Mr. Chairman and members of the committee, my name is James D. Albright. I am Associate General Counsel, New Century Services, Inc., a wholly owned subsidiary of New Century Energies, Inc. My responsibilities include all regulatory and legal matters regarding natural gas for Public Service Company of Colorado (Public Service) and Cheyenne Light, Fuel and Power Company (Cheyenne), both wholly-owned subsidiaries of New Century Energies, Inc. Public Service and Cheyenne are both combination electric and gas utilities. As relevant to these hearings, Public Service and Cheyenne are local distribution companies that provide natural gas service to customers at retail, and are extensively regulated by state utility commissions in Colorado and Wyoming, respectively.

Both Public Service and Cheyenne purchased natural gas during the 1980's from interstate pipelines which, in turn, purchased natural gas produced in various states, including the State of Kansas. Public Service and Cheyenne, which together serve over one million natural gas customers in Colorado and Wyoming, were the lead petitioners in the 1996 federal court case which resulted in the orders mandating the refunds with interest of amounts collected by producers during 1983-1988 attributable to the reimbursement of Kansas *ad valorem* taxes to the extent that their collection caused the producer to collect prices in excess of the otherwise applicable maximum lawful price. For the record, neither Public Service nor Cheyenne stand to retain any of these refunds; that will be flowed through to them by interstate pipelines. Public Service and Cheyenne have pursued these refunds, with interest, for the benefit of their customers in Colorado and Wyoming. While the benefit to any particular customer may be relatively small, approximately \$15 for the average residential customer and \$90 for the average commercial customer, the size of the refund on a customer-by-customer basis has never been the test for excusing refunds. These customers have been wronged through the unlawful collection of reimbursements for these *ad valorem* taxes, the impact of which on consumers as a whole is in the hundreds of millions of dollars and in Colorado, over \$23 million. Public Service and Cheyenne have a strong commitment to protecting the interests of our customers and, in this case, as a direct result of that commitment, we have found ourselves in the position of championing the right to refunds of natural gas consumers in 23 states.

H.R. 1117, introduced by Congressman Moran of Kansas, would forgive, at a minimum, over \$200,000,000 of the estimated \$335,000,000 in refunds that the Federal Energy Regulatory Commission (FERC) has ordered to be paid by those who sold natural gas from 1983 to 1988 at prices which exceeded the maximum lawful prices prescribed under the Natural Gas Policy Act of 1978 (NGPA). These over-collections, as I explained in my June 8, 1999 testimony before this subcommittee, derive from producers charging their customers "add-on" amounts that would reimburse them for *ad valorem* taxes paid to the State of Kansas in addition to the otherwise lawful maximum price under the NGPA. The collection of these add-ons over and above the maximum lawful NGPA price was found by FERC, and affirmed by the United States Court of Appeals for the District of Columbia Circuit in *Public Service Co. of Colorado, et al. v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996), *cert. denied* 520 U.S. 1224 (1997), to have been impermissible under the NGPA.

H.R. 1117 can also be read to excuse all refunds (not just the interest component of the refunds) if the particular consumer who actually paid the overcharge back in the 1983-1988 period cannot be located for purposes of distributing the refunds. What makes this aspect of H.R. 1117 inequitable as well as unworkable is the fact that the refunds must be distributed first at the federal level and then at the state level. FERC has jurisdiction over the first allocation of refunds from the interstate pipelines to their former wholesale customers, many of which are local distribution companies. The states have jurisdiction over the second level of refund distribution—the pass-through of refunds from local distribution companies to the ultimate consumer. H.R. 1117 ignores these jurisdictional allocations and would require the interstate pipelines to identify not only its own customer but also the name of the ultimate consumer from whom the excessive charges were collected. The rationale behind this is that the customers who actually paid the overcollections should receive the refund. In the world of retail rate regulation, the customers who actually pay an overcharge are not always the same customers who receive the refunds. But that has never been, and can never be, the basis for excusing a regulated company from its refund obligation. At the state retail level, tracing customers for refund purposes is neither practical nor cost-effective even within the utility's own service territory; it is virtually impossible to track customers which leave the utility's service territory altogether. Local distribution companies have thousands and, in many cases, millions of customers who are constantly moving from one location to another. In Public Service's territory alone, nearly 20,000 customers change locations each month. That is why rate cases of local distribution companies like Public Service and Cheyenne allocate charges to "classes" of customers and, when refunds are ordered, allocate the return of excessive charges, with interest, to the same customer classes.

The return of excessive gas charges by first sellers under the NGPA is no different. To the extent that pipeline customers are regulated by state commissioners, the states determine the distribution of refunds to the customers in the relevant customer classes of those companies. FERC does not get involved in locating the individual consumer who actually paid the charge, or does the state regulatory agency. Whether at the federal or the state level, it has never been suggested until now that regulated entities which overcharge their customers can be excused from paying refunds if their customers cannot prove that the very same ultimate consumer who paid his proportionate share of the overcharge will actually receive his proportionate share of the refund.

The refunds addressed by H.R. 1117 were collected subject to a general obligation to refund, with interest, overcollections of amounts which are ultimately determined to have exceeded the NGPA maximum lawful price. And, while it may have taken many years for the liability to be determined—during which substantial changes have occurred in the customer bases of both interstate pipelines and local distribution companies—that is no reason for excusing the payment of refunds to the overcharged customers.

The exact way in which ultimate consumers receive compensation, in a highly regulated industry, should be left to the appropriate state agencies that have authority to regulate retail rates to consumers. Those entities may rationally elect to rebate to the existing consumer base, rather than trying to find individual customers from the past. Some states, as does my own, may elect to take unclaimed refunds and place them in a fund to assist low income consumers in paying their utility bills. State regulatory commissions, applying existing state laws, are quite competent to distribute the refunds in a manner consistent with the public interest.

INTEREST SHOULD BE PAID

First and foremost, the committee should recognize that there is no inequity in requiring the return of unlawfully collected overcharges with interest. Interest is not a penalty. It is merely compensation for the time value of money wrongly held by one party and owed to another party. Arguments have been made that interest payments should be excused because the first sellers and the royalty owners here had every reason to believe that the sums which they collected for the Kansas *ad valorem* taxes were lawfully collected from consumers. They argue that FERC had determined in a final order that the Kansas *ad valorem* tax could be collected as an add-on to the otherwise applicable maximum lawful and then, nineteen years later, suddenly changed its mind and ordered the tax collections refunded with interest. Were that the case, the D.C. Circuit's decision requiring full refunds would have been different. The fact of the matter is that it was the Federal Power Commission (FPC), the predecessor of FERC, in rulings regarding the national ceiling price for gas under the Natural Gas Act that issued a final determination on the prices to be col-

lected under the NGA and the national ceiling rate proceedings allowing the Kansas *ad valorem* tax to be added to the national ceiling price. After the NGPA was enacted, the continued viability of the FPC's prior NGA rulings on the collectibility of the Texas *ad valorem* tax was raised by producers. They urged FERC to reverse the FPC's prior disallowance of collection of the tax. The same issue in reverse was raised by pipelines as to the Kansas tax. These proceedings started in 1983, leaving no doubt in anyone's mind (except perhaps the overconfident) that the permissibility of the collection of the Kansas *ad valorem* tax under the NGPA was in question and that an adverse ruling would lead to a refund order under the FERC's regulations. Regardless of the actual knowledge of each gas producer or royalty owner regarding its refund obligation, the reality is that (1) the NGPA made it illegal to collect amounts in excess of the maximum lawful price, (2) the permissibility of the collection of the Kansas *ad valorem* tax under the NGPA was being litigated and (3) FERC's regulations explicitly stated that collections in excess of the NGPA maximum lawful price were to be refunded with interest. There were no surprises except perhaps that the first sellers did not factor in that they could lose.

Given these facts, it is hard to see the inequity in requiring refunds of unlawfully collected revenues with interest. Everyone was on notice that the permissibility of the Kansas *ad valorem* tax as an NGPA add-on was in question. And, everyone was on notice that if not permitted by statute, those dollars would have to be refunded, with interest. Yet, H.R. 1117 would automatically excuse every first seller, including companies like Amoco Production Company, from the obligation to pay interest on the unlawful collections—monies which companies like Amoco have had the use of for up to 16 years. Interest on the refunds merely puts consumers in the position they would have been in had the unlawful charges not been collected. Fairness and equity is on the side of the consumers, not on the side of companies like Amoco. For Congress to forgive the interest overcharged consumers would be to grant the producers a windfall of over \$200 million.

Not only would there be unfairness and inequity in failing to make consumers whole for these illegal overcharges, a legislative forgiveness of interest would unduly discriminate in favor of natural gas produced in Kansas and the state treasury of Kansas over natural gas produced in other states and their state treasuries. Other gas producing states, including particularly Texas, also had *ad valorem* or other property-type taxes in effect during this period which were never eligible for reimbursement as an add-on to the maximum lawful price under the NGPA. Texas' *ad valorem* tax, which in all material respects was identical to Kansas' *ad valorem* tax, was expressly found by the FERC in 1986 not to qualify as a recoverable "add-on" to the maximum lawful price under section 110 of the NGPA. Thus, gas producers from Texas have never been allowed to collect reimbursement for these types of state taxes in the prices charged for natural gas. To forgive interest on these refunds would enact a preference for producers of Kansas gas over producers of gas from other states.

It should also be clear that there is no inequity or injustice in requiring the bulk of the first sellers to demonstrate the kind of *individualized* showing of hardship required by NGPA Section 502(c) if FERC is to excuse payment. That is the standard established by Congress and the standard that has been used to grant special relief from NGPA obligations for more than 20 years.

PROBLEMS WITH H.R. 1117

The problems with H.R. 1117 are clear. First, the legislation is overly broad. Supporters of this legislation claim that relief is needed to avoid burdening very small natural gas producers or royalty owners. In reality, 86% of the refunds are owed by major oil and gas producers. As such, the legislation is far too broad in that it would eliminate the interest payments on the refunds for all producers, not just those who may credibly claim hardship. Second, the legislation does nothing to simplify or expedite the statutory hardship relief process at FERC for legitimate hardship cases. And, third, the legislation would require refunds "only to the extent that the purchaser demonstrates to FERC that the refund will be passed on to ultimate consumers of the natural gas." As I explained earlier, this language is susceptible to an interpretation that would virtually eliminate refund liability. Such legislation would run counter to every federal and state regulatory scheme which has been enacted to protect consumers from excessive rates. The Moran bill does the opposite—it grants natural gas companies—here the producers, a monetary windfall of at least \$200 million at the expense of the consumers.

The Moran bill should not be passed. To the extent that its purpose was to address the problems being faced by small producers and royalty owners in hardship situations, alternatives are available which do not grant windfalls to producers.

A POSSIBLE SOLUTION

While H.R. 1117 goes too far, Public Service and Cheyenne believe that there is room to address the true hardship cases and the cases where the refund obligation is so low as to cause the government and these individuals to incur more cost in resolving questions of liability than the dollar value of the refund liability itself. Under the NGPA, FERC is responsible for the administration of disputes concerning liability for refunds. However, it appears that FERC is caught in a quagmire at the present time and may not be able to find a way to promptly resolve the numerous refund liability issues that have been placed before it. To assist in this process, Congress could consider requiring FERC to expedite its processes, for example, by declaring that any first seller or royalty owner whose refund liability is less than \$500 be excused from paying the refund. In addition, Congress could require FERC to establish a procedure whereby those with refund liabilities less than \$25,000 could establish their entitlement to a hardship exemption by affidavit. For those with refund liability exceeding \$25,000, Congress could require that expedited procedures be established to resolve any factual disputes regarding liability and a FERC decision issued within a set period of time. Public Service and Cheyenne urge the committee, if there is a need to legislate relief provisions for the true hardship cases, to consider such alternative approaches.

This concludes my written statement.

Mr. BARTON. The chairman recognizes himself for the first series of questions.

I wanted to be sure we have a complete record on this, Mr. Albright. NCE, I am told, is a holding company that owns the Public Service Company of Colorado, the Southwestern Public Service Company of Colorado, Cheyenne Light and Power Company and other subsidiaries, including one in England.

I am also told there is a pending merger with Northern States Power. As of the last published reports, that the operating revenues of the various affiliates that encompass NCE total about \$3.1 billion a year. Is that generally correct?

Mr. ALBRIGHT. That sounds correct, Mr. Chairman.

Mr. BARTON. So it would be safe to say that the entity that you represent is not a small potato in this field.

Mr. ALBRIGHT. That is correct, we are not, which is why we were involved in the litigation and prosecuted the case.

Mr. BARTON. How much refund and interest money, if any, are the various groups that you represent at NCE claiming?

Mr. ALBRIGHT. The only groups that I represent within NCE are its customers. I am representing Public Service of Colorado and Cheyenne Light and Power. Under the public utility's regulations in Colorado, we are obligated to represent our customers' interests.

Mr. BARTON. I didn't ask you if you are obligated. I asked you how much interest and penalty the entities that you represent are claiming. You have every legal right to claim it. I am just trying to see what vested interest the parties you represent have in this case. That is all.

Mr. ALBRIGHT. Well, we are really not claiming anything. But, based on the estimates, we are entitled to receive approximately \$20 to \$23 million of principal plus interest.

Mr. BARTON. Okay. Now, if these funds that you just said are in your own companies' customer base, if those funds were to be obtained, would they all go back to your customers?

Mr. ALBRIGHT. As I indicated in my opening statement, there is a statute which allows the Public Utilities Commission to divert some of the refunds that would otherwise be undistributed, and in fact probably all of these would be undistributed if we were to try

to go back and find the original customers. But under the processes normally followed, the PUC would designate a portion, somewhere greater than half, less than 100 percent, that would be credited to our existing current natural gas sales customers. The remaining portion then would go into the Colorado energy assistance funds used exclusively for low-income customers that have trouble paying their heating bills.

Mr. BARTON. Let me rephrase the question. If it is not possible or it is not required under the State laws that your subsidiary companies operate in that you have to try to find the customer that used the gas and paid the tax and paid everything in the beginning, do all the funds go back to these public benefit funds that you just alluded to, or is any of the money going to end up in the corporate coffers?

Mr. ALBRIGHT. None will end up in the corporate coffers. We have indicated to the PUC we would like to be reimbursed for some of our costs for this, but we have not received any, and that has not been ruled upon. All of the money will be paid out from Public Service Company and Cheyenne Light and Power. None will be retained based on the rulings today.

Mr. BARTON. Except for your costs and being an efficient company like you represent, there will be minimal costs. I am sure there will not be large costs that need to be reimbursed. Maybe a couple postage stamps or something for the filing with the various State entities. But it is all going to go back to this public benefit fund then?

Mr. ALBRIGHT. No, that is not what I said. I said a portion of it, less than 50 percent, would likely be directed by the Public Utilities Commission to be placed into the public benefits fund.

Mr. BARTON. What happens to the other 50 percent?

Mr. ALBRIGHT. That would go directly to our current existing sales customers.

Mr. BARTON. Who paid it in the beginning, which seems equitable. That is fair.

Mr. ALBRIGHT. It is the general body of customers, not the particular customers. We don't make an individual isolation of customers to determine whether they were our customer during the 1983 to 1989 period.

Mr. BARTON. My time has expired for the first round. I will come back. Mr. Hall.

Mr. HALL. General Stovall, in his testimony Mr. Albright outlined some alternatives to H.R. 1117, including requiring FERC to allow these with less than \$25,000 in refund liabilities to establish their hardship exemption by affidavit and completely exempting anyone with under \$500 of liability from having to pay at all.

Is this an acceptable—is this a way of settling this in lieu of H.R. 1117?

Ms. STOVALL. I don't think so, Congressman.

Mr. HALL. What are the problems with that?

Ms. STOVALL. I don't think it goes far enough. Clearly, any relief we can get for folks is important, and I wouldn't say no to it, but if I have the ability to say what I prefer, it is very much that we would take care of this, more than just for those folks at the very, very bottom in terms of owing.

When Chairman Barton mentioned earlier that the lowest 10 percent that owe money, the total of that group, the total of those folks is \$25,000. So each of those folks don't owe a tremendous amount of money, but to them it may be substantial.

But when you get into the range of some that owe a few thousand to tens of thousands to hundreds of thousands, it can be as devastating as \$500 might have been to my grandmother. So to say simply based on a dollar amount that we are going to forget that doesn't get to the hardship of how difficult it is for somebody to pay.

My hope is that we can have much greater relief. Because whether or not you have the ability to pay, it is wrong that FERC is trying to make anybody pay when they played by the rules for so many years. That is why just exempting—and even making the majors pay doesn't work. While it is hard to get really sympathetic and have hard feelings or sympathy for the majors, they still played by the very same rules that the small Kansas producers do. That is why I can't distinguish between the two. They all played by the rules that FERC had. They all did lawful transactions, made business decisions based on the law at the time, and now they are faced with this change. So I would hate to see us do anything less than 1117 and would hope, frankly, that we could do more.

Mr. HALL. Mr. Albright, do you want to defend your alternative?

Mr. ALBRIGHT. Well, the alternative is based upon the record in the last case in which there was testimony about how some of the smaller producers suddenly got a bill in the mail that was just going to bankrupt them, and they weren't even involved in the natural gas industry during the time that these taxes were unlawfully collected.

There are cases, legitimate cases of hardship that should be processed on an expeditious manner by FERC. But it doesn't seem like FERC has the wherewithal or perhaps even the resources to deal with these on an expedited basis. The purpose of the \$25,000 cap is just to set forth a minimum criteria that if an affidavit is provided that meets that criteria then whatever anyone else has to say about it will not matter. It still has to be truthful, obviously, but it can't really be rebutted if those criteria are met. FERC definitely has the ability to establish those criteria.

The \$500 limitation, that is really to deal with the problem of those that have received bills that simply can't afford to come to FERC and plead their case. It is just to relieve any of the hardship that may apply to those particular producers or royalty owners that simply don't have the practical resources to come fight the case.

Mr. HALL. Do you think the FERC hardship process is working?

Mr. ALBRIGHT. It is working, but only to those producers that have a vested stake and those customers of those producers or the customers that are complaining that they shouldn't be relieved of hardship to work out the differences as to how much the refunds are and whether there is a compromise solution. The process would allow for a settlement between the conflicting parties and the FERC. But, like I said, there are people that are just too small to actually play the game.

Mr. HALL. Ms. Stovall?

Ms. STOVALL. Last time when we testified there were nine hardship cases that FERC had ruled on, and I think four had been granted. The Missouri commission appealed all of those. It is my understanding, from information yesterday, in the last month they have done an additional one, so they are up to 10 they have worked. To do one in a month when we are talking about hardship cases that even gets the sympathy of Mr. Albright, it is just unconscionable. It is another example, I am afraid, of a Federal agency not living up to its responsibilities.

Mr. HALL. Actually, they did 11 and acted on nine, I think, hadn't they? They acted on six of them. When they adjust that figure to account for the two cases where no money was owed, it looks like FERC has granted waivers in two out of every three cases it has reviewed. So that makes it sound like the process is working in favor of its small producer.

Mr. BARTON. Missouri is appealing. I don't think those appeals have been heard yet. There are over 100 pending cases?

Ms. STOVALL. Over 130, I believe.

Mr. BARTON. It is working, I think, Mr. Hall. If you were a banker trying to get paid on the note, you would be pressing for more expeditious—

Mr. HALL. The point she is entitled to make is the time element there. I heard that Arkansas had a lottery now where instead of getting \$3 million—

Mr. BARTON. Be careful.

Mr. HALL. They get \$1 a year for 3 million years. Maybe that is the way their situation is working.

Mr. BARTON. I was wondering where you were going with that.

Mr. HALL. I yield back my time.

Mr. Chairman, can all statements by subcommittee members be made part of the record? I may have a statement I want to put in the record, and others surely do have.

Mr. BARTON. Without objection, so ordered.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. RICHARD BURR, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, I wanted to thank you for holding this hearing today. I welcome our colleague and another Longworth neighbor, Mr. Moran, as well as our other panelists to discuss Mr. Moran's legislation, H.R. 1117.

Mr. Chairman, in June our Committee held an oversight hearing on Mr. Moran's legislation. We came away from that hearing with a greater understanding of the remedy Mr. Moran is seeking in passage of H.R. 1117. We learned that:

- The court ordered refunds are not going to the consumers who were taxed inappropriately. According to the pipelines it is too costly and there is no way to identify individual consumers from 1983-1988. Interestingly enough, those same records exist in determining who to bill now, based on the same 1983-1988 time frame.
- The five year delay by FERC accounts for one-third of the time and well over one third of the cost of the penalty. For five years, FERC's inaction on the issue simply added cost to this retroactive liability.
- The damage to the producers who would be required to pay refunds to the customers could be devastating. For farmers, royalty owners, and gas producers, the bill might reach \$10,000, whereas the actual refund to the individual household will only be approximately \$15.00, or roughly \$1.25 a month.

Mr. Chairman, at a time when some on our Subcommittee are advocating expanding FERC's power in the soon-to-be restructured electricity market, this example of its inaction over a FIVE YEAR PERIOD, illustrates the need for us to seriously re-

consider the rush to add to their regulatory powers when they have trouble taking action expeditiously within their current framework.

I will be interested to hear the testimony of the two panelists that follow Mr. Moran as well. Most specifically, I would like to hear of whether such a waiver on the payments for the producers constitutes a "taking" of private property. I also would like to see the argument that gas pipelines won't pass all of the money through to the local distribution companies and their customers if the refunds are granted.

I appreciate you holding this hearing, Mr. Chairman, and I yield back.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Mr. Chairman, thank you for holding this hearing on H.R. 1117, introduced by Representative Moran.

On June 8, this Subcommittee conducted an oversight hearing that explored the complex issues raised by the Kansas Ad Valorem tax refund order. At that hearing we heard how government intervention into the marketplace can have unintended consequences years after such intervention has ended.

I am sympathetic to the extreme hardship paying this refund, with interest, will cause for many of the producers and royalty owners located in Kansas and elsewhere. At the same time, I recognize that the consumers have already paid a tax the courts determined they didn't owe. This is a complex issue and it is still unclear to me on whose side the equities lie. Therefore, I look forward to hearing the testimony of the witnesses and hope we can come to an acceptable resolution for both sides.

Thank you.

PREPARED STATEMENT OF HON. RALPH M. HALL, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF TEXAS

Mr. Chairman, thank you for calling this second hearing to see what, if anything can be done to help bring a just resolution to this unfortunate case of some kind of "litigation fumble." What makes this litigation fumble so outrageous is the fact that the parties themselves seem to have acted with due diligence, but it was the government agency, FERC, who dropped the ball, and mysteriously ignored this case for five years, from 1983 until 1988. No one has benefitted from this injustice, and the parties still need to resolve the case so they can move forward.

The reasonableness of refunding various amounts of money to people who in a fifteen year time period have re-located, died, or otherwise become impractical to locate raises valid questions about the enforceability of such a judgement. Furthermore, the inequity seems rather glaring in a finding that producers pay interest for a five year time period in which FERC appears to have lost the case from its radar screen. It seems most appropriate of course that the parties themselves would resolve these questions.

So it is with some hesitance that many of us would approach a bill that would in the view of some, impose a political settlement on the parties. The problem is that the parties have been given good reason to lose faith in the ability of FERC to deliver and enforce a fair judgement in this case. I come here again to listen and try and decipher both the best course for resolving this case, and the best way to ensure that similar situations do not arise in the future.

Thank you, Mr. Chairman, and I yield back the balance of my time.

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF MICHIGAN

Mr. Chairman, today's hearing explores issues relating to the treatment of the Kansas ad valorem tax on natural gas and its disposition under federal law: specifically the Natural Gas Act and the Natural Gas Policy Act.

There is a long and complex history behind this issue, which I am sure we will have recounted today by our esteemed witnesses. I will only point out that Federal Energy Regulatory Commission (FERC) has ordered that the costs of the Kansas tax be refunded to gas consumers and that in 1997, the D.C. Circuit held that since refund claims had been pending from 1983 forward, that FERC should order refunds with interest from 1983 forward.

The final disposition of refunds of the Kansas ad valorem tax is an issue that is still pending before the courts. In fact, oral arguments in this case are set for Sep-

tember 7, only about a month from now. Why should Congress legislate at this time and interfere in the judicial process? The producers are spending lots of their hard earned money to appeal the 1997 court ruling and I think it would be wrong for this Committee to deny them their day in court—especially when the outcome could affect small producers like Mobil and poor royalty owners like Cornell University.

As to substance, the legislation before us would exempt producers from having to pay interest on the refunds of the Kansas ad valorem tax. This is a very nice deal if you can get it, and it's certainly one that I hope this Committee would give you or me if we failed to pay our taxes for five years or more. The legislation would also require that refunds be made only if the purchaser demonstrates to FERC that the refunds will be passed on to the ultimate consumers of the natural gas. This second provision raises some interesting Constitutional questions regarding final judgments and takings, while at the same time it takes away the traditional authority of state utility commissioners to decide how much money goes to companies or rate-payers.

Frankly, I find it difficult to understand why we are talking about moving this bill today. It is the end of July. The August recess and the end of the fiscal year are just around the corner. We have not enacted a Patient's Bill of Rights. We have not ensured the solvency of Medicare. We have not marked up Ms. Eshoo's bill—cosponsored by more than 260 Members—to provide Medicaid coverage to women with breast and cervical cancer. We haven't even had a hearing on Ms. Capps' bill—with almost 200 cosponsors—that would extend Medicare disability coverage to people who are dying of Lou Gehrig's disease.

Yet, today we are starting the process of moving special interest legislation cosponsored by three Members. On Tuesday we spent 4 hours discussing toilets I do not believe that this is how the American people want us to spend the last few legislative days before the end of the fiscal year.

Mr. Chairman, this is a bad bill that should not be moved. It seeks to resolve a matter between private parties that continues to consume the energy and time of both the Executive Branch and the Judicial Branch. I think having two out of three branches working on this matter is more than enough. I suggest that this branch and this Committee have more important matters to attend to in the next two months and hope that we will choose to use our time more wisely in the future.

Mr. BARTON. The gentleman from Mississippi is recognized. We have a pending vote and about 9 minutes in the vote. We are going to recognize you for 5 minutes, but try to be a quick 5 minutes.

Mr. PICKERING. Let me just go to understand what you are proposing, Mr. Albright. \$500 waiver for anyone with a \$500 liability, is that correct?

Mr. ALBRIGHT. I am just proposing that as alternative legislation to really deal with the hardship cases that are out there.

Mr. PICKERING. How much of the liability that is, in your view, outstanding would that in aggregate total?

Mr. ALBRIGHT. I have not made the calculations. It doesn't appear anyone has made a listing of the royalty owners' liabilities. However, there is an exhibit that was entered into the record during the oversight hearing, and of the 17 pages of producers that are listed, let me see, I am sorry, it is 7 pages of the producers that are listed, that would eliminate at least the last page and some of the 6th page. So it looks like there is probably 70 or 80 producers involved. But the royalty owners only receive a small portion of each. There would be a lot of royalty owners covered.

Mr. PICKERING. Now, the total liability, if I remember from our last hearing, is what, \$310 million?

Ms. STOVALL. \$365 million.

Mr. PICKERING. Has Mobil settled for \$50 million? Does that take it off that liability?

Mr. ALBRIGHT. I believe Mobil paid their share of the refunds with interest. Those have been distributed.

Mr. PICKERING. Does that mean the 365 is reduced by 50 million?

Mr. ALBRIGHT. There is another schedule attached to Ms. Lumpe's testimony from the oversight hearing which indicates, if I can get to the right page, it is exhibit F to her testimony, it shows that approximately \$97 million is paid. So that would leave about \$260 or \$270 million unpaid.

Mr. PICKERING. \$270 million outstanding liability.

Mr. ALBRIGHT. I think the majority of that has been paid into escrow accounts by the producers.

Mr. PICKERING. Now, would that be both the overcharge and the interest, or is that simply the interest?

Mr. ALBRIGHT. That is the overcharge plus the interest.

Mr. PICKERING. What is the interest component of \$270 million?

Mr. ALBRIGHT. That I do not have.

Ms. STOVALL. It is 160 percent.

Mr. PICKERING. Sixty percent of the 270. So if you took Mr. Barton's proposal of \$25,000, do you know how much that would reduce that liability?

Mr. ALBRIGHT. No.

Mr. BARTON. It wouldn't be much, because there are not that many. There are 75 claims that total less than \$25,000.

Mr. PICKERING. I am just trying to understand, one, the scope of the problem, and the possible solutions. I still believe that this is a gross case of maladministration and maljustice, and that I don't see an equitable solution any way it goes right now. I know we have a vote on, but it is something that I wanted, Mr. Chairman, to continue to work with you to see if—

Mr. BARTON. I am going to come back. If you want to come back, you are certainly more than welcome to come back. Congressman Hall said he is going to come back also.

Mr. PICKERING. With that, I would yield back my time, or give you back the Chair.

Mr. BARTON. We do have a pending vote, but this is going to be the last legislative hearing before we decide what to do in terms of a markup. I think it is very important to get a number of these issues to establish a record. So I am going to ask both of these witnesses to remain. We should be back and reconvene around 11:30. That is an approximate time. That is going to be pretty close. I am just going to go vote and come back immediately.

So we are in recess until approximately 11:30.

[Brief recess.]

Mr. BARTON. If the subcommittee could come back to order.

The administration officials in Washington ignore us, so why shouldn't the administration officials from Kansas ignore us?

Ms. STOVALL. Because I have great respect for the Congress.

Mr. BARTON. We know the gentlelady from Missouri has blessed us with her presence. If the gentlelady is ready, we recognize you.

Ms. MCCARTHY. As you well know from our work—

Mr. BARTON. The microphone is on now.

Ms. MCCARTHY. I thank you, Mr. Chairman.

Mr. BARTON. You are now recognized, the working Congresswoman from Missouri, who is doing two or three subcommittees at one time.

Ms. MCCARTHY. It is a special day.

Mr. BARTON. We are glad to have you at our subcommittee.

Ms. MCCARTHY. It is an important issue, and I welcome our Attorney General from Kansas, Carla Stovall, back. And, Mr. Albright, thank you very much for your participation in this very issue.

I will not try to revisit any of the questions or concerns that I raised at the first hearing, and I appreciate you looking into those and getting back to me on some of those.

I am still troubled a little bit by the fact that, since the FERC decision is before the DC District Court, why you really think it is wise to legislate on matters that are currently in the courts? It has been my experience in Missouri with our Attorney General there that traditionally Attorneys General shy from that sort of policy. By calling on the Congress to intervene in the judicial process, I would like to know why that is so imperative at this time. If you would reflect, Attorney General Stovall; and, Mr. Albright, if you would like to weigh in, it would be most welcome.

Ms. STOVALL. Our feeling that Congress is our last place to go really is because, while we are going to make our arguments with all of the vim and vigor that we have on September 7, we are not very hopeful that the DC Circuit is going to rule in our favor, considering that they are the ones who made the decision that they did to remand the case back to FERC, indicating they were not satisfied with FERC's rationale for excluding the Kansas tax, and they are the ones that, contrary to FERC's order to say that any refunds should go back to 1988, took it back to 1983. So we just don't have any hopes that that court is going to give us the relief we need. We are asking Congress really to reassert your authority to tell the DC Circuit that they have acted in contravention of what the original intent of Congress was with regard to the Natural Gas Policy Act and the goals that you tried to have from that.

Congress has previously, even in this area, made decisions that legislatively overruled U.S. Supreme Court decisions. So, clearly, you have the authority. We just think it is the only way to have any resolution of this with some finality. Otherwise, the DC Circuit remands back to FERC, and we are dealing with the two agencies that put us in this untenable situation to start with.

Mr. ALBRIGHT. The way I understand, it is the DC Circuit Court of Appeals that has jurisdiction over the case now. The basic issue before the court is whether the FERC erred in denying the major producers petitions for relief of hardship to pay the interest. They were seeking a generic waiver of interest. So the very issue as to whether FERC could or could not by law waive interest is probably going to be addressed by the court. So once that court decision comes out and it becomes final, then you have more vested rights involved, which points back to the constitutionality of H.R. 1117, which was raised earlier.

Ms. MCCARTHY. The reason I raised this question now is that it looks like the case is set for September 7 for the oral arguments. So that is only a month from now. I was wondering why Congress should legislate at this time and interfere with that judicial process.

Mr. ALBRIGHT. I agree with that. I would prefer, and I think it would be out of line for Congress to jump in the middle of a heated litigation that has been ongoing for years and years.

Ms. MCCARTHY. I appreciate that perspective.

I would like to follow up with H.R. 1117 with regard to its requirement that refunds be made only if the purchaser demonstrates to FERC that the refunds would be passed on to the ultimate consumers of the taxed natural gas.

It sounds like a well-intentioned provision to ensure that ratepayers in other States benefit from the refunds, but I wonder if it is not more of a cynical attempt to help keep money in the hands of the Kansas tax producers.

Most interestingly, too, while it might be a well-intentioned provision, isn't it subject to the judgment of Washington bureaucrats instead of the State public utility commissioners who are normally tasked to do this job? We had some rather, I thought, eloquent testimony in the last hearing from the actual public utility commissioners on their role and responsibilities, and this shift to Washington, while well-intentioned perhaps, undermines that whole process that has worked so well for so long in the States.

Mr. ALBRIGHT. I believe that is a correct assessment.

The Public Utilities Commission in Colorado has the duty and is charged under its statutes to apply what is best in the public interest and in the interests of our customers, so they have all the information. They would be prepared to see how the refunds or how the Kansas ad valorem taxes had been overcharged to the customers and what the most equitable and fair way of resolving how those refunds should be distributed, and that is correct, by saying the pipelines now have to step up and say that the ultimate consumer that is going to receive the refund must be the same as the ones that actually paid the overcharges in the first place, which would just totally wipe out that process.

Ms. MCCARTHY. I know I have gone beyond my time, Mr. Chairman—

Mr. BARTON. We are so glad to have you here, we will give you a little extra time, even though your questions are burdening my soul with insinuations of Washington bureaucrats. You are looking at the bureaucrat right back there. That young lady in the purple is the bureaucrat that has been staffing this with this young lady to my right.

Ms. MCCARTHY. I appreciate all of their efforts. I know they do good work for you and for all of us.

I appreciate the extension of time, because I wanted Ms. Stovall to be able to respond and also to reflect on the consumers of Kansas, because they are the first—you are the first State in terms of liability obligation, as my own State of Missouri being second in those numbers, however large, \$81 million and \$61 million respectively. These are large producers, not from the State of Kansas for the most part, who owe these obligations to the taxpayers, ratepayers in Kansas and Missouri, and they are national and international entities from outside of Kansas owing them.

As you reflect on my initial question which Mr. Albright responded to, could you reflect on why in this case these obligations should be waived to your own constituents and mine?

Ms. STOVALL. I appreciate the opportunity to respond to that, because while I certainly like to think of myself as a very active and good consumer protection Attorney General, I would be able to go

back and with a straight face and very sincere and open heart tell any consumer group in Kansas why I oppose the possibility of payment to them based on these refunds.

Even Mr. Albright's testimony is that the average residential consumer will only get \$15, period, and yet what the producers are going to experience are tens of thousands of dollars. So the benefit to the consumer is so minimal when compared to and weighed against what the harm is to the producers and/or the royalty interests.

In addition, one-third of all the folks that owe money, one-third of the producers that are subject to this order, are Kansas producers. So one-third of it is a big number to us. Even though the majors and the international conglomerates are involved in this and it is hard to work up any sympathy for them, as I said in my opening statement, nonetheless the Constitution still applies to them, and in my view there was nothing that was legitimate about the way that 19 years of the laws and rules of FERC being flipped on them retroactively is appropriate.

So I just find it inconceivable, frankly, that we are trying to do this. Even when this legislation would benefit the big bad oil companies, they are entitled to the relief, too, because they paid in good faith based on rulings that were valid and had been upheld for 13 years by FERC.

When it comes to the ultimate consumer, I don't think Congressman Moran was cynical in placing within the bill the provision about making sure that the ultimate consumer got the benefit. What Mr. Albright's comments and everybody who has talked in opposition to Mr. Moran's bill talks about are trying to benefit the consumers. If we are really interested in trying to benefit the consumers, then it shouldn't be consumers who didn't ever pay that ad valorem pass-through to start with.

If the consumers are the ones we care about, it ought to be the ones that paid it. I don't find it disingenuous that, if we are going to collect the money, it ought to go to those consumers. Frankly, that provision was placed in there not to hurt new consumers of natural gas but to be sure the pipelines, who originally made claims to keep \$47 million, wouldn't keep it.

Mr. Moran's provision wasn't necessarily to distinguish between current and past consumers. It was to be very clear that we don't want the pipelines, who have been fighting and financing this litigation. Maybe I am a skeptic, but I don't think it is because they are benevolent. That was the great concern. While they may have backed off of trying to keep that \$47 million, that very much was in the original records. So that was the concern.

Ms. MCCARTHY. Well, I don't think we on the committee are trying to take sides among the various interests, the royalty holders, the pipeline companies and others involved in this. That is what is before the courts, and that is kind of why I raised the overall question of us interfering at this moment in time when the courts are pursuing this in a way that hopefully will not be caught up in any of the politics of the issue but really take an overarching view on the long-term implications of laws and justice.

There are many heart-rending stories of ratepayers and also, of course, the royalty companies, but there are—I don't know that

that is for the Congress to decide. I think that is why to let the courts proceed is an appropriate path to take at this time for this contentious issue that is very difficult. Otherwise the precedent will be set that we in the Congress will jump in again at another point in time for another State in a situation akin to this or as a precedence to this.

I am just having real problems with that role for this Congress, Mr. Chairman. That is why I appreciate you having this hearing and extending my time.

Mr. BARTON. Thank you. I am sure you really do appreciate having this hearing.

But I don't think there is any question, but just to make the record explicit, I have taken a side. And I am on the producers' side and the small royalty owners' side, which Congressmen can take sides—they don't have to, and most of us avoid it like the plague, but sometimes we do. And I have good friends on the pipeline side and have good friends in all the sectors involved, but I do think the ex post facto laws do apply even to small producers and royalty owners.

Ms. MCCARTHY. Mr. Chairman, with that in mind, would you concede that the royalty owners, such as Cornell University and other financially well-off entities, should pay?

Mr. BARTON. I think if it can be determined that there was some Machiavellian plot to somehow divert tax resources into private pockets, we ought to really go after them, sure. But, in this case, FERC ruled one way for years and years and years and then changed their mind, and they are now all in a knot and don't know what they want to do, and I think it is appropriate that the Congress from time to time as an equal branch of the three branches step in and, if nothing else, try to shed some public light on what is normally a hidden proceeding or at least a very closed proceeding in the administration of the justice system.

Ms. MCCARTHY. I respect that very much. I just don't want us in the Congress to try to take the risk out of business.

Mr. BARTON. I am with you on that.

Ms. MCCARTHY. Thank you, sir.

Mr. BARTON. I am also with you that we shouldn't take the risk out of elections. I am certainly adding to my election risk by holding this hearing, in many ways.

The Chair is going to recognize himself for 5 minutes. The Chair does sincerely appreciate the gentlelady from Missouri, because she has studied the issue. There is another side to this obviously. That is why, if it were an easy issue to solve, it wouldn't be in the courts or at the FERC or even here in the Congress. So we are delighted that the gentlelady from Missouri is here.

I have done a little calculation in the interim of my last question round, going back to the statement that the distinguished gentleman, Mr. Albright, made about maybe there might be a resolution of this, and I am basing my calculations on the principal involved, not the interest. But a total of 750 claims encompassing \$127 million worth of principal in terms of taxes is what is at stake, and until my first round I talked about the 10 percent of the smallest claims, which averaged about \$128. The actual 10 percent of the largest claims, the principal involved is \$116 million.

So if you could settle 90 percent of this, 91 percent of the claims are in the 10 percent of the largest claims. So if we base this strictly on the principal amounts and not the interest involved, there is an alternative solution that would solve the small royalty owner and the small producer problem in Kansas.

The material that I have has not been verified, and I need to verify it and then let the minority staff look at it. If we can get that done, we will put that material into the record.

I want to ask you, Attorney General, in my question round this time, what efforts, if any, have been made to determine if the request that the pipelines have made to the FERC in terms of refunds are actually—I won't say legitimate; I am going to stipulate they are all legitimate claims—but if they actually correlate with what was paid? Has anything been done on that?

Ms. STOVALL. To my knowledge, there has been one gas case, the Colorado Interstate Gas case, that in the filings that CIG made to FERC itself, the thousands of documents that they filed, counsel were able to go through those and determine that there, in effect, were great inaccuracies in those, and in fact they were claiming that they paid the maximum lawful price and the ad valorem tax on top of that in cases where the wells had already been deregulated, for example, so there would have been no maximum lawful price. So indeed, Mr. Chairman, there have been those discrepancies.

I think the handout that Mr. Albright referenced that Ms. Lumpe had used in her earlier testimony, was because on those initial filings, which have since decreased now because of inaccuracies that have been counted, erred.

Mr. BARTON. Do you all both agree, Attorney General Stovall and Mr. Albright, that we need at least to agree on what really is owed, and that has not been established yet?

Mr. ALBRIGHT. I agree with that, Mr. Chairman. FERC does have a process to resolve the discrepancies between what the pipelines' records reflect and what was provided to the producers in the way of a notice of refunds due versus the producers' own records. That process is ongoing.

Ms. STOVALL. Mr. Chairman, if I might, could I offer that part of the problem is that the way FERC has set this up is the producers are having to pay 10 percent of the amount that the pipelines say is owed in order to toll the interest running, without any initial determination of what is really owed. It is the pipelines saying to producers, you owe this. The pipelines are having to pay 100 percent of it. So it is a horrible due-process failure to start with.

Second, the pipelines are saying that the—I am not going to remember the name of the documents, but the gas price records, FERC said many years ago were, supposed to be maintained at FERC, and those would be the actual records of customers, royalty owners, et cetera; and the pipelines are now saying that, you know, those records aren't really that accurate and they don't want to use those records for trying to prove these claims. Yet the producers themselves don't have those accurate amounts. So it is a double problem now, because even the records of the pipelines, they are trying to back away from.

Mr. BARTON. Let me read some numbers here. These are big numbers. These are not the small numbers.

But according to the pipeline refund claims that have been filed, and these are tax reimbursement claims of principal, this does not have interest. But Mr. Albright, you mentioned Mobil has settled. According to the document that I have before me, the pipeline collected for reimbursement of tax from Mobil \$17,225,556, but the amount that the pipelines demanded for refund of principal was \$15,107,867, which is a difference of \$2,117,689, or 14 percent.

Oxy, the numbers are smaller, \$5,898,796 collected, \$3,625,155 demanded for refund. The difference, \$2,273,641. But the percentage is 62.7 or 63 percent.

So it would appear—and you may not have this, so we will share this with you and all the others—but it really does appear there is a real fact problem between what the pipelines collected from the producers for reimbursement of tax and what the pipelines are demanding in terms of refund of principal, and that would seem to be a very relevant question that the FERC ought to be trying to get to the bottom of, using the best records that are available.

Ms. STOVALL. Mr. Chairman, 20 applications have been filed to get at that very issue, and none of them have been granted yet by FERC, although they have been on file for almost 2 years. It will be 2 years in November. If I can clarify one point that I think came as a result of questioning by Congressman Pickering, Mobil hasn't settled. They have paid that \$50 million into escrow so that their interest obligation is tolled. But they are not giving up their right to fight and say we don't owe that principal and/or that interest.

I just want the record to be clear we are not conceding any of Mobil's rights here.

Mr. BARTON. Let's assume that we take the gentlelady from Missouri's suggestion that these Washington legislative bureaucrats, which there are two of them, begin to hold this thing in abeyance. What if we did that but we passed just a noncontroversial bill perhaps on the suspension calendar by unanimous consent that said all penalty charges are stopped? In other words, the clock is stopped ticking and then put a timeframe, a reasonable timeframe, for this thing to be resolved. What would Kansas' response be to that?

Ms. STOVALL. By penalties, Congressman, do you mean interest or actual penalties assessed by FERC? Because they have not assessed any penalties yet.

Mr. BARTON. That would be interest. I am not an attorney, so I use terms in a common way, which is very dangerous in a legal setting.

Ms. STOVALL. The jargon with natural gas is a whole new language for me. I want to be sure I am clear as well.

Mr. BARTON. What I want to do is be sure we can do something that puts a little incentive into solving the problem but to take Congresswoman McCarthy's suggestion that we not dictate the outcome.

Ms. STOVALL. Certainly anything that relieves the accruing of the interest is important, because some of those producers haven't been able to toll the running of that interest because they don't

have the money to put in escrow, which is required by FERC, to stop it.

Mr. BARTON. You think your Governor would support something like that?

Ms. STOVALL. There wouldn't be any reason, I think, for us to oppose it.

Mr. BARTON. What about you, Mr. Albright, the parties you represent, how would they react to that?

Mr. ALBRIGHT. Well, I think the parties that I represent, you know, they are customers, and they would be happy to get any of these refunds at this point. They are just like you and me, and they pay gas bills on a day-to-day basis.

Mr. BARTON. Are these the customers that the average over the year is \$12 or they get a grilled cheese sandwich, as Mr. Moran indicated, or are these the larger customers you can't find yet that would might actually get some money if you tried to determine who they are? Which customers are you referring to?

Mr. ALBRIGHT. I am talking about the small customers. I would add, what is more unfair, to take \$320 from one customer or \$15 from 20 million customers? The same unfairness exists.

Mr. BARTON. I take it you don't want us to do what I just suggested, which is back away from this but yet stop the interest clock running and give us a time period to resolve this, either individually or through the States or at the court or through the FERC system?

Mr. ALBRIGHT. What you are suggesting is just toll interest as of a date certain going forward. In effect, most of the producers, and I would concede that not all of the producers, have tolled the interest that they have to pay on the refunds by placing the refunds that the pipelines indicated they owe into escrow.

Mr. BARTON. You are going to have to tell me what tolled means.

Mr. ALBRIGHT. Toll means to stop the interest from running, to keep it from accruing on their refunds liability.

Mr. BARTON. How have they done that?

Mr. ALBRIGHT. They have done it by placing the total refunds, including interest, into an escrow account, an interest-bearing escrow account. So the interest that is now in that account accruing is interest that the bank or whatever financial institution is accruing to that account, and the producer is not paying any additional interest.

I would just clarify it as to Mobil. Mobil did not do that, as Ms. Stovall indicated. She just was mistaken. Mobil actually paid their refunds back to the pipelines, and those pipelines then refunded their customers.

Ms. STOVALL. Subject to refund though, they are still objecting.

Mr. BARTON. All I am trying to do is build on some things that people have said at the hearing today. I am ready to move the Moran bill as is if I can find the votes to do it, but if we are going to not do that, we ought to try to find another way to help resolve the issue. And several people, both at the witness table and up here, have offered some I think positive suggestions on maybe how to do that. I am just trying to see if there is any consensus on that.

Ms. STOVALL. It would really help the small producers, because, contrary to what Mr. Albright suggested, the majority of producers

have not paid the money into escrow. I am not sure what the percentage is, but it is not the majority of the amounts owed. Their interest continues to accrue on a continuing basis. I am like you. I would rather the Moran bill get moved, but at least it would be something.

Mr. BARTON. The gentleman from Mississippi is recognized for 5 minutes.

Mr. PICKERING. Mr. Chairman, I just want to join with you in looking at this case. I do not think it is a case, unlike the gentleman from Missouri, where we should simply wash our hands and leave it to the courts. This is a unique case, where we have had, how many years now——

Ms. STOVALL. Nineteen years.

Mr. PICKERING. [continuing] 19 years have gone by where you have had inconsistent regulatory decisions made by FERC. I happen to believe we have a legislative responsibility under the Constitution to check and give oversight to regulatory agencies when they are either performing poorly or inappropriately or corruptly. In this case, it just seems to me a maladministration.

Now you have the court system coming back in and saying, because the regulatory agency made a mistake, that doesn't resolve or solve the liability going back to all of these people who played by the rules during those 19 years, and as a result of those mistakes, made not by the producers and the royalty owners but because of the mistake of the FERC, the interest, or the penalty in this case, FERC doesn't have to pay for that. They are not held accountable.

There is no justice there. The people who were overcharged are not getting this benefit back, or the overcharge paid back to them. There is not a direct correlation between those who were harmed and those who are now supposed to benefit from the settlement or for the payment.

So I would side with Chairman Barton and Mr. Moran in saying that we should not have the liability accrue to those who are innocent at the time.

So, Mr. Chairman, I want to work with you as we go forward. If there are some proposals or solutions out there that would mitigate or minimize the harm that could be done if we go forward, I am open to any of those types of proposals. But at this time, I do think we should move forward, Mr. Chairman.

Mr. BARTON. Thank you. I have just a few more questions, and then we will conclude the hearing.

Madam Attorney General, is it true that the producers and royalty owners in question are only called upon to pay refunds if the total price collected, including the Kansas tax, exceeded the maximum lawful ceiling price?

Ms. STOVALL. That is what the FERC order says.

Mr. BARTON. Mr. Albright, you agree with that?

Mr. ALBRIGHT. That is, in fact, what the NGPA says.

Mr. BARTON. So we have agreement on that.

Mr. ALBRIGHT. Yes.

Mr. BARTON. I know what NGPA means. That means Natural Gas Policy Act. So I have got that.

Since the NGPA states that, I am going to ask this to you, Mr. Albright: Has the FERC, which stands for Federal Energy Regulatory Commission, determined whether any producer in fact has violated the maximum lawful price at any time in the period between 1983 and 1988?

Mr. ALBRIGHT. Well, that specific question as to each producer is a matter of fact.

Mr. BARTON. Well, to the best of your knowledge of the facts, is the answer to that question or no?

Mr. ALBRIGHT. FERC has not made a determination except for the collection by those producers of the Kansas ad valorem tax.

Mr. BARTON. So your answer is no, the FERC has determined that no producer has violated the maximum lawful price at any time between 1983 and 1988?

Mr. ALBRIGHT. Well, I would not say that FERC has not made that determination. They made a generic determination that that was the case and that is why the refunds were ordered. As far as individual circumstances that may be exceptions to that generic order, those individual cases have not all been processed.

Mr. BARTON. Can you cite one case that has been processed where they have found that a producer violated the maximum lawful ceiling price between 1983 and 1988?

Mr. ALBRIGHT. I am not sure FERC has issued an order. As a matter of fact, I would tend to think they have not issued an order, but I know in the Colorado Interstate Gas Company case referred to by Ms. Stovall, there are those claims that have been made, and to the extent the pipeline—

Mr. BARTON. I am not talking about claims.

Mr. ALBRIGHT. Well, the claims have been made, and the pipelines and producers get together and resolve those discrepancies.

Mr. BARTON. But today, and you certainly are knowledgeable, nobody is all encompassing, but you are certainly a knowledgeable witness, you cannot cite one instance of where the FERC to date has actually found that a producer violated the maximum lawful price between 1983 and 1988, can you?

Mr. ALBRIGHT. Not with respect to these Kansas ad valorem taxes, no.

Mr. BARTON. And if I were to put into the record a draft order that is dated July 27, 1999, which is fairly recent, and I want to quote, "We did not then and are not now determining whether there has in fact been a maximum lawful price violation. We are simply asking the parties to determine in the first instance whether such a violation has occurred and, if so, to provide refunds. If the parties cannot agree, then they may bring their dispute to the Commission for resolution."

If I were to get permission from the minority, who unfortunately is not in attendance, to put this draft order into the record, that would seem to indicate that in fact no maximum lawful price violations have been found? Would you agree with that?

Mr. ALBRIGHT. I would not agree with that.

Mr. BARTON. Would you not agree with that?

Mr. ALBRIGHT. I would not agree with that.

Mr. BARTON. Why would you not agree with that?

Mr. ALBRIGHT. The fact that the court mandated that the Kansas ad valorem taxes that had been refunded or overcollected by these Kansas producers should not have been collected as part of the Natural Gas Policy Act maximum lawful price was a determination that such collection——

Mr. BARTON. You have just agreed earlier that you can't cite an individual case yet that has in fact been found by the FERC that a maximum lawful price violation has occurred, at least in the period between 1983 and 1988. Admittedly this is a draft order. This is not, in fact, an order, but the draft order does, this week, we did not then and are not now determining whether there has in fact been a maximum lawful price violation.

How can you, as decent and honest and patriotic as you certainly seem to be, sit before this subcommittee and say with a straight face what you just said?

Mr. ALBRIGHT. Well, there are two issues involved.

Mr. BARTON. And you are not under oath.

Mr. ALBRIGHT. I could be.

Mr. BARTON. I know. I am sure you would be willing to be, but this is not an oversight subcommittee.

Mr. ALBRIGHT. The question that you are asking and the discussion by FERC in the draft order relates to a——

Mr. BARTON. Have you seen the draft order?

Mr. ALBRIGHT. Yes, I have.

Mr. BARTON. See, I am not enough of a FERC attorney—I am not a FERC attorney at all, in fact, so I don't know if these draft orders are circulated. But a draft order is put out for people to look at, apparently?

Mr. ALBRIGHT. It is publicly available, but it is not binding and continues be relied on. We can discuss it.

Mr. BARTON. This was not the first time you heard these words?

Mr. ALBRIGHT. That is correct.

Mr. BARTON. You are honest. That is good.

Mr. ALBRIGHT. The reference in that draft order is to a determination as to the specific producer that is at issue in that case, whether that producer has in fact violated the Natural Gas Policy Act by collecting the Kansas ad valorem tax.

Mr. BARTON. You are saying this draft order applies to one specific case, not to a generic number of cases?

Mr. ALBRIGHT. Yes. It applies to that producer. FERC has not made producer-by-producer determinations yet, and may well have to, to resolve a lot of these disputes as to whether that producer violated the NGPA by collecting the Kansas ad valorem taxes. But FERC has made, pursuant to the DC Circuit Court's mandate, the determination that collection of the Kansas ad valorem tax in excess of the NGPA stated maximum lawful price is a violation of the NGPA and must be refunded. So the generic determination has been made.

Mr. BARTON. Do you agree with what he just said on the generic determination, Madam Attorney General?

Ms. STOVALL. I agree that the court said if and when the maximum lawful price was exceeded, that tax needs to be refunded.

Mr. BARTON. But there has been no determination as to the if and when?

Ms. STOVALL. True.

Mr. BARTON. Now, have any producers, to either of your knowledge, demanded hearings before the FERC to, in fact, adjudicate whether any violated the maximum lawful price?

Mr. ALBRIGHT. Can you repeat the question, Mr. Chairman? I am not sure I followed "to adjudicate."

Mr. BARTON. I think you all understand where I am going with this, but I will repeat the question.

We are trying to determine whether in fact there have been any maximum lawful price violations. I think you both agreed that no specific case has yet been determined that there has been a maximum lawful price violation. So my question this time around is, have any of the producers demanded a hearing before the FERC to adjudicate—sometimes I don't pronounce things very correctly—to adjudicate whether any of their sales violated the maximum lawful price?

Mr. ALBRIGHT. The answer to that is, yes, some of the produce users have.

Mr. BARTON. Do you agree with that?

Ms. STOVALL. It is my understanding 20 applications have been filed.

Mr. BARTON. Twenty applications have been filed. Do either of you knowledgeable witnesses know when those hearings are going to be held?

Ms. STOVALL. They were filed in November 1997.

Mr. BARTON. They have been out there for about 2 years now.

Ms. STOVALL. That is exactly right. None of them have been granted yet.

Mr. BARTON. What is your response to that?

Mr. ALBRIGHT. The reference to November 1997, a lot of the large producers raised the issue as being an issue but didn't make the claim that in fact they had—

Mr. BARTON. We just agreed, the distinguished lady from Kansas just said that 20 of these claims have been filed. Is that right? Have been filed. Not raised the issue, have been filed. Now, Mr. Albright, do you dispute that?

Mr. ALBRIGHT. Yes, I would dispute that claims have been made to the FERC, that the producers themselves in specific instances have not exceeded—they were generic claims that were made, and in fact the specific claims—

Mr. BARTON. What is the difference between a claim and a generic claim?

Mr. ALBRIGHT. Well, she is making the argument that FERC has not made such a determination, therefore cannot order refunds. That was the claim that was made in November 1997.

Mr. BARTON. Madam Attorney General, what is your response to that somewhat legalistic answer that he just gave me?

Ms. STOVALL. Mr. Albright may have more details on specifics than what I do. What I know is—

Mr. BARTON. You are just a servant of the people from Kansas trying to find the facts.

Ms. STOVALL. Very hard working, trying to serve justice. You are exactly right, Mr. Chairman.

What I do know is, in many, many occasions, the producers received much, much less than the maximum lawful price of gas in that 1983 to 1988 period, because the market price was so low and the pipelines were requiring those market-out contracts. So we know from a practical matter that maximum lawful price was not exceeded in all of the situations. Again, that CIG case proves that that I referred to earlier.

Mr. BARTON. What is your answer to his response? I mean, you seem pretty specific that a true claim has been filed. I don't know enough to know what a claim is and what a claim is not. He seems to be fairly confident that what you are saying has in fact been filed as a specific claim is a more amorphous—you know, we are just kind of interested in getting a little general information.

Ms. STOVALL. My gallery back here says that it was the——

Mr. BARTON. This side of the room is not on your side.

Ms. STOVALL. Some of them are, in the very back.

Mr. BARTON. Mr. Albright's gang is over here, and your gang is over here. It causes me to look cross-eyed when I see the audience reaction.

Ms. STOVALL. The 20 applications filed in November 1997 were figures for hearing. They weren't necessarily claims. But, nonetheless, we are trying to bring this issue to FERC's attention.

Mr. BARTON. So what was filed was we want to bring the facts before the FERC and the FERC has not yet even said we want to hear the facts.

Ms. STOVALL. That is correct.

Mr. BARTON. Do you agree with that?

Mr. ALBRIGHT. I wouldn't agree with that.

Let's go a step further. What happened pursuant to the September 10, 1997, order, which is the first order in which FERC on remand directed that the pipelines seek these refunds and that producers were obligated to pay the refunds, many pleadings were filed in response to that, and that is what was filed by the producers in the late part of 1997, and in fact it was a petition for a hearing——

Mr. BARTON. It was a petition for a hearing.

Mr. ALBRIGHT. But to——

Mr. BARTON. You admit that.

Mr. ALBRIGHT. It was a petition for a hearing.

Mr. BARTON. God bless you, Mr. Albright.

Mr. ALBRIGHT. The process that has occurred is that each of the pipelines have sent notices and filed refund reports or reports of notice of refunds to FERC, and that process has instituted a docket, a proceeding for each pipeline in which the producers and the pipeline compare records, resolve the disputes as to whether or not an NGPA violation occurred. Because nobody is claiming that the producers owe any amount that wasn't in excess of the NGPA maximum.

Mr. BARTON. People are claiming the producers need to pay the principal and the interest, and the interest appears to continue to be accumulating, and it would appear to me that is unfair.

Mr. ALBRIGHT. Those producers who have those claims, many of them have elected to deposit the amount of the refund claimed by the pipeline.

Mr. BARTON. Why wouldn't it be fair for your side to get with the Attorney General of Kansas and the producer's side and ask the FERC to go ahead and accept the facts that have been filed and do that and expedite things?

Mr. ALBRIGHT. We would love for FERC to get moving on this case, Mr. Chairman.

Mr. BARTON. You would encourage your people to send a letter to the FERC to say, 1997 is 2 years ago, and the millennium is upon us. Why don't we go ahead and bring these current pending 20 petitions to a hearing? You are for that?

Mr. ALBRIGHT. Yes.

Mr. BARTON. Okay. Good. A straight answer, yes. Okay.

Well, I guess I could go on and on, but I am going to conclude. We are going to work with the minority and interested parties, including Congressman Moran. We are going to see if a compromise bill can be crafted that all parties agree to. That may not be possible, obviously, because there is a significant amount of money in play here. But we won't be in session after next weekend, but the staff will be working on this, and we will see what, if anything, can be done legislatively sometime in September.

And I would encourage all witnesses and interested parties to take a serious look at the Moran bill, because I think the Congressman has put a lot of effort into it, and I do believe that it would help if we could move something that, at a minimum, expedites FERC consideration of some of these issues.

So, with that, I want to thank both of you two witnesses for being here again and appreciate you waiting so we could come back and ask some other questions. But this hearing is adjourned.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

MOBIL EXPLORATION & PRODUCING U.S. INC.

August 17, 1999

The Honorable JOE BARTON
Chairman, Energy and Power Subcommittee
Commerce Committee
2125 RHOB
Washington D.C. 20515

Re: H.R. 1117 Hearing on July 29, 1999

DEAR MR. CHAIRMAN: Mobil appreciates the opportunity to supplement the record of the hearing held by your Subcommittee on July 29, 1999. We understand that there may have been some uncertainty concerning Mobil's payment of refunds of the reimbursement of Kansas ad valorem taxes.

In September 1997, the FERC ordered producers to make full refunds, including interest, by March 10, 1998. As of the end of 1997, Mobil's estimated refund liability was approximately \$60,392,600. This total included \$22,664,500 in principal and approximately \$37,728,100 of interest that had accrued from 1983 through December 31, 1997. The FERC had not authorized any arrangement for escrow or bonding instead of payment to the pipelines. Interest was compounding at a rate of over \$13,000 per day and about \$400,000 per month. Therefore, Mobil made refunds of approximately \$47,175,500 at the end of 1997. This payment reduced the accrual of additional interest by about eighty percent.

Later, in late January, 1998, the FERC finally allowed producers to escrow or post a bond for refunds and interest. Mobil set up an interest-bearing account, and paid approximately \$13,395,700 into escrow on February 27, 1998. This amount included the portion not refunded in December 1997 plus additional interest on that amount through the end of February 1998.

I hope that this information is helpful and sufficient. As always, Sara Glenn in our Washington office is available if you have further questions on this or other

matters before the Subcommittee. Again, Mobil appreciates the interest of you and the members of the Subcommittee in this problem.

Sincerely,

J. MICHAEL YEAGER
President

SHOOK, HARDY & BACON L.L.P.
August 13, 1999

The Honorable KAREN MCCARTHY
United States House of Representatives
Washington, D.C. 20515

Re: Kansas Ad Valorem Tax Refund Hearings on H.R. 1117

DEAR REPRESENTATIVE MCCARTHY: On behalf of Carla J. Stovall, Attorney General for the State of Kansas, we are responding to your recent inquiry regarding certain data referenced in the testimony presented by Attorney General Stovall at the hearing held on June 8, 1999 concerning H.R. 1117.

We believe that the figures in which you expressed an interest—i.e., the number of refund claims at various dollar levels—are contained in the materials submitted to Chairman Barton on August 4, 1999 by the Kansas Independent Oil and Gas Association ("KIOGA"). Accordingly, we would refer your attention to the KIOGA submission.

If you have any questions or we can be of further assistance, please let us know.

Sincerely,

WILLIAM F. DEMAREST, JR., ELISABETH R. MYERS-KERBAL
Counsel for the State of Kansas

cc: Cathy Van Way, Esq.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426
June 30, 1999

The Honorable JOHN SHIMKUS
U.S. House of Representatives
Washington, D.C. 20515

DEAR CONGRESSMAN SHIMKUS: During the June 8, 1999, hearing held by the Subcommittee on Energy and Power of the House Commerce Committee on the subject of the Kansas *ad valorem* tax refund issue, you requested from me a written explanation of the Federal Energy Regulatory Commission's refund procedures.

The enclosure describes the Commission's process for resolving any disputes over the amount of refund obligations and the procedures for the flowthrough of refunds by pipelines to their customers.

If you would like any further information, please do not hesitate to contact me.

Sincerely,

DOUGLAS W. SMITH
General Counsel

Enclosure

cc: The Honorable Joe Barton
Chairman
Subcommittee on Energy and Power

KANSAS AD VALOREM REFUND PROCEDURES

1. Statement of Refunds Due, Number and Procedures for Refunds by First Sellers

In a Commission order issued on November 9, 1997, pipelines were required to serve first sellers with a "Statement of Refunds Due" for the period October 3, 1983 through June 28, 1988. The Statement was to include the amount, including interest, that the pipeline believed the first seller owed. These statements were to be sent by the pipelines directly to first sellers four months before the refunds were due to provide the parties with ample opportunity to resolve differences over the refund amounts before the refunds were due.

In the November 9th order the Commission also required pipelines to file refund reports with the Commission. These reports must list first sellers that made refunds (with principal and interest shown separately) and also list any first seller that the pipeline believed still had a refund obligation.

Once the refund report was filed with the Commission, the Commission staff sent letters to first sellers listed in the pipeline refund reports with an outstanding refund obligation. The letter indicated the pipeline believed that there was a refund obligation and advised the first seller that it could request an adjustment to prevent special hardship.

A first seller can ask the Commission for: (a) permission to amortize the refunds over an extended period not to exceed five years; (b) an adjustment to prevent special hardship; or (c) resolution of disputes over its refund obligation.

Under any of these options, the Commission has a variety of procedural options open to it. These range from, but are not limited to, alternative dispute resolution, appointment of a settlement judge, resolution of the matter on a paper record, or setting the matter for a formal administrative hearing before an administrative law judge.

Generally, however, when a first seller requests the commission to resolve disputes over refund obligations, the Commission's staff first seeks data from both parties in an attempt to resolve the differences. After the Commission's staff reviews the data, the Commission could issue an order resolving the dispute, or could set the matter for a formal hearing before an administrative law judge, or could choose another procedural option, as set forth above.

In cases where a first seller requests: (a) permission to amortize the refunds or (b) an adjustment to prevent special hardship, the Commission staff reviews financial data supplied by the applicant. In these cases, the Commission again has the full range of procedural options available to it. Mindful of the substantial expense of participating in a formal hearing, to date the Commission has acted on requests for adjustments based on the record consisting of written submissions and any further data provided to staff.

2. Procedures for the Flowthrough of Refunds by Pipelines

Interstate pipelines were required to pass through any ad valorem tax refunds they received by making lump-sum cash payments to the customers who were actually overcharged within 30 days after receipt of refunds from the producers. If a pipeline does not make refunds within this 30-day period, the interest provisions in section 154.67(c) will be triggered and interest must be paid from the date the pipeline receives the refunds from the producers until the date the pipeline pays refunds to its customers.

The Commission required pipelines to file refund reports showing: (a) the amounts received from producers (with principal and interest shown separately); (b) first sellers that still owe refunds; and (c) the basis it used to apportion the refunds among its customers.

The initial report was required to be filed by May 19, 1998, and annually thereafter for the next five years. The pipelines must serve a copy of its report on all of its customers; in addition, the Commission notices the reports to allow any party to dispute the distribution of refunds.