BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
MUNICIPALITY OF ANCHORAGE	)	OAH No. 08-0395-TAX
d/b/a ANCHORAGE MUNICIPAL LIGHT & POWER	)	
	)	
1999-2005 Gas Production Tax	)	

DECISION

I. Introduction

A. Nature of the Case

Anchorage Municipal Light and Power (ML&P) is a municipally-owned electric utility that uses gas-fired turbines to produce electricity. During the period at issue in this case, ML&P owned an interest in a nearby gas field and was a gas producer. ML&P also purchased gas from others during this period. And finally, ML&P was a gas seller, selling gas to two other utilities. This case is about what kind of gas—purchased gas, or gas ML&P produced itself—was being used to supply the other utilities.

Because it is a municipal entity, ML&P is exempt from gas production tax for the gas it produces and uses in its own turbines.[1] ML&P also has no production tax liability for gas it purchases from others (because it is not a producer with respect to that gas), regardless of whether it uses or sells the purchased gas. ML&P is not, however, exempt from production tax with respect to gas it produces *and* sells to other utilities.

For the period from 1999 through 2005, the Department of Revenue (DOR) has required ML&P to deem its sales to the other utilities to be sales from the gas ML&P produced, and to pay production tax for that gas. ML&P has done so under protest. ML&P contends that nearly all of the gas sold to other utilities was gas ML&P had purchased, not subject to further taxation. ML&P seeks a refund.

[1] This was established in *Municipality of Anchorage v. Department of Revenue,* 104 P.3d 120 (Alaska 2004).

B. Procedural History

In the summer of 2008, DOR issued a final Informal Conference Decision (ICD) rejecting ML&P's position and denying a refund of the production taxes at issue. ML&P appealed to this office. The parties immediately stipulated that the case should be tried, at least in part, through the submission of written pre-filed testimony.[2] After discovery had closed and both sides had submitted two rounds of pre-filed testimony, they stipulated that "the parties are prepared to rest their respective cases on the evidence already submitted."[3] The parties were to brief the case according to an agreed schedule, followed by an oral argument.[4] There was an express provision that the administrative law judge could, if he wished, schedule a live hearing "to pose questions to witnesses who have submitted prefiled testimony," with the scope of that hearing limited to the ALJ's questions and related cross-examination by counsel.[5] These arrangements were incorporated into a procedural order.[6] Neither the stipulation nor the order contemplated the addition of different or more complete documentary evidence than what had already been supplied.

Briefing and oral argument were complete on December 20, 2010. The ALJ did not begin working closely with the voluminous evidence the parties had submitted until two years later. When he did, he was able to draft a full decision but he felt that there were gaps and ambiguities in the record on one issue, namely, where ML&P took delivery of its purchased gas. This was an important threshold question because, in order to show that it had sold only purchased gas to its utility customers, ML&P had to show that it actually owned purchased gas to resell to those customers at the delivery points those customers had specified.

The gaps and ambiguities seemed to the ALJ—perhaps wrongly, in retrospect—to be easily resolvable. Rather than convene a live hearing, he invited the parties to submit documents and a stipulation or affidavits addressing four problems:

- Both parties' experts had discussed a group of sample monthly "offtake statements,"[7] one from each of the seven tax years at issue. Both experts seemed to assume that the

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2 *See* Scheduling Order (Aug. 28, 2008).
3 Joint Report and Motion to Vacate Hearing and Establish Briefing Schedule (Dec. 23, 2009) at 1.
4 *Id*. at 1-2.
5 *Id*. at 2.
6 Order Vacating Hearing and Establishing Briefing Schedule (Dec. 23, 2009).
7 "Offtake" in this context would be the amount of gas removed from the place of production, *see* Williams & Meyers, *Oil and Gas Terms* (7th ed. 1987), at 637, but these statements reported a broader range of information, including information on sales point deliveries.

samples were typical of the full set of offtake statements, but neither had actually said so. The ALJ asked to see the full set of offtake statements to confirm that they all showed the same pattern.[8]

- The offtake statements appeared to present information that must be filed with the Department of Natural Resources (DNR) under a key reporting regulation, and ML&P had not quarreled with DOR's statements in argument that, indeed, these statements were reports to DNR. Nonetheless, there was no actual evidence, and no foursquare stipulation, to that effect. The ALJ asked the parties to clarify what role the offtake statements played in DNR reporting and, if the offtake statements were not the official reports, to tell him how the DNR reporting requirement was fulfilled.[9]
- The meat of the DNR reporting regulation was contained in an instructions document "incorporated by reference" into the regulation. However, the parties seemed to have overlooked the fact that there had been two versions of the regulation, incorporating different instructions documents. One relevant version of the regulation came into effect in 2002 and remains in effect today. Because it is still in effect, the incorporated document is still available from public sources, and the ALJ could consult it. But prior to 2002, a different regulation had been in effect incorporating a different instructions document, one apparently no longer available to the public. Since the parties had not supplied the text of this superseded law (because they are incorporated in a regulation, the instructions are law), the ALJ asked for a copy so that he would have the exact text of the law applicable to some of the earlier tax years at issue.[10]
- ML&P had supplied a diagram of the pipelines and meter locations associated with the gas field at issue, but the diagram was clearly a gross simplification, and it did not identify the very precise delivery points specified in certain contracts ML&P was relying on to make its case. The ALJ asked for a more detailed diagram or explanation.[11]

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[8] Request for Supplemental Materials (Jan. 23, 2013), item 5.

[9] *Id.,* items 1-4.

[10] *Id.*, item 2.

[11] Additional Request for Supplemental Materials (Jan. 28, 2013). Two other questions were asked about minor points of confusion in certain documents ML&P submitted in response to the initial queries. Second Additional Request for Supplemental Materials (Feb. 4, 2013).

Since one party always has the burden on a given issue, it is never essential for adjudicators to ask clarifying questions or seek to fill gaps inadvertently left in the record. Where ambiguity persists, one can simply resolve the issue against the party with the burden, at least in the context of parties represented by counsel. There is, however, a tradition in Alaska administrative proceedings to encourage clarity, so that questions can be resolved on their merits, rather than on defects or omissions in a party's presentation.[12]

This process probably would have unfolded quite differently had the case been tried in a live hearing. The ALJ would have betrayed his puzzlement as the evidence came in, and the parties and witnesses would almost certainly have responded by addressing the areas that confused him. In this case, however, all of the parties' evidence was submitted before the ALJ heard or evaluated any of it. The organic give-and-take of a live evidentiary proceeding was lost.

C. Exclusion of Clarifying Evidence

Initially, neither party objected to the requests for supplemental materials.[13] However, in its first formal and comprehensive response a month later, ML&P began to express reservations about the process, observing that its stipulation to try the case on a written record extended only to the written record that had been submitted at the time of the stipulation, and asserting a right to discovery and cross-examination regarding the new materials being added to the record.[14] The ALJ told the parties he thought the procedural point ML&P was making had some merit.[15] He distributed to the parties his very tentative draft of part of a decision based on the record as a whole, including the new materials, so that ML&P could better assess what kind of additional proceedings (such as argument, cross-examination, or responsive evidence) it might desire.[16]

In its final response on this procedural query, ML&P has unequivocally taken the position "that it is inappropriate for OAH of its own motion to seek, consider, or base its decision in any way on evidence beyond the evidence that the parties have agreed must form the basis for

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12 *E.g., In re Downs,* OAH No. 10-0501-REC (Real Estate Comm'n 2011), at 1 (ALJ requested document, which was admitted without objection); *Aetna Life Ins. v. Division of General Services,* OAH No. 06-0230-PRO (Office of Admin. Hrgs. 2006), at 2, 5 n.35 (same); *In re Alaska Medical Development-Fairbanks*, OAH No. 06-0744-DHS, "Order of Remand" (Comm'r of Health & Soc. Serv. 2007) (commissioner ordered proceeding reopened to receive and develop new evidence).

13 Status Conference (Jan. 29, 2013).

14 Municipal Light & Power's Second Response to Requests for Supplemental Materials, at 3.

15 Status Conference (March 5, 2013).

16 Procedural Order (March 5, 2013).

OAH's decision."[17] ML&P asserts that it is improper for the ALJ to "assist[] parties in developing evidence to support their positions," and expressly asks that "OAH proceed to reach a decision in this matter based on the evidentiary record of the parties' prefiled testimonies."[18]

ML&P, which has the burden of proof on the underlying issues and bears the risk should the record be murky and unpersuasive, has always been the potential beneficiary of the ALJ's requests for clarifying evidence. But ML&P may have good reasons for insisting that its own presentation not be augmented in any way. While it is certainly permissible for an adjudicator to try to clarify the record, particularly in the absence of an objection from either party, at the end of the day a represented party such as ML&P, if it insists, will ordinarily be permitted to present the case it chooses to present.

Accordingly, ML&P's objection will be sustained. All of the supplemental evidence submitted by either party in response to the ALJ's requests (that is, all evidence submitted in February, 2013) is excluded.

II. Factual Background

A. ML&P's Gas Sources and Sales Obligations

In 1991, ML&P began purchasing the gas it needed for electric generation from three companies that, at that time, had working interests of one-third each in Cook Inlet's Beluga River Field. The working interest owners were Shell Western E&P Inc. ("Shell"), ARCO Alaska, Inc. ("ARCO"), and Chevron U.S.A. Inc. ("Chevron"). ML&P had essentially identical contracts with each of them, in which the producer agreed to sell, and ML&P agreed to buy, one-third of ML&P's total gas requirements for electric generation. These contracts ran through December 31, 2005.[19]

In 1996, ML&P purchased Shell's interest in the Beluga River Field for approximately $120 million.[20] This meant that ML&P could now produce for itself the one-third of its own *requirements* that it was not obligated to purchase from ARCO and Chevron. One-third of the Beluga River Field *production*, however, exceeded one-third of ML&P's requirements, meaning that ML&P had some gas left over after making its required purchases from ARCO and Chevron

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[17] Municipal Light & Power's Response to March 5, 2013 Procedural Order, at 2.
[18] *Id*.
[19] Paragraph drawn from Helmick direct testimony at 6-7; Ex. DBH-2, DBH-3, DBH-4.
[20] Helmick direct testimony at 7.

and taking its own share of production.[21] Shell had various other sales contracts in place, and ML&P succeeded to those contracts.[22] Two of the contracts are of interest for this case. One required ML&P to supply a portion of the gas required by Chugach Electric Association, Inc. ("Chugach") at its Beluga generating facility.[23] The other required ML&P to supply a certain quantity of gas to a subsidiary of ENSTAR Natural Gas Company ("ENSTAR").[24]

B. Reallocation Between Sources

The gas that comes out of the Beluga River Field is homogenous—one cubic foot is the same as another—and the gas of the various working interest owners is entirely commingled as it leaves the field. In 1996, ML&P informed ARCO and Chevron that it intended, insofar as possible, to allocate gas it received under its purchase contracts with them to fulfill its sales contracts with Chugach, ENSTAR, and others, while allocating the gas from its own one-third interest in the Beluga River Field to its own power generation needs.[25] This would not alter ARCO and Chevron's obligations—each was obligated to supply an amount of gas equivalent to one-third of ML&P's generation needs—but it would simply re-route some of that gas to resale. ARCO assented and Chevron protested,[26] and there the matter lay until 1999; ML&P did not in fact reallocate any purchased gas to resale during 1997 and 1998.[27]

In May of 2000, ML&P declared to Chevron and Phillips Alaska Inc. (which had succeeded to the ARCO contract) that, in 1999, it had used all of the gas purchased from them, or 5.3 million Mcf, to supply more than 90 percent of its sales to Chugach and ENSTAR.[28] This was a paper allocation; there was no physical routing or rerouting of gas associated with this determination.

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[21] *Id*. at 11-12.
[22] *Id*. at 8.
[23] *Id.* at 8-9.
[24] *Id.* at 8, 10; Ex. DBH-6B.
[25] Ex. DBH-10
[26] Ex. DBH-11, 12, 13.
[27] *See* Ex. DBH-14.
[28] *Id.* The claimed allocation was that 5.3 million Mcf of purchased gas was used in connection to sales to Chugach and ENSTAR that, at least at that time, were thought to total 5.5 million Mcf (slightly different figures for sales to Chugach and ENSTAR are suggested by later documents). Exhibit DBH-8 shows that 5.3 million Mcf was 100 percent of purchased gas in 1999. The amount of this purchased gas said to have been allocated to the Chugach/ENSTAR sales was later lowered to 4.9 million Mcf, seemingly on the basis that, when month-by-month volumes are examined, the original full-year allocation claim would not be supportable, due to certain months in which sales exceeded purchases. *See* Ex. DBH-8.

On February 8, 2001 (more than two years after the reallocation had purportedly begun), ML&P informed DOR of this allocation,[29] seeking a refund of production taxes associated with the purchased gas it was allocating to Chugach and ENSTAR deliveries. On the same date, ML&P likewise informed the Department of Natural Resources (DNR) and the Minerals Management Service (MMS) that it had been so allocating its production and purchases for the preceding two years and would continue to do so.[30]

DNR responded that it would have no objection to the reallocation described to it, provided valuation for royalty purposes remained unchanged.[31] Nothing in the record indicates that ML&P ever followed up and actually made the reallocation in its regulatory reports to DNR.[32]

DOR eventually denied the refund claim. In a 2004 royalty audit letter, MMS also rejected ML&P's reallocation, contending that volumes delivered to each ML&P purchaser are set by the offtake statements discussed later in this decision and that those statements were inconsistent with the reallocation.[33]

For its part, ML&P followed the same pattern it had announced through the end of 2005, declaring, for tax purposes, a paper allocation of purchased gas, rather than gas from its own production share, as the gas to be used for the sales to Chugach and ENSTAR whenever there was sufficient purchased gas to cover the sales.[34] The total amount of purchased gas allocated to sales was 32.5 million Mcf over the seven affected years, of which 26.3 million Mcf were said to have gone to Chugach and the balance to ENSTAR.[35]

The ARCO and Chevron contracts expired at the end of 2005, and with them the allocation issue. Since ML&P no longer had any purchased gas to allocate, its sales obligations to Chugach and ENSTAR necessarily had to come from its own production, and hence these gas volumes were indisputably subject to production tax.[36]

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[29] Ex. DBH-22.
[30] Ex. DBH-28. DBH-25.
[31] Ex. DBH-29.
[32] *Cf.* 11 AAC 04.040, discussed later in this decision.
[33] Ex. 47; Dees responsive testimony at 36.
[34] *See* Ex. DBH-8.
[35] *Id*.
[36] *See* Helmick direct testimony at 13.

III. Issue for Resolution on Appeal

A. Scope of Issue Appealed from ICD

The ICD addressed a mix of assessments and claims for refund relating to tax years 1999-2005. There were nominally two matters at issue for these years: whether the reallocation described above was valid, and whether ML&P's method of valuing taxable gas during certain periods was correct. The valuation issue was of much less significance than the reallocation issue,[37] and ML&P has not briefed it on appeal. ML&P has pursued reversal of the ICD only on the allocation issue, and appears to accept the division's calculation of the amount of refund owing should ML&P prevail on that issue.[38]

The ICD rejected ML&P's position on reallocation on the following basis:

> The allocation method, originally applied retroactively, is merely a mathematical reallocation that makes paper adjustments to reported volumes of gas. ML&P's paper allocation is not reflective of actual facts or events. The Beluga field operator statements or gas delivery arrangements did not change to reflect the allocation. ML&P has not shown that any change was made to its cost recovery requirements for RCA tariff filings.

Of particular note for this decision is the ICD's finding that ML&P did not actually deliver purchased gas and produced gas in the manner indicated in the reallocation.

B. ML&P's Burden of Proof

In an appeal from an ICD, the "taxpayer bears the burden of proof on questions of fact."[39] This means that "the factual underpinnings of the assessment will stand unless [the taxpayer] shows, by a preponderance of the evidence, that they are in error."[40] As ML&P states in its final brief, ML&P's task is to demonstrate that "all the facts and circumstances support ML&P's allocation of produced gas to its own use for generating electricity."[41] This entails a showing that it could have, and did, deliver purchased gas to Chugach and ENSTAR in accordance with its reallocation.

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[37] Dees responsive testimony at 45; *see also* Dees direct testimony at 22.

[38] Opening Brief of Municipality of Anchorage at 60.

[39] AS 43.05.455(c). The standard of proof is a preponderance of the evidence. Note that, although this case has been submitted on a written record, it is not in the posture of summary adjudication. Disputed questions of fact may be, and indeed must be, resolved according to the standard of proof.

[40] *In re Tuttle,* OAH No. 11-0176-TAX (Office of Administrative Hearings 2011), at 5 (http://aws.state.ak.us/officeofadminhearings/Documents/TAX/VR/TAX110176.pdf).

[41] Reply Brief of Municipality of Anchorage at 4.

IV. Adequacy of ML&P's Showing in Support of the Reallocation

A. Whether the Sales Contracts Permitted the Reallocation

A threshold question in establishing whether ML&P could have delivered purchased gas to Chugach and ENSTAR is whether such a delivery and resale was contractually permissible under the ARCO and Chevron supply contracts. The preponderance of the evidence shows that it was.

Both supply contracts required the seller to supply, and ML&P to purchase, "gas in the amount of one-third (1/3) of ML&P's Total Gas Requirements."[42] What is notable about this language is that it did not commit ML&P to purchase from the seller one-third *of the gas* required for its electric generation business, but rather to purchase gas "in the amount" equal to one-third of that requirement. Indeed, since the contracts expressly allowed ML&P to take delivery at the Chugach meters, the contracting parties clearly understood that the gas might not be used directly to fire one-third of the needs of ML&P's generation facility. Although they evidently did not specifically foresee the precise mechanism of substitution at issue in this case, ARCO, Chevron, and ML&P did foresee, and allow for, an Mcf-for-Mcf substitution whereby a portion of the *needs* of the ML&P generators in Anchorage would be delivered to the Chugach facility and used to fire generators there instead.[43] Hence, the reallocation of purchased gas to another use so that ML&P could draw on different sources for its own use was in keeping with both the language of the supply contracts and the general intent behind the language.

B. Whether Pipeline Connections Permitted the Reallocation

With respect to deliveries to Chugach (the less significant issue of deliveries to ENSTAR is discussed later), DOR has questioned whether ML&P could physically have routed purchased gas to the Chugach facility. As a theoretical matter, ML&P has demonstrated that it could. Under the ARCO and Chevron contracts, ML&P was unconditionally allowed to take delivery of its purchased gas at "the facilities of Enstar or Chugach Electric Association, Inc. ("CEA"), at

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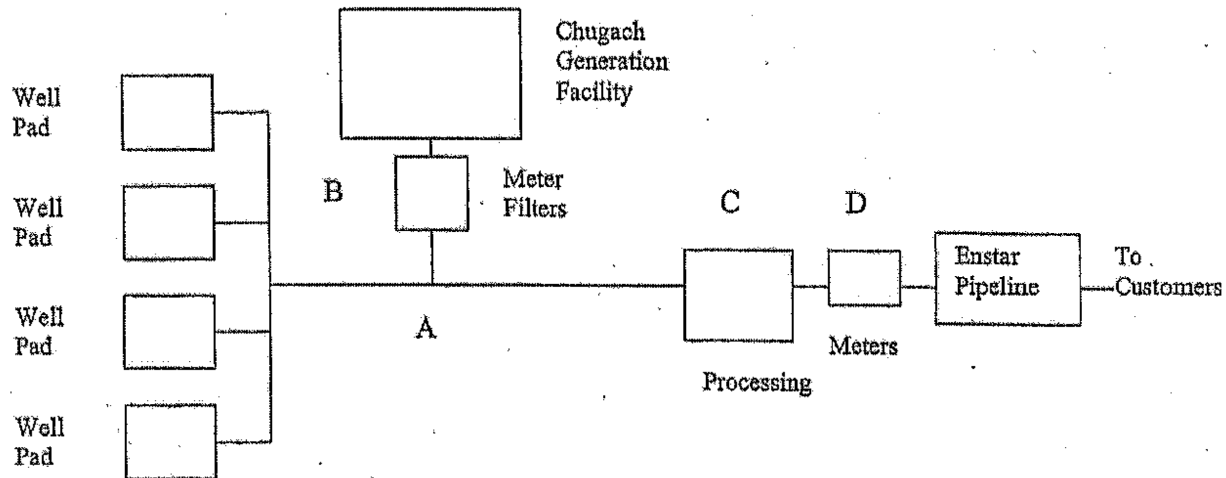
[42] Ex. DBH-3 at 14; DBH-4 at 14.

[43] Ex. 25 at 23-24. This was consistent with the parties' evident intent that the promised sales to ML&P should not be displaced (reduced) by other purchases. *See* Helmick reply testimony at 20-21.

One of the contracting parties, ARCO, readily agreed that the reallocation at issue in this case was consistent with its 1991 sales contract with ML&P. Ex. DBH-11. The other, Chevron, would not acknowledge that its own 1991 contract allowed for reallocation, but Chevron's brief communications to that effect do not provide any persuasive reasoning. *See* Ex. DBH-12, DBH-13. Beyond a pair of perfunctory letters in the 1990s, Chevron does not seem to have sought to block the maneuver.

the current geographical location of the Beluga River Field."[44] Accordingly, ML&P could take ownership of the purchased gas at point B in the diagram below,[45] and it was possible for gas delivered to Chugach in fulfillment of ML&P's obligations to Chugach to be purchased gas.



With that said, there is a separate question of *whether ML&P has demonstrated that it did, in fact, take delivery of any purchased gas at point B*,[46] rather than the Enstar facilities at point D. This separate question will be addressed in Section IV-D below.

C. The Validity of Paper Allocations

In the ICD, DOR suggested that ML&P's allocation of its gas must be disregarded because it is purely a "paper" allocation. This view is unpersuasive. With all of the gas of the three working interest owners commingled as it came out of the Beluga River Field, paper allocation was inevitable and appropriate in this context.

For example, the allocations that DOR contends should be determinative in this case—those found in the offtake statements discussed later in this decision—are themselves paper allocations. The April 2000 offtake statement shows 2,493 Mcf delivered through the ENSTAR pipeline to the ARCO complex.[47] All of this is attributed to ARCO's share of production, and none to ML&P's or Chevron's. And yet, one would suppose, two out of three natural gas

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44 Ex. DBH-3 at 14 and DBH-4 at 14. With mutual agreement, ML&P could take delivery elsewhere as well.
45 The diagram is taken from page 15 of the direct testimony of ML&P's expert, Daniel Helmick.
46 *See* Dees reply testimony at 39-42.
47 Ex. 24 at 2.

molecules entering the ENSTAR pipeline came from ML&P's and Chevron's shares of production. It is only though paper allocation that ARCO can be deemed to have taken only from ARCO's share when it took 2,493 Mcf from the pipeline for its own use. And it is through paper allocation that the other working interest owners are compensated for that use by corresponding allocations elsewhere or, ultimately, through the Gas Balancing Agreement[48] between the three owners.

In distribution of intermingled gases and liquids under shared ownership, paper allocation can be true allocation.[49] While it may be so that, when it declared some of its gas to be used for one purpose and some for another, ML&P was simply engaging in an accounting exercise, that fact alone is not fatal to ML&P's case.

A corollary to the permissibility of paper allocation of intermingled gases and liquids is that ML&P's burden of proof in this proceeding is not as daunting as DOR contends. In DOR's view, ML&P must "show the gas deliveries happened as it claims,"[50] and that "if their claim of fungibility is true, they can't prove their case."[51] However, an allocation case like this one is not about tracing commingled molecules along a pipeline and finding out where they went. Provided ML&P actually owned gas of the two relevant types (purchased and produced) at a given location, it could allocate the gas on paper to downstream recipients. All ML&P must prove is that it owned sufficient quantities of the relevant types of gas at that location, that the allocation it proposes is a permissible one—not barred by contract or by law—and that it took all of the relevant paper steps to make the allocation.

A second corollary of acknowledging that paper allocation can be real allocation is that the paper trail of gas volumes is important. Regulatory filings, contractual delivery points, and delivery records of particular volumes of gas may not casually be disregarded or left inconsistent with the desired allocation. In keeping with this second corollary, ML&P claims that it "comprehensively sought to structure its business and financial relationships in accordance with

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[48] Ex. DBH-7.

[49] *See, e.g., People's Natural Gas Co. v. Public Serv. Comm'n,* 270 U.S 550 (1926) (gas volume could be added at one point in pipeline and then subtracted in equal volume at later point without changing its legal character or source, even though it was commingled during transport with gas of a different legal character or source). The *People's* holding has been limited in later cases involving complex Commerce Clause issues, but the fundamental concept that fungible commodities may be collected and redistributed by allocation remains valid.

[50] Department of Revenue's Responsive Brief, at 58.

[51] DeVries statement at Oral Argument, Dec. 20, 2010.

its allocation of gas."[52] Sections D and E below address whether ML&P has demonstrated that the relationships were indeed structured in a way consistent with the allocation.

D. Deliveries to Chugach

In order to sell purchased gas to Chugach, ML&P had to own purchased gas at the delivery point set by its contract with Chugach. The delivery point under the ML&P-Chugach contract was point B in the diagram above.[53]

Looking upstream of that sale, it has already been noted that ML&P could take delivery of its purchased gas from the sellers (ARCO/Phillips and Chevron) at either point D or point B. Purchased gas delivered to ML&P at point D could *not* be resold to Chugach; purchased gas delivered to ML&P at point B *could* be. To show that it owned purchased gas at point B that it could allocate to Chugach sales, ML&P must show that it took delivery of purchased gas at point B.

The reporting system whereby the deliveries of the production of a field are formally designated is set by DNR's royalty-reporting regulations, 11 AAC 04.040(a).[54] The regulation in effect during the latter half of the period at issue in this case required lessees to report information called for in the *State of Alaska Oil and Gas Royalty Reporting Instructions* as they existed on September 1, 2002.[55] Of particular interest to this case, those instructions required:

> Lease owners or their designated 'Operator' must submit meter run tickets, or equivalents as approved by DO&G, and supporting schedules for the gross production, net production, and all dispositions to individual lessees. Lease owners or their designated 'Operator' must also report sales point deliveries when the operator makes those deliveries on behalf of lessees in the Accounting Unit.[56]

While these instructions were in effect, the owners of the working interests in the Beluga River Field had to—either themselves or through "their designated 'Operator'"—report the sales point deliveries made on their behalf by means of the filings under this regulation.

A slightly different version of 11 AAC 04.040(a), found in Register 145 of the Alaska Administrative Code, was in effect in tax years 1999-2001 and most of tax year 2002. Its text

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[52] Reply Brief of Municipality of Anchorage at 59.

[53] Ex. DBH-5A at 3, 9, 56, 61.

[54] At oral argument, DOR also pointed to 15 AAC 55.520(b), but that regulation did not exist during the tax years at issue in this case.

[55] These instructions may be revised from time to time, but it is the September 1, 2002 version that has the force of regulation.

[56] *State of Alaska Oil and Gas Royalty Reporting Instructions* (revised as of September 1, 2002), at I-6. The full text of those *Instructions* remains publicly on file in the location described in the Editor's Note to the regulation.

was identical, but it incorporated the *Instructions* as they existed on November 1, 1997. The text of these superseded instructions is no longer available from standard research sources.[57] It is inferred that they were substantially similar to the 2002 *Instructions* because (1) no party has contended that they were different in any relevant way and (2) insofar as any of the materials filed pursuant to 11 AAC 04.040(a) are in the record, they report the same information regardless of which side of the regulatory amendment they fall on.

In the trial of this case (apart from exhibits that have been excluded pursuant to ML&P's own objection, discussed in Part I-C), ML&P did not supply a comprehensive set of its or its co-owners' filings, or those made on their behalf, under 11 AAC 04.040(a). Accordingly, one cannot tell whether ML&P actually took delivery of any purchased gas at point B. To put it another way, one cannot tell whether ARCO/Phillips or Chevron made any sales point deliveries to ML&P as a customer at point B. And one therefore cannot tell whether ML&P ever owned any purchased gas at point B that it could resell to Chugach.

There is admitted evidence in the record that suggests the contrary. The operator of the Beluga River Field[58] generated monthly statements, sometimes titled "Working Interest Agreement Statements," showing the offtake from the Beluga River Field, the amount attributable to each of the three producers, and its disposition with respect to the various contracts for delivery of gas from the field.[59] Both parties refer to these as "offtake statements" or "offtake schedules,"[60] and that terminology will be followed here, although the reports do more than report the simple offtake from the field. The record contains one monthly example of an offtake statement for each of the seven tax years at issue.

The seven sample offtake statements show all of ML&P's purchased gas as delivered to ML&P at the ENSTAR pipeline.[61] All of the gas delivered to the Chugach Generation Facility in connection with ML&P's sales contract with Chugach is shown as ML&P production.[62] This

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57 ML&P has objected to supplementation of the record to include evidence of these earlier instructions.

58 Depending on the year, this was ARCO Alaska Inc., Phillips Alaska Inc., or ConocoPhillips Alaska, Inc.

59 Seven examples are collected at Ex. 24.

60 Helmick reply testimony at 26; Dees direct testimony at 20.

61 In addition to these seven examples, the record contains an implicit MMS determination that all of the offtake statements in 2001 were inconsistent with the reallocation ML&P sought to make in its letters sent on February 8 of that year. *See* Ex. 47; Dees responsive testimony at 36. This is confirmation that the sample offtake statement at Exhibit 24, page 3, is typical for that year with respect to the pattern of sales point deliveries.

62 *See* Dees direct testimony at 20-21; Dees responsive testimony at 40; Helmick reply testimony at 26 ("these statements . . . indicate the delivery of gas as described by Mr. Dees").

pattern is consistent, regardless of whether the offtake statement was created before or after ML&P announced its reallocation.

DOR took the position at oral argument that these offtake statements were filed as the official designations of deliveries under 11 AAC 04.040(a), and when ML&P's counsel responded he did not contend otherwise. There is, however, no formal stipulation to this effect.

ML&P's argument against the use of these statements has been that they are simply the allocations of the operator, not of ML&P. However, the operator would be ML&P's agent insofar as it made filings required of a lessee under 11 AAC 04.040(a). Moreover, the operator was ARCO or its successor—that is, one of the producers from whom ML&P was buying its purchased gas. The only evidence in this case indicates that the operator never purported to deliver *any* ARCO/Phillips or Chevron production to ML&P at point B, the Chugach meters.

With the evidence in this state, ML&P's unilateral, retroactive claim to DOR in 2001 and thereafter that it had reallocated gas volumes to sell purchased gas to Chugach has not been established as valid. Under the ARCO and Chevron contracts, purchased gas did not belong to ML&P until it was delivered at one of the contractual delivery points.[63] As has been noted previously, the contracts allowed for two delivery points—either the Chugach generation facility or the ENSTAR pipeline. To the extent that any evidence at all has been offered on the issue, it suggests that in all seven years at issue ML&P *took* delivery of all of the purchased gas at the ENSTAR pipeline. Conversely, it indicates that ML&P production satisfying the ML&P obligation to Chugach was being delivered to the Chugach sales point. The 26,322,061 Mcf[64] of purchased gas that ML&P now claims to have resold at the Chugach meters (point B in the diagram on page 10) in fact appears to have been delivered to ML&P at the ENSTAR pipeline (point D). Having taken delivery at the ENSTAR pipeline, ML&P could not then deliver this gas to Chugach, whose facility is upstream of that delivery point.[65] Moreover, ML&P's obligation to Chugach had apparently already been fulfilled through a sales point delivery of its own production at the Chugach meters.

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[63] Ex. DBH-3 at 52; DBH-4 at 51.

[64] Ex. DBH-8 at 3.

[65] There is no evidence in this case to support a "backhaul" arrangement, whereby gas taken at a downstream point can be "delivered" upstream through a specific exchange agreement. *Cf. ANR Pipeline Co. v. FERC,* 771 F.2d 507, 511-12 (D.C. Cir. 1985); *Tennessee Gas Pipeline Co. v. FERC,* 809 F.2d 1138, 1140 n.2, 1143 (5th Cir. 1987). In any event, ML&P has not claimed any such arrangement.

To put the matter another way: ML&P was free, within contractual and legal bounds, to allocate its commingled purchased and produced gas as it saw fit. But at the inlet to the Chugach generation facility, ML&P has not shown that it had any purchased gas to allocate.

E. Deliveries to ENSTAR

The preceding discussion covers 81 percent of the gas at issue in this case. We must then turn to the remaining 19 percent of the gas at issue, the gas ultimately destined for sale to ENSTAR. In accounting for the gas going into the ENSTAR pipeline, the operator listed ML&P's obligation to ENSTAR in a column devoted to ML&P's produced gas, again suggesting that ML&P's own production, not purchases, were destined to satisfy that obligation.[66]

One can imagine circumstances in which the offtake statements would not have much bearing on the allocation issue with respect to the ENSTAR gas. Suppose, for example, ML&P were taking delivery of all of its produced and purchased gas at the ENSTAR pipeline inlet, and then transporting that gas (still under ML&P's ownership) down the pipeline to a later distribution point, where some would be delivered to ENSTAR as a purchaser and some to ML&P's own generation facilities. ML&P could presumably reallocate this commingled gas before committing it to subsequent destinations or buyers. But that is not how gas deliveries from the Beluga River Field were structured by contract.

Purchases by ENSTAR from ML&P occurred, not at some downstream location, but "at the inlet flanges of [ENSTAR's] meter station" at the beginning of the ENSTAR pipeline.[67] In other words, title passed to ENSTAR at the very point ML&P's agent, the field operator, was making delivery of ML&P's production. The implication is that the operator effectively made delivery to ENSTAR on ML&P's behalf; ML&P never collected, transported, or redistributed the gas involved in the ENSTAR purchases. If the operator reported that it supplied produced gas to that location, the delivery was complete and ML&P has suggested no theory under which it could subsequently reallocate.

ML&P's *purchased* gas, on the other hand, did not become ML&P's property until "the outlet side" of certain meters at the beginning of the pipeline.[68] In the absence of contrary evidence, one must surmise that this point is downstream of the inlet flanges of the meter

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66 Dees responsive testimony at 41-42.
67 *See* Ex. DBH-6A at 8, Art. 2.1.
68 Ex. DBH-3 at 74; DBH-4 at 74.

station.[69] Thus it appears that ML&P did not have title to any purchased gas at the inlet flanges—it only acquired purchased gas at a downstream location—and hence it could not have resold purchased gas to ENSTAR at the location specified in its contract with ENSTAR. To allocate purchased gas to cover its sales to ENSTAR, ML&P would have had either to amend its contractual arrangements with ENSTAR or to amend its contractual arrangements for delivery of purchased gas.

The evidence regarding the ENSTAR deliveries is frustratingly ambiguous. To the extent that evidence exists, however, it suggests that the paper reallocation ML&P announced in its 2001 letter to DOR is inconsistent with formal indicia of gas ownership and allocation—the contracts and field records that show who owned gas at each point in the distribution cycle. It may be that ML&P formed an intent to reallocate and even went so far as to obtain the permission of one important regulatory party, DNR, to proceed with doing so, but then failed to follow through to perfect the arrangement.

In essence, as was the case with sales to Chugach, the record suggests that ML&P could not have sold its purchased gas to ENSTAR because it did not take delivery of that purchased gas until downstream of the point of delivery to that customer, and because it had already delivered its own produced gas to them. ML&P has not carried its burden of establishing that it could, and did, distribute purchased gas as it now claims.

V. Other Issues

DOR has argued that ML&P is barred from the allocation it proposes by several aspects of its dealings with the Regulatory Commission of Alaska (RCA) and the RCA's predecessor agency, the Alaska Public Utilities Commission. These alleged bars relate to ML&P's tariff as a utility, to the need for RCA approval of gas supply arrangements, and to representations ML&P made to the RCA and other stakeholders in connection with its acquisition of a working interest in the Beluga River Field. Addressing these arguments would involve a difficult threshold matter of the extent to which a tax tribunal should attempt to project the regulatory authority of the RCA. The RCA has authority of its own to impose a remedy should it determine that a party's gas deliveries or tax accounting has violated its obligations as a utility, and it may be in a

[69] The evidence in this case is equivocal, but it suggests that there is just one meter or metering station at the beginning of the pipeline. Helmick direct testimony at 14-15; Helmick reply testimony at 27 ("the ENSTAR pipeline meter"). ML&P was invited to further elucidate the question of where the "outlet side" delivery point for ML&P purchases lay in relation to the "inlet flanges" delivery point for its sales to ENSTAR, but it did not do so and it objects to doing so.

better position to know what those obligations are. Since the failures of proof discussed earlier in this decision are fully dispositive of this case, the administrative law judge elects not to reach the remaining issues.

VI. Conclusion

No basis has been demonstrated to disturb the assessment and denials of refund at issue. The Informal Conference Decision dated July 7, 2008 is affirmed.

DATED this 22nd day of May, 2013.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

NOTICE

This is the hearing decision of the Administrative Law Judge under Alaska Statute 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.[70]

A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.[71] A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.[72]

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date this decision becomes final.[73]

[This document has been modified to conform to the technical standards for publication.]

70 AS 43.05.465(f)(1).
71 AS 43.05.470.
72 AS 43.05.470(b).
73 AS 43.05.465 sets out the timelines for when this decision will become final.