ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 16-1285

ANR STORAGE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

Lona T. Perry
Deputy Solicitor

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

May 24, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

The parties and intervenors appearing before this Court are identified in Petitioner's brief.

B. Rulings Under Review

ANR Storage Co., Opinion No. 538, 153 FERC ¶ 61,052 (2015), JA 178, *on reh'g*, 155 FERC ¶ 61,279 (2016), JA 273.

C. Related Cases

Counsel is not aware of any related cases pending before this Court or any other court.

/s/ Lona T. Perry
Lona T. Perry

May 24, 2017

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

REGULATIONS:

GLOSSARY

ANR Storage	Petitioner ANR Storage Company
FERC or Commission	Respondent Federal Energy Regulatory Commission
Initial Decision	*ANR Storage Co.*, 146 FERC ¶ 63,007 (2014), JA 9
Opinion 538	*ANR Storage Co.*, Opinion No. 538, 153 FERC ¶ 61,052 (2015), JA 178
Order 678 Rulemaking	*Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220, *on reh'g*, Order No. 678-A, 117 FERC ¶ 61,190 (2006)
Policy Statement	*Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *on reh'g*, 75 FERC ¶ 61,024 (1996), *petitions for review denied and dismissed*, *Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998)
Rehearing Order	*ANR Storage Co.*, 155 FERC ¶ 61,279 (2016), JA 273

In the United States Court of Appeals for the District of Columbia Circuit

No. 16-1285

ANR STORAGE COMPANY,
Petitioner,

v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

ANR Storage Company (ANR Storage) is a company that provides natural gas storage service subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC or Commission). In the challenged orders, the Commission denied ANR Storage's request to charge market-based rates because ANR Storage failed to meet its burden of proof to demonstrate that it lacks significant market power. *See ANR Storage Co.*, Opinion No. 538, 153 FERC ¶ 61,052 (2015), JA 178 (Opinion 538), *on reh'g*, 155 FERC ¶ 61,279 (2016), JA 273 (Rehearing

Order). This appeal presents the issue of whether the Commission's determination was reasonable.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

I. THE COMMISSION'S FRAMEWORK FOR ANALYZING MARKET-BASED RATE REQUESTS

The Commission evaluates requests to charge market-based rates for storage services under the analytical framework of a 1996 Policy Statement on rate alternatives to traditional cost-of-service regulation.[1] The Commission has approved market-based rates for storage services where applicants have demonstrated, consistent with the criteria in the Policy Statement, that they lack significant market power or have adopted conditions that significantly mitigate market power. The Commission defines market power as "the ability . . . to profitably maintain prices above competitive levels for a significant period of time." Policy Statement at 61,230.

The Commission's analysis of whether an applicant has the ability to exercise market power includes three major steps: (1) definition of the relevant

[1] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (Policy Statement), *on reh'g*, 75 FERC ¶ 61,024 (1996), *petitions for review denied and dismissed, Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998).

markets (product and geographic); (2) measurement of a firm's market share and market concentration; and (3) evaluation of other relevant factors. *Id*. Generally, the relevant geographic market is the area containing suppliers that can affect any attempt by the applicant to exercise market power. *Id*. at 61,232. To define the relevant product market, the Policy Statement requires the applicant to identify "the specific products or services and the suppliers of those products or services that provide good alternatives to the applicant's ability to exercise market power." *Id.* The Commission defines a good alternative as "an alternative that is available soon enough, has a price that is low enough, and has a quality high enough to permit customers to substitute the alternative for the applicant's service." *Id.*

The second step requires performing a market share and market concentration analysis. The applicant's market share measures its ability to act on its own to exert market power. *Id*. at 61,234. The market concentration measures the ability of the largest market participants to work together to exert market power. *Id*. The Commission calculates a storage firm's market share by dividing the amount of daily deliverability and working gas supplied by the applicant, and its affiliates, by the total supply of daily deliverability and working gas within the relevant market. *ANR Storage Co.*, 146 FERC ¶ 63,007 P 8 (2014), JA 9 (Initial Decision). To determine market concentration, the Commission uses the

Herfindahl Hirschman Index.[2] The Policy Statement states that a low index figure – generally less than 1,800 – indicates that a market is less concentrated, but the Commission did not adopt a rigid brightline threshold level for market concentration. Policy Statement at 61,235.

While the Commission evaluates the market share and market concentration figures in determining whether an applicant can exercise market power, market share and market concentration do not alone give a comprehensive view of all important factors. *Id*. Accordingly, as the third step in the Commission's analysis, the Commission considers the impact of other competitive factors. *Id*. Among the considerations, the Commission "will evaluate whether sufficient quantities of good alternatives are available to the applicant's customers to make a price increase unprofitable." *Id*. The question is whether customers are able to replace a significant proportion of their usage with other alternatives if the applicant were to increase its price. *Id*.

[2] The Herfindahl Hirschman Index is calculated by summing the squares of each storage provider's market share. The decimal form of the index is converted to whole numbers by multiplying the decimal form by 10,000. For example, if the seller were a monopolist, the seller's market share would be 100 percent. Squaring the monopolist's market share would yield an HHI of 10,000 (= 100 x 100). Initial Decision P 8 n.11, JA 12.

In 2006, in its Order 678 Rulemaking,[3] the Commission modified its approach to defining the relevant product market for storage services. Order 678 Rulemaking P 1. While in the past, the Commission had looked only to the availability of other storage alternatives in assessing market power, the Commission decided to adopt a more expansive definition of the relevant product market to include close substitutes for gas storage service, including, for example, local production. *Id*. P 11.

The Commission emphasized that it would consider these alternative products on a case-by-case basis in the context of individual applications for market-based rates. *Id*. An applicant is required to identify "'the specific products or services and the suppliers of those products and services that provide good alternatives to the applicant's ability to exercise market power.'" *Id*. P 47 (quoting Policy Statement at 61,231). The burden is on the applicant to "'show how each of the substitute services in the product market are adequate substitutes to the applicant's service in terms of quality, price and availability.'" *Id*. (quoting Policy Statement at 61,231). The Commission declined to prescribe any particular method for determining the substitutability of a product in the rulemaking, but rather found that the determination of substitutability would be based on the record

[3] *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220 (Order 678 Rulemaking), *on reh'g*, Order No. 678-A, 117 FERC ¶ 61,190 (2006).

developed in individual proceedings. *Id*. To show that alternative products are good alternatives, applicants must be able to demonstrate that for peak demand periods customers will be able to choose the alternative product as a comparable substitute for storage services offered by the applicant. *Id*. P 48. *See also id*. P 59 (market screens are not dispositive of whether the Commission will grant market-based rate authority; rather, the Commission evaluates each application on a case-by-case basis).

The Commission also codified, in 18 C.F.R. § 284.503(b)(4), its current practice that capacity on pipeline systems owned or controlled by the applicant's affiliates should not be included among customers' alternatives and should be included in the market share calculated for the applicant. Order 678 Rulemaking P 62.

(The Order 678 Rulemaking also implemented the recently-enacted section 4(f) of the Natural Gas Act, 15 U.S.C. § 717c(f), which permits the Commission to authorize new storage projects (i.e. projects placed into service after passage of the 2005 amendment to the Act), to provide service at market-based rates even where the applicant has not demonstrated that it lacks market power. Order 678 Rulemaking P 102. Section 4(f) requires that the Commission find that market-based rates are in the public interest and necessary to encourage the construction of new capacity in areas needing storage service, and that customers are adequately

protected. *Id*. This provision is not at issue here, as ANR Storage has not made any application under section 4(f) for market-based rate authority, nor demonstrated that the circumstances required by that provision exist here.)

II. THE PROCEEDINGS BELOW

A. ANR Storage's Market-Based Rate Application

ANR Storage provides interstate natural gas storage services to 12 firm customers under cost-based, FERC-regulated rates. Opinion No. 538 P 6, JA 179. Gas from ANR Storage's fields is transported directly on the systems of its affiliates, ANR Pipeline Company and Great Lakes Gas Transmission Limited Partnership, and indirectly via various pipelines that interconnect with ANR Pipeline and Great Lakes. *Id*. ANR Storage along with ANR Pipeline, Great Lakes, and Blue Lake Gas Storage Company are wholly owned indirect subsidiaries of TransCanada American Investments Ltd. *Id*. ANR Storage operates four storage fields located in northern Michigan. *Id*. Its affiliates ANR Pipeline and Blue Lake also provide cost-based storage service in Michigan. *Id*. For a discussion of natural gas storage generally, please see FERC's Energy Primer at 28-31, which is available at http://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

In March of 2012, ANR Storage filed a petition for a declaratory order requesting that the Commission authorize ANR Storage to charge market-based

rates for natural gas storage services. *See ANR Storage Co*., 141 FERC ¶ 61,099 P 1, JA 1 (2012). In support of its request, ANR Storage included a market power study that defined the relevant geographic market as the Central Great Lakes Market, which includes areas in Michigan, Illinois, Indiana, Ohio and western Ontario. *Id*. P 7, JA 4. ANR Storage defined the product market as natural gas storage and Michigan local production. *Id*. P 9, JA 4.

A protester, Northern States Power Company, filed its own market study, which it contended showed that ANR Storage does have market power. *Id*. P 14, JA 6. Northern States' study showed that ANR Storage and its affiliates are the dominant storage providers in the market, and two of the top five storage providers, DTE Energy and Spectra Energy, are already operating under market-based rates. *Id*. With market-based rate storage providers already controlling a significant percentage of the market, Northern States argued that the potential exists for market-based rate providers to increase prices, on their own or in tandem, by a significant amount for a significant period of time. *Id*.

The Commission found that it lacked a complete record to determine whether ANR Storage's proposal was just and reasonable, and therefore set a hearing to determine whether ANR Storage lacked sufficient market power to charge market-based rates. *Id*. P 16, JA 7. This was the first fully-litigated proceeding where a gas storage provider sought market-based rate authority.

Opinion 538 P 1, JA 178. Accordingly, the Commission found that this case presented an opportunity for the Commission to set forth in detail its policies and procedures for market-based rate applications from gas storage providers, allowing the Commission to make clear how gas storage providers may meet their evidentiary burden to demonstrate they lack significant market power. *Id*.

B. The Initial Decision

In his Initial Decision, the Administrative Law Judge found that the relevant product market was firm storage service and Michigan local production. Initial Decision P 443, JA 128. The Judge rejected ANR Storage's argument that interruptible storage service, *id*. PP 443, 448-50, JA 128, 129-30, and intrastate storage service (e.g. state-regulated storage committed to the service of local retail load), should be included in the product market as good alternatives to ANR Storage. *Id*. PP 459-62, JA 133-35.

The Administrative Law Judge found that the appropriate geographic market was comprised of Michigan, northern Illinois, northern Indiana, and western Ontario. *Id*. PP 475-76, JA 140-41. The Judge rejected ANR Storage's argument that southern Illinois, southern Indiana and Ohio (which are included in ANR Storage's Central Great Lakes Market) should be included in the geographic market. *Id*. P 476, JA 141.

ANR Storage's market study listed 19 storage owners as having facilities that are good competitive alternatives to ANR Storage and ANR Storage's TransCanada affiliates. *Id*. P 482, JA 143. Consistent with his determinations regarding the proper product market, the Administrative Law Judge excluded from ANR Storage's list of good alternatives interruptible and intrastate storage capacity, as well as capacity that was fully subscribed and capacity that was not physically available to ANR Storage customers. *See id*. P 493, JA 150-57. Applying his determination regarding the geographic market, the Administrative Law Judge excluded storage capacity in southern Indiana, southern Illinois and Ohio. *See id*. P 480, JA 142. Based on the resulting market metrics, the Administrative Law Judge concluded that ANR Storage had failed to meet its burden to show a lack of market power in the relevant markets. *Id*. PP 500-02, JA 163-64. The Administrative Law Judge also rejected the additional relevant factors ANR Storage proffered in support of its application as too inconclusive to affect the outcome in this case. *Id*. P 509, JA 166.

C. The Challenged Orders

In the challenged orders, the Commission reversed a number of the Administrative Law Judge's determinations regarding the relevant markets and the competitive alternatives as too restrictive. *See* Opinion 538 PP 3-4, JA 178-79. The Commission, however, ultimately agreed with the Administrative Law Judge's

finding that ANR Storage had failed to meet its burden to demonstrate that it lacked market power. *Id*. PP 3, 5, JA 178, 179.

With regard to the geographic market, the Commission reversed the Initial Decision and found that ANR Storage had provided sufficient evidence to support its Central Great Lakes Market as the appropriate geographical market. Opinion 538 P 139, JA 235.

With regard to the product market, the Commission affirmed the Initial Decision's exclusion of interruptible storage, *id*. PP 74-78, JA 205-07; Rehearing Order PP 17, 23, JA 279, 282, but reversed the Initial Decision's exclusion of intrastate storage. Opinion 538 PP 106-08, JA 220-21. As the Commission explained, "the parameters of a product market are established by reasonable interchangeability, which results in a product market including the applicant's product, products that will increase in demand given a price increase by the applicant (cross-elasticity of demand), and the extent to which suppliers will switch to the applicant's service (supply substitutability)." *Id*. P 59, JA 198. The Commission held that intrastate storage properly was included in the relevant product market because: (1) intrastate storage facilities can easily and economically alter their regulatory status to provide interstate service in a short period of time, providing supply substitutability that can constrain an anti-competitive price increase; and (2) the use of existing intrastate storage can reduce

demand for interstate storage, providing cross-elasticity of demand that can discipline an anti-competitive price increase in the interstate storage market. *Id*. PP 107-08, JA 220-21. *See also* Rehearing Order PP 20-22, JA 280-82. The Commission also reversed the Initial Decision's exclusion of intrastate facilities as good alternatives to ANR Storage's interstate storage service. Opinion 538 P 163, JA 244.

In Opinion 538, the Commission applied these determinations to the projects proposed by ANR Storage as good alternatives, *see id*. PP 186-210, JA 253-60, and calculated the market metrics for ANR Storage. *Id*. P 213, JA 260. The Commission found that the ANR Storage/TransCanada market share was 16.12 percent of working gas and 15.16 percent of daily deliverability, and the Herfindahl Hirschman Index (market concentration index) calculations for working gas and daily deliverability were 951 and 1010 respectively. *Id*.

The Commission found that ANR Storage's market share of 16.12 percent for working gas required closer scrutiny. Opinion 538 P 215, JA 261. While the Commission recognized that ANR Storage's market metrics were within the range of similar entities that have been granted market-based authority, *id*. P 5, JA 179, those cases presented additional circumstances that limited the applicant's market power that are not present here. For example, the Commission has approved market-based rates where applicants were new entrants to competitive markets

dominated by existing entities charging cost-based rates. *Id*. P 215, JA 261; Rehearing Order P 35, JA 288. Here, ANR Storage is an existing company and is itself the largest storage provider in the market in terms of working gas. Opinion 538 P 215, JA 261; Rehearing Order PP 34-35, JA 288-89. The Commission had also approved market-based rates based on similar market metrics when the applicant's facilities were in a major production, transportation and storage area with extensive storage infrastructure. Opinion 538 P 216, JA 261. ANR Storage is not in such a production area, but rather is the largest storage provider in a market area that has fewer providers, presenting greater market power concerns. *Id*.

Further, the Commission found that it had included intrastate facilities in the good competitive alternatives to ANR Storage based on both the ability of intrastate storage to reduce demand for interstate storage, and the potential for intrastate facilities to quickly shift to providing interstate service in the event of an anticompetitive price increase. Opinion 538 P 219, JA 262; Rehearing Order P 37, JA 289. With regard to shifting operations from intrastate to interstate, while the Commission agreed with ANR Storage that federal authorization to make interstate sales could be obtained quickly, Opinion 538 P 163, JA 244, the Commission remained concerned that facilities providing intrastate service comprised a large segment of the competitive alternatives to ANR Storage. Opinion 538 PP 219-20, JA 262; Rehearing Order P 37, JA 289. The sheer number of facilities that would

have to either (1) acquire federal authorization for interstate service and/or (2) release capacity to prevent an exercise of market power by ANR Storage was substantial. Opinion 538 P 219, JA 262. Any delay in these facilities almost uniformly shifting operations could prevent the market from disciplining ANR Storage's potential price increase. *Id*. Thus, "[w]hile each facility is theoretically a good alternative to [ANR Storage], the requirement that a substantial number of them all enter the interstate market with available capacity in order to discipline ANR Storage is concerning." *Id*. The Commission concluded that ANR Storage failed to demonstrate that intrastate providers would make sufficient capacity available in the interstate market in the event of an anticompetitive price increase by ANR Storage to check ANR Storage's market power. Rehearing Order P 37, JA 289.

Accordingly, "[b]ased on the size of the applicant in relation to the market, the relative lack of current competitors providing firm interstate storage service, the need for a substantial number of other facilities among the good alternatives to shift operations in order to offer firm interstate service, and also considering the fact that [ANR Storage] is not a new entrant but a strong incumbent, the Commission finds that [ANR Storage] has not met its evidentiary burden to show it lacks significant market power in the relevant markets." Opinion 538 P 220, JA 262. The Commission further found that none of the other factors proffered by

ANR Storage to support its application outweighed the results of this market analysis. *Id*. P 242, JA 271.

On rehearing, the Commission removed additional alternatives from the market that increased ANR Storage's market share and market concentration metrics: (1) the Commission removed two facilities from the good alternatives because they were not physically available to ANR Storage customers and ANR Storage did not show that the facilities could be made available at minimal cost, Rehearing Order P 30, JA 286; and (2) the Commission required that additional capacity of one project be included in the ANR Storage/TransCanada market share because ANR Storage did not overcome the rebuttable presumption that ANR Storage/TransCanada controlled the project. *Id*. PP 31-32, JA 286-87. As the Commission denied ANR Storage's application based on the market metrics in Opinion No. 538 prior to these determinations, the Commission found that these determinations would not alter the denial of ANR Storage's application, and therefore the Commission did not recalculate the market metrics. *Id*. PP 30, 32, JA 286, 287.

SUMMARY OF ARGUMENT

In assuring that rates remain "just and reasonable," as required by the Natural Gas Act, the Commission grants market-based rate authority only upon a showing that the applicant does not possess, or has adequately mitigated, market

power. The applicant bears the burden of proof. To demonstrate a lack of market power, the applicant must define the relevant product and geographic markets, compile a list of competitive alternatives, calculate market share and market concentration numbers, and identify any additional factors that could impact the application for market-based rates.

Here, the Commission reasonably concluded that ANR Storage failed to prove that it lacks significant market power. ANR Storage was not a new entrant to the market expanding the available capacity, but rather was a strong incumbent in a market area seeking to switch existing facilities from cost-based to market-based rates. ANR Storage's 16.12 percent market share of working gas capacity in fact made it the largest competitor in the relevant market.

Furthermore, to demonstrate a lack of market power, ANR Storage was required to show that sufficient quantities of good alternatives were available to its customers to make a price increase unprofitable. While the substantial number of intrastate storage providers in the relevant market resulted in a large quantity of theoretically good alternatives to ANR Storage's interstate service, ANR Storage failed to demonstrate that the intrastate providers would shift their operations from intrastate to interstate storage in sufficient quantities to discipline an anticompetitive price increase by ANR Storage.

ANR Storage's primary argument on appeal is that Commission precedent compels the conclusion that ANR Storage's 16.12 percent market share demonstrates a lack of market power. ANR Storage asserts that, in prior cases involving applicants with similar market shares, the Commission has never denied market-based rate authority or applied closer scrutiny to the applicant's market position.

The Commission reasonably rejected the notion that its precedent precluded closer scrutiny of ANR Storage's market position in this case. While the Commission considers market metrics such as market share and market concentration, such metrics are not dispositive. Rather, the Commission considers all relevant factors in evaluating a request for market-based rates, and considers each application on a case-by-case basis.

The Commission recognized that ANR Storage's market metrics were within the range of entities that had been granted market-based rate authority, but those cases involved market-power mitigating conditions that do not exist here. For example, the Commission has approved market-based rates for new entrants in the New York/Pennsylvania storage market because the market there was dominated by one entity -- with greater than 40 percent of the market working gas capacity -- that was charging cost-based rates. The Commission found that the cost-based rates of the dominant storage provider were just and reasonable, and would

discipline any effort by new entrants to exercise market power. The Commission also has granted market-based rate authority for new entrants in the Gulf Coast market because it is a major production area with extensive storage infrastructure that does not present the same market power concerns as ANR Storage's market-area storage, which has fewer providers.

ANR Storage also challenges the finding that it failed to show that a sufficient number of its intrastate competitors would shift operations to interstate service to check an exercise of market power. ANR Storage argues that in prior cases the Commission has not considered the proportion of intrastate storage providers in approving market-based rates. As the Commission explained, however, ANR Storage's market share of 16.12 percent prompted the Commission to apply closer scrutiny to ANR Storage's competitive alternatives. In contrast, most of the cases cited by ANR Storage concerned entities with much smaller market shares, which did not require the closer scrutiny applied here. The cited cases with higher market shares were in the Gulf Coast production market, which does not present the same market-power concerns as ANR Storage's market-area storage.

ANR Storage further asserts that the Commission lacked evidence that a substantial number of its competitors were engaged in local, intrastate service. This ignores that the Initial Decision and Opinion 538 engaged in an

individualized, detailed analysis of each of ANR Storage's proposed competitive alternatives, including the storage capacity available for each and the amount of that capacity reserved for local service or available to the interstate market. Substantial evidence thus demonstrated that ANR Storage's market competitors were predominantly providing localized, intrastate storage service.

Substantial evidence also supported the Commission's determination that Dominion and NiSource (Ohio capacity) were not good alternatives to ANR Storage because they were physically unavailable to ANR Storage customers. ANR Storage failed to meet its burden to show that these facilities could be quickly and inexpensively made available to its customers. ANR Storage also failed to meet its burden to show that it lacked control over the storage capacity of Eaton Rapids, and therefore that storage capacity properly was included in the ANR Storage/TransCanada affiliates market share. The Commission also reasonably rejected using ANR Storage's updated figures in calculating the market metrics, as the Commission found that the updated numbers would not change the result of the market analysis. ANR Storage's additional factors, including its argument regarding ease of entry into the market, did not outweigh the market analysis.

Accordingly, based on ANR Storage's size in relation to the market and its market share, the fact that it is not a new entrant but a strong incumbent, the

relative lack of current competitors providing firm interstate storage service, and the need for a substantial number of intrastate facilities among the good alternatives to shift operations to offer interstate service, the Commission reasonably concluded that ANR Storage did not meet its evidentiary burden to show it lacks significant market power.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011, 1016 (D.C. Cir. 2003). "The 'scope of review under the 'arbitrary and capricious standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. "Rather, the court must uphold a rule if the agency has "'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). "And nowhere is that more true than in a technical area like [] rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Id*. (quoting

Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 532 (2008)).

The Court upholds FERC's factual findings if they are supported by substantial evidence. Natural Gas Act § 19, 15 U.S.C. § 717r(b); *Williams Gas Processing*, 331 F.3d at 1016. "Once assured the Commission has engaged in reasoned decisionmaking, it is not for [the Court] to reweigh the conflicting evidence or otherwise to substitute [its] judgment for that of the Commission." *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995).

The challenged order affirmed certain determinations, following a trial-type evidentiary hearing, of an Administrative Law Judge. Where the Commission adopts an Administrative Law Judge's conclusion, it need not repeat the Administrative Law Judge's findings and reasoning. *See, e.g.*, *Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 967-68 (D.C. Cir. 1984).

II. THE COMMISSION REASONABLY FOUND THAT ANR STORAGE FAILED TO PROVE THAT IT LACKS SIGNIFICANT MARKET POWER.

Section 4(a) of the Natural Gas Act requires that a natural gas company's rates be "just and reasonable." *Northern Natural Gas Co. v. FERC*, 700 F.3d 11, 13 (D.C. Cir. 2012) (quoting 15 U.S.C. § 717c(a)). "The Commission has generally understood this to mean cost-based rates, with 'market-based rates' to be allowed only for a firm that showed it lacked market power in the relevant

market." *Id*. (citing Policy Statement at 61,227). "Absent a showing that a particular company lacks market power or that sufficient regulatory safeguards, e.g., a cost-of-service fallback rate, can be implemented to eliminate the potential exercise of market power, the Commission would continue some form of cost-based ratemaking." Policy Statement at 61,229.

Upon filing an application for market-based rate authority, the applicant has the burden of proof to show that it lacks significant market power. Opinion 538 P 2, JA 178. "Companies must define the relevant product and geographic markets, compile a list of competitive alternatives, calculate market share and market concentration numbers, and identify any additional factors that could impact a market power application." *Id.* While the Commission considers market metrics such as market share and market concentration in its market-power analysis, the use of such metrics "is not dispositive of whether [the Commission] will grant a request for market-based rates." Order 678 Rulemaking P 59. Rather, the Commission considers "all relevant factors" in determining whether to approve market-based rates, and evaluates all proposals on a case-by-case basis. *Id*.

A. The Commission's Findings On ANR Storage's Market-Rate Application.

This case is the first fully-litigated proceeding in which a gas storage provider has sought market-based rate authority. Opinion 538 P 1, JA 178. On review of the Initial Decision, the Commission found that the Administrative Law

Judge had erred in limiting the relevant geographic and product markets. *Id*. P 3, JA 178. The Commission agreed with ANR Storage that the geographic market was the Central Great Lakes Market, and that the product market included not only firm interstate storage and local Michigan production, but also intrastate storage (e.g. state-regulated storage committed to the service of local retail load). *Id*. The Commission affirmed the Initial Decision's determination that interruptible storage was correctly excluded from the relevant product market, *id*., a finding ANR Storage does not challenge on appeal.

The Commission also agreed with ANR Storage that the competitive alternatives to ANR Storage should include intrastate storage providers. *Id*. P 4, JA 179. Upon determining the list of competitive alternatives, the Commission derived market share and market concentration calculations. *Id*. P 5, JA 179. The Commission concluded that ANR Storage and its affiliated entities together possessed a market share of 16.12 percent of the working gas capacity, and that the market concentration was low. *Id*. PP 213-14, JA 260-61.

Considering the particular position of ANR Storage in the relevant markets, the Commission ultimately agreed with the Administrative Law Judge's Initial Decision that ANR Storage failed to prove that it lacks significant market power in the relevant markets. *Id*. PP 5, 220, JA 179, 262. ANR Storage was not a new entrant to the market expanding the available capacity, but rather was a strong

incumbent in a market area seeking to switch existing facilities from cost-based to market-based rate regulation. *Id*. PP 219-20, JA 262; Rehearing Order P 35, JA 288. ANR Storage's 16.12 percent market share of working gas capacity in fact made it the largest competitor in the relevant market. Opinion 538 PP 215, 220, JA 261, 262; Rehearing Order P 34, JA 288.

Furthermore, to demonstrate a lack of market power, ANR Storage was required to show that "sufficient quantities of good alternatives are available to the applicant's customers to make a price increase unprofitable." Policy Statement at 61,235. In other words, ANR Storage must show that its customers would be able to replace a significant proportion of their capacity with other alternatives if ANR Storage raised its price. *Id*. While including intrastate storage providers in the competitive alternatives resulted in a large quantity of theoretically good alternatives to ANR Storage's interstate service, *see* Opinion 538 PP 214, 219, JA 261, 262; Rehearing Order P 36-37, JA 289-90, ANR Storage failed to demonstrate that the intrastate providers would make sufficient capacity available in the interstate market to discipline a potential anticompetitive price increase by ANR Storage. Rehearing Order P 37, JA 289. *See also* Opinion 538 PP 219-20, JA 262.

Accordingly, the Commission concluded that, "[b]ased on the size of the applicant in relation to the market, the relative lack of current competitors

providing firm interstate storage service, the need for a substantial number of other facilities among the good alternatives to shift operations in order to offer firm interstate service, and also considering the fact that [ANR Storage] is not a new entrant but a strong incumbent, the Commission finds that [ANR Storage] has not met its evidentiary burden to show it lacks significant market power in the relevant markets." Opinion 538 P 220, JA 262. *See also* Rehearing Order P 37, JA 289.

As demonstrated below, this determination by the Commission should be upheld. "The disputed question here involves both technical understanding and policy judgment." *Elec. Power Supply Ass'n*, 136 S. Ct. at 784. In reviewing the Commission's determination, the Court may not substitute its judgment for that of the Commission, *id*. at 782, but rather the Court's "limited role is to ensure that the Commission engaged in reasoned decision-making." *Id*. at 784. The Commission satisfies that role where it weighs competing views, makes a choice with adequate support in the record, and "intelligibly explain[s] the reasons for making that choice." *Id*. The Commission's decision here met that standard.

B. ANR Storage's Market Lacks Market-Power Mitigating Conditions That Justified Awarding Market-Based Rates To Entities With Similar Market Metrics.

ANR Storage challenges the finding that it failed to demonstrate that it lacked market power, arguing that, in prior cases with market shares similar to ANR Storage's 16.12 percent, the Commission has never denied market-based rate

authority or applied "closer scrutiny" to the applicant's market position. *See* ANR Storage Brief at 18-31. The Commission recognized that "these market metrics were within range of similar entities that were granted market-based rate authority." Opinion 538 P 5, JA 179. However, the markets at issue in those other cases had market-power mitigating conditions that do not exist in ANR Storage's market. *Id*. PP 215-20, JA 261-62; Rehearing Order PP 35, 38, JA 288, 290. Thus, the Commission fully explained "the specific concerns of this case" as compared to the prior cases involving similar market metrics that led the Commission to deny market-based rate authority in this instance. Rehearing Order P 38, JA 290. *See, e.g., Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015) (court defers to Commission's interpretation of its own precedent); *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007) (same).

1. Unlike Prior Cases In The New York/Pennsylvania Market, ANR Storage Is Not A New Entrant Facing A Dominant Storage Provider Charging Cost-Based Rates.

The Commission pointed to its decision in *Wyckoff Gas Storage Co., LLC*, 105 FERC ¶ 61,027 (2003), where the Commission granted market-based rate authority to a new entrant in the New York/Pennsylvania market that, when combined with its affiliated entity, National Fuel, would have a 16 percent market

share.[4] Opinion 538 P 215, JA 261. In that case, while the Commission recognized that a 16 percent market share raised market power concerns, *see Wyckoff*, 105 FERC ¶ 61,027 P 57, the Commission granted Wyckoff market-based rate authority because it was a new entrant to a competitive market dominated by other entities charging cost-based rates. Opinion 538 P 215, JA 261. *See also* Rehearing Order P 35, JA 288.

When *Wyckoff* was decided, almost all of the storage facilities in the New York/Pennsylvania market had cost-based rates. *Wyckoff*, 105 FERC ¶ 61,027 P 60. In particular, the market was dominated by one large storage company, Dominion Transmission Corporation, that alone accounted for 43 percent of the available working gas capacity. *Id*. P 47. Thus, even though the market was concentrated, Wyckoff's competitors, including the dominant competitor Dominion, charged regulated, just and reasonable, cost-based rates, and the Commission found that Wyckoff had incentive to market its services at or below the regulated rates. *Id*.

---

[4] While Wyckoff would have had a 16 percent market share of working gas capacity in the New York/Pennsylvania market if combined with National Fuel, *see* 105 FERC ¶ 61,027 PP 47, 57, the Commission found that Wyckoff's market share properly should be considered on a stand-alone basis, because National Fuel's two percent non-voting interest in Wyckoff did not give National Fuel control over Wyckoff operations. *Id*. P 59. Wyckoff's stand-alone market share of working gas was 1.2 percent, *id*. P 57, and therefore Wyckoff was a "new, relatively small entrant" into the relevant market. *Id*. P 56.

The other cases cited by ANR Storage following *Wyckoff* and granting market-based rate authority to new storage providers in the New York/Pennsylvania market, *see* ANR Storage Brief at 21, followed the same analysis: granting market-based rate authority notwithstanding market concentration because applicants for new storage capacity or services had small market shares and the majority of storage service in the market -- including that of the dominant market participant, Dominion -- was charged at cost-based rates. *See, e.g., Rager Mountain Storage Co., LLC*, 152 FERC ¶ 61,098 P 12 (2015) (new storage service with 5.1 percent market share of working gas capacity); *UGI Storage Co*., 133 FERC ¶ 61,073 PP 80-81 (2010) (new acquisition and operation of existing storage facilities with 3.2 percent market share), *reh'g denied*, 134 FERC ¶ 61,239 (2011); *Chestnut Ridge Storage LLC*, 128 FERC ¶ 61,210 PP 35-36, 39 (2009) (new storage facility with 4.6 percent market share), *vacated on other grounds*, 139 FERC ¶ 61,149 (2012); *UGI LNG, Inc*., 127 FERC ¶ 61,257 PP 18-20 (2009) (expansion of LNG gas storage facility with 3.97 percent market share); *Arlington Storage Co., LLC*, 125 FERC ¶ 61,306 PP 52-54 (2008) (new storage facility with 7.6 percent market share when combined with affiliated entities); *Cent. N.Y. Oil & Gas Co*., 116 FERC ¶ 61,277 PP 31, 33-34 (2006) (expansion of existing storage facility with 5.2 percent market share).

Thus, although the New York/Pennsylvania market is concentrated, "[i]n consuming regions, such as the Northeast portion of the United States, where there are few providers, some with large market shares whose services are regulated, the Commission has approved requests to implement market-based rates by considering factors other than market concentration including the small size of the applicant's market share." Order 678 Rulemaking P 91. "In these situations we find that market-power concerns are low." *Id*.

Here, in contrast, ANR Storage is not a small new entrant in a market where the dominant provider is charging cost-based rates. *See* Opinion 538 P 215, JA 261. To the contrary, ANR Storage is itself the largest existing competitor charging cost-based rates. *Id*. As ANR Storage states, its next largest competitor, DTE Energy, already charges market-based rates. *See* ANR Storage Brief at 25-26 & n.2, 30. One of the DTE Energy subsidiaries, Michigan Consolidated Gas Co., was granted market-based rate authority in a letter order approving a settlement with its ratepayers. *See Michigan Consolidated Gas Co*., Letter Order, Docket No. PR09-10 (May 21, 2009). That letter order specifically provides (at P 2(i)) that it is a "negotiated agreement of the issues in this proceeding," and the Commission shall not be "deemed to have approved, accepted, agreed, or otherwise consented to any principle or issue in this proceeding." The other subsidiary, Washington 10 Storage Corp., was granted market-based rate authority based upon an unopposed

application. *See Washington 10 Storage Corp*., Letter Order, Docket No. PR08-26 at 2 (October 3, 2008). Here, in contrast, ANR Storage's customers strongly opposed ANR Storage's petition for market-based rates. Moreover, the DTE Energy subsidiaries' largest competitor in the market, ANR Storage and its TransCanada affiliates, charged cost-based rates, which would check the ability of the DTE Energy subsidiaries to charge extra-competitive rates.

Thus, ANR Storage's circumstances here are not equivalent to those of the DTE Energy subsidiaries when they were granted market-based rate authority. To the extent ANR Storage argues that it should now be granted market-based rate authority because DTE Energy already has such authority, ANR Storage Brief at 30, ANR Storage cannot be awarded market-based rates without showing it lacks market power (i.e. it cannot be authorized to charge an unjust and unreasonable rate) because a market competitor already possesses market-based rates. *See, e.g.*, *FPC v. Conway Corp*., 426 U.S. 271, 278-80 (1976) (the rate the Commission sets to remedy undue discrimination must fall within the zone of reasonableness). Rather, as ANR Storage stated in its request for agency rehearing, a showing of undue discrimination "would mean that the market based rate authorizations issued to other market participants would have to be re-opened and vacated," a remedy ANR Storage has not sought or justified in this proceeding. Request of ANR Storage Company for Rehearing at 27, JA 1455.

2. Unlike Prior Cases In The Gulf Coast Market, ANR Storage Is Not In A Major Production Area Where Market-Power Concerns Are Lower.

The Commission further pointed out that it had granted an unopposed request for market-based rate authority in *Copiah Storage, LLC*, 121 FERC ¶ 61,272 (2007), *on reh'g*, 123 FERC ¶ 61,082 (2008), in connection with the certification of new gas storage facilities. Opinion 538 P 216, JA 261. *See Copiah Storage*, 121 FERC ¶ 61,272 PP 1, 25. The Commission found that Copiah, with its affiliates, possessed an 8.8 percent market share in working gas capacity and a 22 percent market share in peak day deliverability. *Id*. P 23. While the Commission ordinarily would find that the 22 percent market share in peak day deliverability presented market power concerns, the Commission found such concerns mitigated by the fact that the Copiah facilities were to be constructed in the Gulf Coast production market. *Id*. PP 24-25. "[B]ecause Copiah is located within the major production, transportation and storage area in the Gulf Coast, the Commission agrees with the conclusion in Copiah's study that there exist a large number of alternatives available to shippers on pipelines interconnected with Texas Eastern, which will interconnect with Copiah." Opinion 538 P 216, JA 261 (quoting *Copiah Storage*, 121 FERC ¶ 61,272 P 24). *See, e.g., Rate Regulation of Certain Underground Storage Facilities*, 113 FERC ¶ 61,306 P 18 (2005) (Notice of Proposed Rulemaking for the Order 678 Rulemaking) (noting that the

Commission had approved all requests for market-based rates where the applicant was located in a production area, based upon the extensive storage infrastructure in such regions).

Similarly, in *Liberty Gas Storage, LLC*, 127 FERC ¶ 61,221 P 28 (2009) (cited in ANR Storage Brief at 25), the Commission granted an unopposed request for market-based rates in connection with the certification of new gas storage facilities in the Gulf Coast production area, where the applicant would have 7.63 percent of the storage market working gas capacity and 16.04 percent of peak day deliverability. *See id*. at PP 27-28, 33. The Commission pointed out that it distinguishes between production area storage facilities, such as those in the Gulf Coast, and market-area facilities. *Id*. P 24. "In general, alternative storage facilities make market power in a production area less of a concern." *Id*. *See also Petal Gas Storage, L.L.C.*, 102 FERC ¶ 61,243 PP 19-22 (2003) (cited in ANR Storage Brief at 24) (permitting market-based rates for new storage facilities which, when combined with affiliated facilities, had a market share of working gas capacity of 16.9 percent, and a 20.6 percent share of daily deliverability, because these market shares did not present market power concerns in the competitive Gulf Coast production market); *Egan Hub Partners, L.P.*, 95 FERC ¶ 61,395 at 62,472-73 (2001), *amended by*, 99 FERC ¶ 61,269 (2002) (cited in ANR Storage Brief at 24-25) (granting unopposed request for market-based rates for expansion natural

gas facilities on the Gulf Coast, with a market share of working gas capacity of 5.1 percent and a market share of peak day deliverability of 14.9 percent).

Furthermore, while ANR Storage asserts that the Gulf Coast storage subsidiaries addressed above were owned by market incumbents, *see* ANR Storage Brief at 22-25, this ignores that in these cases market-based rate authority was approved in connection with the certification of new or expanded storage facilities, which increased the alternatives available to customers in the market. *See*, *e.g*., Order 678 Rulemaking P 31 (new entrants offer another choice to existing customers, and thus more frequently lead to lower, not higher rates). Here, ANR Storage was proposing market-based rates for existing, not new, facilities. *See id*. P 56 (a storage provider applying for market-based rates for existing cost-based service does not increase the number of competitors in a market).

Thus, while ANR Storage's market share here is comparable to or lower than some of the Gulf Coast market shares, ANR Storage does not reside in a region similar to the Gulf Coast. Opinion 538 P 217, JA 262. Rather, "[i]t is unquestioned that [ANR Storage] is the largest storage service provider in the [Central Great Lakes Market], with over 25,000 MMcf more working gas than its nearest competitor, DTE Energy." *Id*. Under the circumstances, the Commission found this case to be more akin to the situation in *Red Lake Gas Storage, L.P*., 102 FERC ¶ 61,077 (2003), *reh'g denied*, 103 FERC ¶ 61,277 (2003), in which the

Commission denied market-based rates where the applicant, a new natural gas storage company, would have a market share of 10.20 percent for working gas capacity and 19.87 percent for daily deliverability. *See* Opinion 538 P 218, JA 262; *Red Lake*, 102 FERC ¶ 61,077 P 32. Although new, the entrant was a large entity entering a highly-concentrated market, in which there was no other firm storage capacity available. *Red Lake*, 102 FERC ¶ 61,077 P 34. The only other storage facilities in the relevant geographic market were fully subscribed, and Red Lake failed to demonstrate that capacity would become unsubscribed in the future. *Id*. P 36.

Nor does *ONEOK Gas Storage, L.L.C.*, 90 FERC ¶ 61,283 (2000), *reh'g denied*, 91 FERC ¶ 61,173 (2000), aid ANR Storage. *See* ANR Storage Brief at 23-24. In *ONEOK*, the Commission granted market-based rate authority to an intrastate storage system that was seeking federal authorization to provide interstate interruptible storage service. *ONEOK*, 90 FERC ¶ 61,283 at 61,952. The Commission noted that ONEOK's working gas capacity market share of 13.5 percent, and daily delivery capacity of 21.8 percent, were higher than those in cases in which the Commission had previously approved market-based rates. *Id*. at 61,955. Nevertheless, the Commission found it appropriate to grant the unopposed request for market-based rates, because ONEOK was proposing only to offer a very limited product, interruptible storage service, in competition with other

facilities offering firm and interruptible service as well as transportation. *Id*. The Commission found that ONEOK would have to remain competitive to compete with the services offered by full-service providers. *Id*. Additionally, evidence showed that 30 percent of the capacity in the market area was unsubscribed, leading to discounting and limiting any ability to charge non-competitive rates. *Id*.

ANR Storage points to the 20 percent market power screen the Commission employs in evaluating market power in electric cases. ANR Storage Brief at 26 (citing *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012)). That screen is inapposite here as it compares an applicant's share of uncommitted capacity to the uncommitted capacity of the entire market on a seasonal basis. *See Horizontal Market Power*, 138 FERC ¶ 61,109 P 6. Moreover, in *Wyckoff*, the Commission recognized that a 16 percent market share presented market power concerns, and rejected arguments based on electric cases that the Commission does not find market power when market shares are below 20 percent. *Wyckoff*, 105 FERC ¶ 61,027 P 57 n.30 (finding electric cases not adopted in the Policy Statement to be irrelevant to the market power analysis for natural gas storage).

Likewise, while ANR Storage cites market-based rate cases from the oil industry, ANR Storage Brief at 26-27, the Commission in the Order 678 Rulemaking found market-based rate cases concerning the oil industry inapposite

in determining market power in the natural gas storage market. *See* Order 678 Rulemaking P 56 (finding that oil pipeline market-based rate cases reflect "the specific competitive circumstances affecting oil pipelines," including that oil pipelines are common carriers operating in a different regulatory context, and that they compete not only with other oil pipeline providers but also other modes of delivering oil such as rail, barges and trucks). While not cited by ANR Storage, this Court's decision in *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012), overturning Commission orders denying market-based rates to an oil pipeline, is also factually inapposite; the oil pipeline found to lack market power in that case was a new market entrant with only three percent of the product market. *See id*. at 1103.

C. The Commission's Conclusions Regarding ANR Storage's Competitive Alternatives Were Reasonable.

1. ANR Storage Failed To Demonstrate That A Sufficient Quantity of Intrastate Storage Providers Would Switch To Interstate Service To Check An Anticompetitive Price Increase.

ANR Storage identified 19 entities providing storage services that it regarded as good competitive alternatives to its own interstate storage and that of its TransCanada affiliates. *See* Initial Decision P 493, JA 150. A number of these storage facilities were owned by or affiliated with local distribution companies in the United States and Ontario, and were entirely or largely devoted to providing

local service to retail loads rather than interstate service. *Id*.; Opinion 538 PP 185-210, JA 253-60 (discussing each alternative).

The Commission permitted ANR Storage to include this capacity as competitive alternatives in calculating the market metrics.[5] The Commission found it appropriate to include intrastate storage providers both because the use of existing intrastate storage could reduce the overall demand for interstate storage, Opinion 538 P 108, JA 221, *see* ANR Storage Brief at 38-51, and because intrastate sellers lacking federal authorization to sell in the interstate market could obtain such authority quickly and easily. Opinion 538 P 107, JA 220. *See* ANR Storage Brief at 51-57. Further, the Commission found that "capacity reserved for customers behind city gates should not be eliminated from the relevant market," Opinion 538 P 208, JA 259, because "intrastate storage that had been committed could be released, sublet, assigned or otherwise used to serve a different entity." *Id*. P 162, JA 244.

Nevertheless, to prove a lack of market power, the Commission found that ANR Storage must demonstrate an effect on both demand and supply sufficient enough to check a potential exercise of market power by ANR Storage. Rehearing Order P 37, JA 289; Opinion 538 PP 219-20, JA 262. ANR Storage failed to

[5] The Commission affirmed the Initial Decision's exclusion of one entity, NGO Transmission, Inc. *See* Opinion 538 P 200, JA 257.

establish that the effect of intrastate storage on demand alone was sufficient to check ANR Storage's market power. Rehearing Order P 37, JA 289. With regard to the effect on supply, ANR Storage failed to show that enough capacity would shift from intrastate to interstate service to discipline an anticompetitive price increase by ANR Storage. *Id*.

A significant number of potential competitors were intrastate storage providers with state-mandated service obligations (or Canadian providers with local retail service obligations). *See* Opinion 538 PP 186-210, JA 253-60 (reviewing individual proposed alternatives); Initial Decision P 94, JA 30 (citing NSP-1 at 16, JA 1301) (in-state storage facilities are often owned by local distribution companies or their affiliates, who hold most of the capacity to serve the demands of firm distribution customers, and are often subject to state regulatory limitations on moving gas into the interstate market). For these facilities to check ANR Storage's market power by increasing interstate supply, a substantial number of them would have to shift capacity currently being used for local service to interstate service. Opinion 538 P 219, JA 262; Rehearing Order P 37, JA 289. "Any delay in these facilities almost uniformly shifting operations could prevent the market from disciplining ANR Storage's potential price increase." Opinion 538 P 219, JA 262.

The Commission reasonably found it speculative whether "a significant number of alternatives would make themselves available in response to an anti-competitive price increase by [ANR Storage]." Opinion 538 P 5, JA 179. *See, e.g.*, Order 678 Rulemaking P 13 (recognizing that local distribution companies can only make available capacity that is not needed to meet state-mandated service obligations for captive retail customers). "While each facility is theoretically a good alternative to [ANR Storage], the requirement that a substantial number of them all enter the interstate market with available capacity in order to discipline [ANR Storage] is concerning." Opinion 538 P 219, JA 262. That intrastate competitors could quickly obtain federal authorization to provide interstate service, ANR Storage Brief at 51-57, does not answer the question whether such entities, which are fully or largely dedicated to serving retail load, could be expected to switch their capacity to interstate service in sufficient numbers to check an anti-competitive price increase by ANR Storage. *See* Rehearing Order P 37, JA 289.

2. The Commission's Determination Was Supported By Substantial Evidence.

ANR Storage contends that the Commission found a substantial number of intrastate competitors "without evidentiary support" and without "any quantification of what 'a substantial number' amounted to." ANR Storage Brief at 31. This ignores that the Initial Decision PP 493-500, JA 150-63, and Opinion 538 PP 186-210, JA 253-60, engaged in an individualized, detailed analysis of each of

ANR Storage's proposed competitive alternatives, including the storage capacity available for each and the amount of that capacity reserved for local service or available to the interstate market.

ANR Storage asserts that only 12.8 percent of working gas capacity in the Central Great Lakes Market lacked federal authorization to sell in the interstate market. ANR Storage Brief at 37.[6] However, the Commission found that other of ANR Storage's competitive alternatives also transacted entirely or primarily in intrastate markets. Specifically, the Initial Decision and Opinion 538 found that the storage capacity of the following entities also was entirely or largely devoted to local service:

- **Integrys**: 35,137 MMcf of capacity of local distribution subsidiaries reserved to provide local service. Opinion 538 P 197, JA 256 (42,137 MMcf of total working gas capacity minus 7000 MMcf in interruptible service); Initial Decision PP 493, 499, JA 152, 160; NSP-6 at 18-22, JA 1325-29.

- **Nicor, Inc**.: 149,740 MMcf of local distribution company working gas capacity dedicated to in-state service. Opinion 538 P 201, JA 257; Initial Decision PP 493, 499, JA 153, 161; NSP-6 at 25-26, JA 1332-33.

[6] ANR Storage cites to Request of ANR Storage Company for Rehearing at 30 & n.114, JA 1458, which states that the 12.8 percent figure includes the working gas capacity for: Ameren (25,766 MMcf), CMS Energy Corp. (139,373 MMcf), NiSource (Northern Indiana Public Service Co.) (6982 MMcf), ProLiance (732 MMcf), Robinson Energy (925 MMcf), SEMCO Energy, Inc. (SEMCO Storage) (4865 MMcf) and Vectren (12,917 MMcf), for a total of 191,560 MMcf. The capacity figures are from Opinion 538, except for the modification of SEMCO capacity from the Rehearing Order P 32, JA 287.

- **DTE Energy**: 79,970 MMcf of the capacity of local distribution subsidiary unavailable to the interstate market. Opinion 538 PP 192-95, JA 255-56 (222,237 MMcf total working gas capacity minus 142,267 MMcf available to the interstate market); Initial Decision PP 493, 499, JA 151, 160; NSP-6 at 8-11, JA 1315-18.

- **Enbridge, Inc.**: 84,246 MMcf devoted to local service in Ontario. Opinion 538 P 196, JA 256 (100,946 MMcf total working gas capacity minus 16,700 MMcf available to the interstate market); Initial Decision PP 493, 499, JA 152, 160; NSP-6 at 16-18, JA 1323-25.

- **Spectra Energy (Union Gas)**: 128,095 MMcf of capacity devoted to local service in Ontario. Opinion 538 P 208, JA 259 (158,095 MMcf total working gas capacity minus the 30,000 MMcf of capacity the Initial Decision found to be available to interstate market); Initial Decision PP 493, 499, JA 155, 161; NSP-6 at 34-35, JA 1341-42.

Taking this additional capacity into account, intrastate or local service comprised 668,748 MMcf of capacity, or 51.05 percent of the total market capacity of 1,310,022 MMcf.[7] The 250,690 MMcf[8] of capacity attributable to the ANR Storage/TransCanada affiliates was another 19.13 percent of the market. Michigan

[7] This figure is the total market working gas capacity of 1,535,225 MMcf in Opinion 538 P 213, JA 260, minus the capacity of Dominion (63,120 MMcf) and NiSource (Ohio capacity) (162,083 MMcf), which were excluded from the market on rehearing as physically unavailable to ANR Storage customers. *See* Rehearing Order P 30, JA 286. NiSource also has 6982 MMcf of capacity in Indiana, owned by the Northern Indiana Public Service Co., which is physically available to ANR Storage customers. *See* Initial Decision P 493, JA 153; n.6 *supra*.

[8] This figure is the TransCanada working gas capacity of 247,490 MMcf from Opinion 538 P 209, JA 259, plus the additional 3200 MMcf of Eaton Rapids capacity added in the Rehearing Order. *See* Rehearing Order P 32, JA 287.

local production provided 57,839 MMcf of capacity to the market, or 4.42 percent of the market. Opinion 538 P 211, JA 260. This left 332,745 MMcf of working gas capacity, or 25.40 percent of the market, currently providing interstate service.

Thus, the Commission's conclusion regarding the predominance of intrastate storage as a competitive alternative to ANR Storage was amply supported by substantial evidence in the record. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784. Having weighed competing views and reached a determination based on adequate support in the record, the Commission fulfilled its statutory duty to engage in reasoned decision-making. *Id*.

ANR Storage points to the ability of Canadian (Enbridge and Spectra) and Michigan (DTE subsidiary Michigan Consolidated Gas Co. and CMS Energy subsidiary Consumers Energy Co.) local distribution companies to import and export gas from Canada. *See* ANR Storage Brief at 49-51; Request of ANR Storage Co. for Rehearing at 49-52, JA 2044-47. However, each of those alternatives is among the entities discussed above found to have significant, if not all, capacity devoted to local distribution service.

Further, ANR Storage argues that there are "economic drivers" in the market, including "rising Marcellus and Utica shale production," that would incent intrastate storage providers to shift to interstate service. ANR Storage Brief at 55-56. The Commission, however, affirmed the Initial Decision's rejection of this

evidence of changes in the industry as too speculative to affect the market metrics. *See* Opinion 538 P 242, JA 271; Initial Decision P 527, JA 171. Further, incentives to switch to interstate service do not address the limitations on companies whose capacity is all or largely devoted to mandated local distribution service.

3. Cases Purporting To Show The Commission Does Not Consider The Number Of Intrastate Alternatives In Granting Market-Based Rates Are Inapposite.

ANR Storage complains that the Commission had not in previous cases analyzed the number of intrastate storage providers included in the market metrics. ANR Storage Brief at 35-38. The cited cases, although numerous, do not support ANR Storage's claim that the Commission erred in considering the significant number of intrastate providers in ANR Storage's market metrics.

The Commission evaluates each application for market-based rates on a case-by-case basis. Rehearing Order P 38, JA 290; Opinion 538 P 135, JA 233. Here, the Commission explained, it applied "closer scrutiny" to the market analysis in this case based upon ANR Storage's 16.12 percent market share, which was the largest share of working gas capacity in the market. Opinion 538 P 215, JA 261; Rehearing Order P 35, JA 288.

In contrast, most of the cases ANR Storage cites, *see* ANR Storage Brief at 35-38, involved unopposed market-based rate applications for storage providers

with small market shares that did not require closer scrutiny. *See Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197 PP 40-41, 43 (2010) (unopposed application using two separate geographic markets, one where the applicant had market shares of 1.7 percent of working gas capacity and 2.7 percent peak day deliverability, and the second where the applicant had market shares of 3.3 percent working gas and 3.6 percent deliverability); *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095 PP 21, 23 (2009) (unopposed application with 3.3 percent market share of working gas capacity and 10.45 percent peak day deliverability), *vacated on other grounds*, 150 FERC ¶ 61,157 (2015); *Enstor Houston Hub Storage & Transportation, LP*, 123 FERC ¶ 61,019 PP 30, 40 (2008) (unopposed application with a combined 7.4 percent share of working gas capacity and 7.5 percent share of deliverability in production-area markets), *vacated on other grounds*, 143 FERC ¶ 61,236 (2013); *Bluewater Gas Storage, LLC*, 117 FERC ¶ 61,122 PP 18, 28 (2006) (unopposed application with a 2.6 percent market share in working gas capacity and 3.2 percent peak day deliverability), *reh'g granted on other grounds*, 117 FERC ¶ 61,351 (2006); *WPS-ESI Gas Storage, LLC*, 108 FERC ¶ 61,061 PP 7, 16 (2004) (unopposed application with less than one percent market share); *Cent. Okla. Oil & Gas Corp.*, 80 FERC ¶ 61,250 at 61,919-20 (1997) (unopposed application with market share of 3.04 percent working gas capacity and 4.51 percent deliverability).

In cases where market power issues were presented, as in *Koch Gateway Pipeline Co*., 66 FERC ¶ 61,385 (1994), the Commission found that further analysis was required not only to find that competitive alternatives are good alternatives, but also that they would be available in sufficient quantities to check an exercise of market power. *See id*. at 62,303. *Koch Gateway* concerned a contested application where the applicant had a market share of 11.9 percent of working gas capacity and 6.1 percent of storage deliverability. *Id*. at 62,303. The Commission observed that, to establish a lack of market power, Koch Gateway must not only demonstrate good alternatives to its service, but also show that the alternatives are "available in sufficient quantity to make Koch Gateway's price increase unprofitable." *Id*. at 62,299. *See also id*. at 62,303 (finding that, notwithstanding Koch Gateway's small market share, "[s]ome further analysis is prudent to ensure that the substantial alternate supply identified by Koch Gateway represents good alternatives for Koch Gateway's customers"). Koch Gateway demonstrated that a sufficient quantity of capacity could be made available in the market by showing that the minimum monthly figure for unutilized capacity in the relevant market was five times Koch Gateway's storage capacity. *Id*. "Thus, even if only 20 percent of the minimum unutilized storage were released, customers could replace all of Koch Gateway's capacity." *Id*. No comparable showing was made here.

Further, as the Initial Decision noted at P 456, JA 132, both *Koch Gateway* and *Gulf South Pipeline Co., LP*, 101 FERC ¶ 61,204 (2002) (unopposed market-based rate application with 11.8 percent market share of working gas),[9] concerned storage facilities located in the Gulf Coast producing region, which causes less concern about potential market power. *See* pages 31-33 *supra*. *See also Leaf River Energy Center, LLC*, 142 FERC ¶ 62,233 at 64,639-40 (2013) (unopposed application for expansion of storage facilities in the Gulf Coast production market with a 3.13 percent market share of working gas capacity and a 12.5 percent market share of peak day deliverability).

4. The Commission's Rulings On Rehearing Excluding Dominion, NiSource (Ohio Capacity) and Eaton Rapids From Good Alternatives Were Reasonable.

On rehearing, the Commission found that Dominion and NiSource (Ohio capacity) should be excluded from the good alternatives because they were physically unavailable to ANR customers, and that all of the Eaton Rapids capacity should be allocated to the ANR Storage/TransCanada affiliates. *See* Rehearing Order PP 30, 32, JA 286, 287. As the Commission had already found that ANR Storage failed to demonstrate a lack of market power, these determinations did not alter the Commission's conclusion, serving rather only to increase ANR Storage's

[9] Gulf South's market share is set forth in its April 12, 2002 Application, Exhibit I at 12, which can be found on elibrary at www.ferc.gov at Accession No. 20020415-0107.

market share from that determined in Opinion 538. *Id*. As ANR Storage did not seek reconsideration of the Rehearing Order, the Commission had no opportunity to directly address the arguments ANR Storage now makes on brief, but the arguments are, as demonstrated below, in any event without merit.

a. The Commission Reasonably Found Dominion And NiSource (Ohio Capacity) Were Not Good Alternatives As They Were Physically Unavailable To ANR Storage Customers.

The Initial Decision found that Dominion and NiSource (Ohio capacity) were not good alternatives because they were physically unavailable to ANR Storage's customers. Initial Decision P 493 (discussion of Dominion and NiSource), JA 151, 153. Although Dominion and NiSource are interconnected with ANR Pipeline, ANR Storage Brief at 58, the meter connections between ANR Pipeline and Dominion are set up to measure flows in one direction only, from ANR Pipeline into Dominion. Initial Decision P 493, JA 151 (citing TGS-1 at 8-9, JA 1371-72). Accordingly, gas cannot be physically withdrawn from Dominion's facilities and delivered into ANR Pipeline for delivery to ANR Storage's customers. *Id*. P 238, JA 72 (citing TGS-2 at 4, JA 1382). Likewise, the meters connecting ANR Pipeline with Columbia Gas Transmission, which is NiSource's pipeline affiliate, are also not bi-directional. *Id*. P 493, JA 153 (discussion of NiSource) (citing TGS-1 at 11-12, JA 1374-75). Moreover, the prevailing pressure at those points of interconnection is not sufficient to support deliveries into ANR

Pipeline, and the Columbia lines at some of those interconnections are too small to support delivery service to ANR's customers. *Id*. (citing TGS-1 at 11-12, JA 1374-75). The Initial Decision also found that, although ANR Storage witnesses had the opportunity at hearing to rebut the evidence concerning the physical unavailability of these facilities, ANR Storage failed to do so. Initial Decision PP 495-98, JA 157-59.

In Opinion 538, the Commission found that the changes needed to make these facilities physically available could occur quickly with minimal financial investment so they were still good alternatives. Opinion 538 PP 191, 202, JA 255, 257. However, on rehearing, the Commission concluded that there was inadequate record support for this finding, as ANR Storage provided no evidence on the anticipated costs of interconnecting these facilities. Rehearing Order P 30, JA 286. ANR Storage does not on brief demonstrate that it did in fact provide such evidence, and therefore no basis exists for overturning this determination.

ANR Storage points to the statement in Opinion 538 P 191, JA 255, that "Dominion is also available to customers through the use of exchanges." This observation was made in conjunction with the finding that Dominion could be easily and inexpensively physically interconnected; the Commission made no finding that accessibility through exchanges alone was sufficient to make Dominion a good alternative. *See id*. Evidence showed that displacement alone,

such as through exchanges, was not a viable replacement for physical service because such displacement would require natural gas to flow from ANR Pipeline into the NiSource or Dominion storage facility in a continuous and predictable quantity equal to the volumes to be displaced from the NiSource or Dominion facility for delivery off of ANR Pipeline. As there was no evidence that would occur, the reliability of such service was not comparable to that of ANR Storage. *See* Initial Decision P 237, JA 72 (citing TGS-2 at 3, JA 1381). *See also id*. P 104, JA 36 (discussion of Dominion) (delivery from Dominion by displacement is insufficiently reliable to meet the need for firm storage service). *See, e.g., Red Lake Storage, L.P*., 103 FERC 61,277 P 21 (2003) ("A theory of speculative potential exchange availability, unsupported by any evidence of the customer's costs imposed for use of such services or of the quality of such arrangements, offers nothing upon which we can reasonable rely as good alternatives and puts at risk the needs of Red Lake's storage customers.").

b. The Commission Reasonably Found Eaton Rapids Was Not A Good Alternative Because ANR Storage Failed To Rebut The Presumption Of Control.

ANR Storage owns 50 percent of the Eaton Rapids storage capacity and is responsible for marketing and operating the facilities. Opinion 538 P 205, JA 258. In the Policy Statement, the Commission stated that capacity on pipeline systems owned or controlled by the applicant's affiliates should not be considered among

the customers' good alternatives. Rehearing Order P 32, JA 287 (citing Policy Statement at 61,234 n.59). Traditionally, the Commission has found that a voting interest of 10 percent or more creates a rebuttable presumption of control. *Id*. (citing *WPS-ESI Gas Storage*, 108 FERC ¶ 61,061 P 14).

In Opinion 538, the Commission found that ANR Storage/TransCanada's 50 percent ownership interest in Eaton Rapids did not establish control because it was not sufficient to outvote SEMCO Energy's 50 percent share if it was held by a single entity, and it was unclear what entity or entities held the SEMCO share. Opinion 538 P 206, JA 259; Rehearing Order P 32, JA 287. Accordingly, the Commission attributed only half of the Eaton Ridge capacity to the ANR Storage/TransCanada market share. Opinion 538 P 206, JA 259. On rehearing, the Commission found that this holding improperly placed the burden of proof for establishing control on ANR Storage's customers. Rehearing Order P 32, JA 287. As ANR Storage failed to provide evidence concerning the ownership of the SEMCO share, ANR Storage did not overcome the presumption that a voting interest of 10 percent or more creates a rebuttable presumption of control, and the Commission allocated 100 percent of the Eaton Rapids capacity to ANR Storage/TransCanada. *Id*.

On brief, ANR Storage cites two pieces of evidence, neither of which even addresses let alone resolves the issue raised by the Commission. *See* ANR Storage

Brief at 60. Exhibit JIG-10, JA 1283, only concerns the ANR Storage/TransCanada ownership interest in Eaton Rapids. The Hearing Transcript at 628, JA 1416, likewise does not discuss the composition of SEMCO's ownership interest. In fact, that testimony established that unanimous consent of the partners is required to contract with third parties for Eaton Rapids capacity, which effectively gives ANR Storage veto power over any contracting opportunities. *See* Transcript at 626-28, JA 1414-16.

D. The Commission Reasonably Rejected ANR Storage's Arguments Regarding The Opinion 538 Calculation Of Market Metrics.

ANR Storage complains that Opinion 538 calculated the market metrics using the same data used in the Initial Decision, rather than updated data ANR Storage presented on rebuttal in ANR-116, JA 964. *See* ANR Storage Brief at 60-61. On rehearing, the Commission found that "[t]he numbers set forth in ANR-116, even if utilized by the Commission, would not materially change the ruling that ANR Storage failed to meet its evidentiary burden in this proceeding." Rehearing Order P 33, JA 287. The Commission pointed out that the market concentration index figures set forth in ANR-116 (969 for working gas and 1084 for daily deliverability) showed a higher market concentration than the figures calculated in Opinion 538 (951 for working gas and 1010 for daily deliverability). *Id*. (citing Opinion 538 P 213, JA 260). Similarly, while ANR Storage claims that Opinion 538 miscalculated the market concentration index, *see* ANR Storage Brief

at 60-61, those "corrected" figures also reflected a higher market concentration than those calculated in Opinion 538. *See* Request of ANR Storage Company for Rehearing at 14, JA 1442 (stating that the correct figures for the market concentration index in Opinion 538 should be 980 for working gas and 1042 for daily deliverability).

The Commission noted that the market share calculations in ANR-116 (14.92 percent for working gas and 14.28 percent in daily deliverability) were slightly lower than those in Opinion 538 (16.12 percent of working gas and 15.16 percent daily deliverability). Rehearing Order P 33, JA 288. However, "[t]hese slightly lower market shares set forth in ANR-116, even if accepted by the Commission, would not alter the rulings in Opinion 538." *Id*. Further, the Commission's determinations in the Rehearing Order, excluding Dominion, NiSource (Ohio capacity) and Eaton Rapids from the market metrics as good competitive alternatives, served only to further increase ANR Storage's market share and the market concentration from that calculated in Opinion 538. *See* Rehearing Order PP 30, 32, JA 286, 287.

E. The Commission Reasonably Rejected ANR Storage's Assertion That Other Factors Outweighed The Market Analysis And Justified Granting Market-Based Rate Authority.

Where the Commission's review of market metrics suggests significant market power, the Commission will evaluate other factors, such as ease of entry

into the market, to determine whether the other factors would suffice to mitigate the applicant's market power. Order 678 Rulemaking P 55. In Opinion 538, the Commission affirmed the Initial Decision determination that none of the other factors suggested by ANR Storage outweighed the determination in the market analysis that ANR Storage had failed to demonstrate that it lacked market power. Opinion 538 PP 5, 242, JA 179, 271.

ANR Storage argues that ease of entry into the Greater Central Great Lakes market would mitigate ANR Storage's market power. ANR Storage Brief at 61-63. The Commission reasonably affirmed the Initial Decision's conclusion that ANR Storage's arguments regarding ease of entry did not outweigh the results of the market analysis. Opinion 538 P 242, JA 271. As the Initial Decision found, there are two categories of ease of entry: (1) the geological suitability of the region for development of natural gas storage; and (2) the regulatory and economic conditions of the market. Initial Decision P 513, JA 167. Based on ANR Storage's evidence, the Initial Decision agreed with ANR Storage that the geographic market was geologically suited for gas storage. *Id.* P 514, JA 167. *See* ANR Storage Brief at 61-62 (arguing geological suitability).

However, as to the regulatory and economic conditions of the market, the Initial Decision concluded that the identity of recent market entrants demonstrates that entry into the Central Great Lakes Market is not easy for most potential market

participants. Initial Decision P 519, JA 169. Since 2000, five new storage projects had been constructed. *Id*. ANR Pipeline constructed three of the new storage projects, and DTE Energy, the second-largest market participant in the Central Great Lakes Market, constructed one project. Accordingly, only one project, Bluewater, had been constructed by a small independent company in the past 13 years. *Id*.

Construction of just five projects in 13 years does not demonstrate that the market is easy to enter. *Id*. The fact that the largest incumbent market participants – especially ANR Storage and its affiliates – developed 80 percent of the new projects implies that it is difficult for independent storage facilities to enter the market. *Id*. ANR Storage points to the increase in market working gas capacity between its original figures in ANR-7, JA 430-32, and the updated figures in ANR-116, JA 964-66. ANR Storage Brief at 63. Even assuming the Commission had chosen to accept the updated market information in ANR-116, a comparison of ANR-7 and ANR-116 suggests that the increase in capacity was substantially due to an increase in capacity at DTE Energy's existing Six Lakes facility, which does nothing to undermine the Administrative Law Judge's conclusion that market entry is difficult for all except the dominant incumbents of the market.

ANR Storage further complains that the Commission failed to consider its proposal to extend certain rate protections to existing customers with long-term

recourse rate contracts in the event that ANR Storage is awarded market-based rate authority. ANR Storage Brief at 64. While ANR Storage now describes this proposal as a "proposed mitigation measure," *id*., in ANR Storage's Petition for Declaratory Order Authorizing Market-Based Rates at 53-54, JA 346-47, in a section entitled "Implementation and Transition to Market-Based Rates Authorization," ANR Storage portrayed this proposal as a "transitional step" in the event that it was awarded market-based rates, not as mitigation in the event that it is found to have market power. *See id*. at 53.

Further, mitigation measures that will permit the award of market-based rates must prevent the exercise of market power. *See* Policy Statement at 61,230 (the Commission may deem market power mitigated only where "specified conditions are met that prevent the exercise of market power"). Cost-based recourse rates mitigate market power when they are available to all customers as an alternative to negotiated rates. *See id*. at 61,240. ANR Storage nowhere explains how transitional rate protections applicable only to certain existing contracts with certain existing customers would prevent ANR Storage from exercising market power with regard to other current or future contracts or other current or future customers.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

/s/ Lona T. Perry
Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory Commission
Washington, D.C. 20426
(202) 502-8334
lona.perry@ferc.gov

May 24, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,705 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ Lona T. Perry

Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel.: 202-502-8334
Fax: 202-273-0901
E-mail: lona.perry@ferc.gov

May 24, 2017

ADDENDUM

STATUTES
AND
REGULATIONS

TABLE OF CONTENTS

STATUTES: **PAGE**

gations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, § 3A, as added Pub. L. 109–58, title III, § 311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or

charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, §17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, §18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported

by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amend-ed [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85–791, § 19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, § 19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order

(1) Applicants providing service under subpart B or subpart G of this part must file a request for declaratory order and comply with the service and filing requirements of part 154 of this chapter. Interventions and protests to applications for market-based rates must be filed within 30 days of the application unless the notice issued by the Commission provides otherwise. An applicant providing service under subpart B or subpart G of this part cannot charge market-based rates under this subpart of this part until its application has been accepted by the Commission. Once accepted, the applicant can make the appropriate filing necessary to set its market-based rates into effect.

(2) Applicants providing service under subpart C of this part must file in accordance with the requirements of that subpart.

§ 284.503 Market-power determination.

An applicant may apply for market-based rates by filing a request for a market-power determination that complies with the following:

(a) The applicant must set forth its specific request and adequately demonstrate that it lacks market power in the market to be served, and must include an executive summary of its statement of position and a statement of material facts in addition to its complete statement of position. The statement of material facts must include citation to the supporting statements, exhibits, affidavits, and prepared testimony.

(b) The applicant must include with its application the following information:

(1) *Statement A—geographic market.* This statement must describe the geographic markets for storage services in which the applicant seeks to establish that it lacks significant market power. It must include the market related to the service for which it proposes to charge market-based rates. The statement must explain why the applicant's method for selecting the geographic markets is appropriate.

(2) *Statement B—product market.* This statement must identify the product market or markets for which the applicant seeks to establish that it lacks significant market power. The statement must explain why the particular product definition is appropriate.

(3) *Statement C—the applicant's facilities and services.* This statement must describe the applicant's own facilities and services, and those of all parent, subsidiary, or affiliated companies, in the relevant markets identified in Statements A and B in paragraphs (b)(1) and (2) of this section. The statement must include all pertinent data about the storage facilities and services.

(4) *Statement D—competitive alternatives.* This statement must describe available alternatives in competition with the applicant in the relevant markets and other competition constraining the applicant's rates in those markets. Such proposed alternatives may include an appropriate combination of other storage, local gas supply, LNG, financial instruments and pipeline capacity. These alternatives must be shown to be reasonably available as a substitute in the area to be served soon enough, at a price low enough, and with a quality high enough to be a reasonable alternative to the applicant's services. Capacity (transportation, storage, LNG, or production) owned or controlled by the applicant and affiliates of the applicant in the relevant market shall be clearly and fully identified and may not be considered as alternatives competing with the applicant. Rather, the capacity of an applicant's affiliates is to be included in the market share calculated for the applicant. To the extent available, the statement must include all pertinent data about storage or other alternatives and other constraining competition.

(5) *Statement E—potential competition.* This statement must describe potential competition in the relevant markets. To the extent available, the statement must include data about the potential competitors, including their costs, and their distance in miles from the applicant's facilities and major consuming markets. This statement must also describe any relevant barriers to entry and the applicant's assessment of whether ease of entry is an effective counter to attempts to exercise market power in the relevant markets.

(6) *Statement F—maps.* This statement must consist of maps showing the applicant's principal facilities, pipelines to which the applicant intends to interconnect and other pipelines within the area to be served, the direction of flow of each line, the location of the alternatives to the applicant's service offerings, including their distance in miles from the applicant's facility. The statement must include a general system map and maps by geographic markets. The information required by this statement may be on separate pages.

(7) *Statement G—market-power measures.* This statement must set forth the calculation of the market concentration of the relevant markets using the Herfindahl-Hirschman Index. The statement must also set forth the applicant's market share, inclusive of affiliated service offerings, in the markets to be served. The statement must also set forth the calculation of other market-power measures relied on by the applicant. The statement must include complete particulars about the applicant's calculations.

(8) *Statement H—other factors.* This statement must describe any other factors that bear on the issue of whether the applicant lacks significant market power in the relevant markets. The description must explain why those other factors are pertinent.

(9) *Statement I—prepared testimony.* This statement must include the proposed testimony in support of the application and will serve as the applicant's case-in-chief, if the Commission sets the application for hearing. The proposed witness must subscribe to the testimony and swear that all statements of fact contained in the proposed testimony are true and correct to the best of his or her knowledge, information, and belief.

§ 284.504 Standard requirements for market-power authorizations.

(a) Applicants granted the authority to charge market-based rates under § 284.503 that provide cost-based service(s) must separately account for all costs and revenues associated with facilities used to provide the market-based services. When it files to change its cost-based rates, applicant must provide a summary of the costs and revenues associated with market-based rates with applicable cross references to §§ 154.312 and 154.313 of this chapter. The summary statement must provide the formulae and explain the bases used in the allocation of common costs between the applicant's cost-based services and its market-based services.

(b) A storage service provider granted the authority to charge market-based rates under § 284.503 is required to notify the Commission within 10 days of acquiring knowledge of significant changes occurring in its market power status. Such notification should include a detailed description of the new facilities/services and their relationship to the storage service provider. Significant changes include, but are not limited to:

(1) The storage provider expanding its storage capacity beyond the amount authorized in this proceeding;

(2) The storage provider acquiring transportation facilities or additional storage capacity;

(3) An affiliate providing storage or transportation services in the same market area; and

(4) The storage provider or an affiliate acquiring an interest in or is acquired by an interstate pipeline.

§ 284.505 Market-based rates for storage providers without a market-power determination.

(a) Any storage service provider seeking market-based rates for storage capacity, pursuant to the authority of section 4(f) of the Natural Gas Act, related to a specific facility put into service after August 8, 2005, may apply for market-based rates by complying with the following requirements:

(1) The storage service provider must demonstrate that market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(2) The storage service provider must provide a means of protecting customers from the potential exercise of market power.

(b) Any storage service provider seeking market-based rates for storage capacity pursuant to this section will be presumed by the Commission to have market power.

ANR Storage Company v. FERC **Docket No. RP12-479**
D.C. Cir. No. 16-1285

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 24th day of May 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

Betsy Ryan Carr — EMAIL
BP Energy Company
Helios Plaza
201 Helios Way
Houston, TX 77079

Katherine B. Edwards — EMAIL
Edwards & Floom, LLP
1517 King St.
Alexandria, VA 22314

James Harrison Holt — EMAIL
Betts & Holt
1100 17th St., NW, Suite 901
Washington, DC 20036

Douglas F. John — EMAIL
Matthew Todd Rick
John & Hengerer
1730 Rhode Island Ave., NW, Suite 600
Washington, DC 20036-3116

William Michael Rappolt EMAIL
Kevin Siqveland
Mark F. Sunback
Kenneth L. Wiseman
Andrews Kurth LLP
1350 I St., NW, Suite 1100
Washington, DC 20005

Robert Irving White EMAIL
Squire Patton Boggs (US) LLP
2550 M St., NW
Washington, DC 20037-1350

/s/ Lona T. Perry
Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-8334
Fax: (202) 273-0901
Email: Lona.Perry@ferc.gov