

168 FERC ¶ 61,195
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

ANR Storage Company

Docket No. RP12-479-003

ORDER ON REMAND

(Issued September 26, 2019)

1. On September 21, 2018, the United States Court of Appeals for the District of Columbia Circuit (Court) issued an opinion in *ANR Storage Co. v. FERC*,¹ remanding the Commission's decision to reject ANR Storage Company's (ANR Storage) application for market-based rate authority for natural gas storage service.² Specifically, the Court held that the Commission failed to adequately justify treating ANR Storage differently from other storage companies in the region who were granted market-based rate authority, with specific reference to the storage affiliates of DTE Energy Company (DTE), and also failed to explain an apparent inconsistency in its characterization of competing facilities. As discussed below, upon reconsideration of the record in this proceeding, we grant ANR Storage's application for market-based rate authority.

I. Background

2. The general background of this proceeding is set forth in Opinion No. 538.³ Applying the Alternative Rate Policy Statement⁴ and related case law, Opinion No. 538

¹ 904 F.3d 1020 (D.C. Cir. 2018).

² *ANR Storage Co.*, 146 FERC ¶ 63,007 (2014) (Initial Decision); *ANR Storage Co.*, Opinion No. 538, 153 FERC ¶ 61,052 (2015); *ANR Storage Co.*, 155 FERC ¶ 61,279 (2016) (Rehearing Order).

³ Opinion No. 538, 153 FERC ¶ 61,052 at PP 6-11.

⁴ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (Alternative Rate Policy Statement), *order granting clarification*, 74 FERC ¶ 61,194, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*,

found that ANR Storage failed to meet its evidentiary burden to show that it lacked significant market power. Opinion No. 538 found that the relevant product market for its analysis is firm interstate storage, firm intrastate storage,⁵ and local production,⁶ but excluded interruptible service.⁷ Opinion No. 538 found that the geographic market is the Central Great Lakes region, consisting of Michigan, Illinois, Indiana, Ohio, and western Ontario.⁸

3. The Commission then reviewed the competitive alternatives by addressing “all three criteria for determining a good alternative: price, availability, and quality.”⁹ The Commission found that the Initial Decision incorrectly articulated tests in an overly specific manner.¹⁰ It explained that a review of alternatives should begin with a rebuttable presumption that “storage providers that are interconnected to, and in close proximity with, the applicant are adequately comparable in price.”¹¹ The Commission also expanded the scope of availability to include capacity that is committed under contract, but subject to capacity release, and to include intrastate capacity that lacked Part 284 certification but would otherwise qualify. Reviewing the third criteria of quality, the Commission found interruptible service should not count as a competitive alternative. Otherwise, the Commission found, there were no material disputes about the quality of competitive alternatives.

75 FERC ¶ 61,066 (1996), *petitions for review denied and dismissed sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998), *criteria modified*, *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220, (cross referenced at 115 FERC ¶ 61,343), *order on clarification and reh’g* Order No. 678-A, 117 FERC ¶ 61,190 (2006).

⁵ *Id.* P 108.

⁶ *Id.* P 110.

⁷ *Id.* P 78.

⁸ *Id.* PP 3, 132-141.

⁹ *Id.* P 155.

¹⁰ *Id.* P 160.

¹¹ *Id.* P 160 (citing *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385 (1994)).

4. After reviewing the evidence regarding market share, Opinion No. 538 calculated ANR Storage/TransCanada's market share as 16.12 percent of working gas and 15.16 percent for daily deliverables.¹² Using the Herfindahl-Hirschman Index (HHI) method of determining market concentration in the relevant product market in the Central Great Lakes region, the Commission calculated HHIs of 951 for working gas and 1,010 for daily deliverability.¹³ The Commission stated that the Alternative Rate Policy Statement established a threshold HHI of 1,800 to warrant closer scrutiny, and found that the "low HHIs in this proceeding indicate that customers have large quantities of good alternatives available."¹⁴ However, the Commission found that ANR Storage's "market share of 16.12 percent for working gas, however, requires closer scrutiny."¹⁵

5. The Commission discussed several cases in which the Commission approved market-based rates for applicants with market shares of 16 percent or higher, but distinguished them because "[it] is unquestioned that [ANR Storage] is the largest storage service provider in the market, with over 25,000 MMcf more working gas than its nearest competitor, DTE."¹⁶ Instead, Opinion No. 538 found that the most analogous case was *Red Lake*, in which the applicant had a similar market share, but "the market was highly concentrated, with HHIs of 8,167 and 6,816."¹⁷ While noting that ANR Storage's "market is not nearly as concentrated as that in *Red Lake*,"¹⁸ the Commission expressed concern that ANR Storage could still dominate its competitors. In particular, the Commission stated that even though it had "included intrastate facilities and facilities that were fully subscribed" when defining the relevant market, it doubted the ability of those facilities to actually "discipline a potential anticompetitive price increase by" ANR Storage, because of "the sheer number of facilities that would have to either (a) acquire a Part 284 certificate, and/or (b) release capacity."¹⁹ The Commission thus concluded that because of "the size of the applicant in relation to the market, the relative lack of current

¹² *Id.* P 213.

¹³ *Id.*

¹⁴ *Id.* P 214 (citing Alternative Rate Policy Statement, 74 FERC ¶ 61,076 at P 51).

¹⁵ *Id.* P 215.

¹⁶ *Id.* P 217.

¹⁷ *Id.* P 218 (citing *Red Lake Storage, L.P.*, 102 FERC ¶ 61,077 (2003) (*Red Lake*)).

¹⁸ *Id.* P 219.

¹⁹ *Id.*

competitors,” and ANR Storage’s status as an incumbent, ANR Storage had “not met its evidentiary burden to show it lacks significant market power.”²⁰

6. Finally, Opinion No. 538 ruled that none of the other, qualitative factors brought into evidence had a significant effect on the results of the market analysis.²¹

7. On rehearing, ANR Storage argued that the Commission erred in finding that it had not met its evidentiary burden to show it lacks significant market power. For instance, ANR Storage argued that the Commission erred in not giving enough weight to ANR Storage’s evidence that interruptible service provides a competitive alternative and that certain competitors’ capacity was not calculated correctly, both of which would lower the HHI. ANR Storage also argued that the Commission erred by failing to appropriately consider ANR Storage’s proposed mitigation measures.²² The intervenors who opposed ANR Storage also raised numerous points on rehearing.²³

8. The Commission denied ANR Storage’s request for rehearing. The Commission held that even if it accepted ANR Storage’s evidence and recalculations, it would only lower ANR Storage/TransCanada’s market share slightly – to 14.92 percent for working gas and 14.28 percent in daily deliverability – and therefore would not alter the rulings in Opinion No. 538.²⁴ ANR Storage also claimed that the Commission erred in stating that it was “the largest storage provider in the market,”²⁵ and that this misunderstanding “added an additional hurdle to ANR Storage’s burden.”²⁶ The Commission rejected the factual claim, holding that “ANR Storage is the incumbent and is the largest storage

²⁰ *Id.* P 220.

²¹ *Id.* P 242.

²² Rehearing Order, 155 FERC ¶ 61,279 at PP 5-7.

²³ The intervenors also sought rehearing on several issues. The Commission granted rehearing on two issues: (1) removing two competitors from the list of good alternatives, on the grounds that those two competitors were not directly interconnected with ANR Storage, *Id.* P 30; and (2) treating the Eaton Rapids storage facility that is partly owned by ANR Storage as though it were wholly owned by ANR Storage for the purpose of calculating market share, *Id.* PP 31-32.

²⁴ *Id.* P 33.

²⁵ *Id.* P 34 (citing Opinion No. 538, 153 FERC ¶ 61,052 at P 215).

²⁶ *Id.* P 35.

provider in the market,” and rejected ANR Storage’s interpretation of its effect, arguing that being the largest storage provider does not affect the applicant’s burden of proof, but rather acts to distinguish ANR Storage’s case from other applicants who were awarded market-based rate authority despite having a similar market share to ANR Storage, but were not the market leader.²⁷ Finally, the Commission rejected ANR Storage’s arguments that the Commission should grant its request for market-based rate authority because it has granted market-based rate authority to other storage companies with similar market shares on the grounds that “the Commission reviews applications for market-based rate authority on a case-by-case basis.”²⁸

II. ANR Storage Co. v. FERC

9. In *ANR Storage Co. v. FERC*, the Court set aside the Commission’s orders and remanded the proceeding for further proceedings consistent with the opinion. In particular, the Court identified two major errors: (1) the failure to address ANR Storage’s resemblance to DTE, which had previously received market-based rate authority for two storage affiliates in the same geographic market as ANR Storage;²⁹ and (2) inconsistencies about which competitors qualified as “good alternatives.”³⁰

10. The Court found that the Commission “barely even mentioned” ANR Storage’s attempt to compare itself to the two DTE affiliates that received market-based rate authority, MichCon and Washington 10, apparently on the grounds that those two applications were approved without substantive analysis because one was uncontested and the other was part of a settlement.³¹ The Court rejected this approach, ruling that the Commission “could not lawfully have granted MichCon market-based rate authority unless it concluded that the company lacked power in the relevant market,” and that furthermore, once faced with ANR Storage’s application, the Commission still had a “statutory duty—imposed by the [Administrative Procedure Act] and owed to all *other* regulated parties—to provide some reasonable justification for any adverse treatment relative to similarly situated competitors.”³² The Court noted that, on the record before

²⁷ *Id.*

²⁸ *Id.* P 38.

²⁹ *ANR Storage Co. v. FERC*, 904 F.3d 1020 at 1024-1025.

³⁰ *Id.* at 1027-1028.

³¹ *Id.* at 1025.

³² *Id.*

it, the DTE affiliates and ANR Storage appear very similar, with both companies offering the same service in the same geographic market, and “virtually indistinguishable with respect to their current market power,” with “ANR’s shares to be 16.12 percent of the market for working gas and 15.16 percent of the market for daily deliverability,” compared to, DTE’s market shares being “over 18 percent for working gas and 17 percent for daily deliverability,” at the time of DTE’s applications, and at the current time being “14.48 percent of the market for working gas and 18.02 percent of the market for daily deliverability.”³³ The Court directed the Commission to consider the issue of DTE’s affiliates on remand.

11. The Court also noted that Opinion No. 538 and the Rehearing Order were internally inconsistent as to whether intrastate storage and storage subject to capacity release qualified as good competitive alternatives. The Court found: “first, it included them in the relevant product market; second, it deemed them ‘good alternatives;’ but third, it deemed them not sufficiently good alternatives to constrain ANR’s exercise of market power.”³⁴ Early in Opinion No. 538, the Court noted, the Commission deemed intrastate and interstate storage reasonably interchangeable. Later in Opinion No. 538, however, the Commission “found ‘concerning’ the ‘sheer number’ of such facilities that would need to ‘enter the interstate market with available capacity’ in order to constrain ANR,” and cited this as a reason for concluding “that ANR had not proven a lack of market power.”³⁵ The Court recognized that it would be possible for the Commission to opine that “substitutability is a question of degree,” with intrastate and releasable capacity at some intermediate point, but found that the Commission had not articulated such a position, but rather had been “internally inconsistent.”³⁶ Accordingly, the Court directed the Commission to consider these points on remand as well.

12. The Court additionally rejected three other arguments raised in court as procedurally barred because they did not appear in the Commission’s orders. The Court acknowledged one argument, that when the DTE affiliates applied for market-based rate authority, their market power was checked because their largest competitor, ANR Storage, charged cost-based rates, but ANR Storage’s market power could not similarly be checked by DTE because DTE already was charging market-based rates. The Court commented that it “frankly doubt[s] that FERC may pick winners and losers in this

³³ *Id.*

³⁴ *Id.* at 1026.

³⁵ *Id.* at 1027.

³⁶ *Id.* at 1028.

way.”³⁷ The Court also acknowledged an argument that the Commission might have distinguished DTE’s affiliates, MichCon and Washington 10, because they were relatively smaller affiliates than ANR Storage but commented that “this rationale seems difficult to reconcile with FERC’s longstanding practice of attributing to each company the capacity of all affiliates.”³⁸ Finally, the Court acknowledged, without comment, an argument raised by intervenors that intrastate providers may not qualify as good competitive alternatives because non-Federal laws may restrict their ability to compete in interstate commerce.³⁹

III. Determination

13. Pursuant to the Alternative Rate Policy Statement, the Commission has developed a framework for evaluating requests by natural gas pipelines for authorization to charge market-based rates. This framework has two principal purposes: (a) to determine whether the applicant can withhold or restrict services and, as a result, increase price by a significant amount for a significant period of time; and (b) to determine whether the applicant can discriminate unduly in price or terms and conditions. To find that an applicant cannot withhold or restrict services, significantly increase prices over an extended period, or unduly discriminate, the Commission must find either that there is a lack of market power⁴⁰ because customers have good alternatives,⁴¹ or that the applicant or the Commission can mitigate the market power with specified conditions. The Commission performs the same analysis for section 311 or Hinshaw pipelines as it does for interstate Natural Gas Act pipelines.⁴²

³⁷ *Id.* at 1025-26.

³⁸ *Id.* at 1026.

³⁹ *Id.* at 1028.

⁴⁰ The Commission defines “market power” as “the ability of a pipeline to profitably maintain prices above competitive levels for a significant period of time.” *See* Alternative Rate Policy Statement, 74 FERC at 61,230.

⁴¹ “A ‘good alternative’ is 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 an applicant’s service.” *Golden Triangle Storage, Inc.*, 152 FERC ¶ 61,158, at P 10, n.7 (2015) (*Golden Triangle*).

⁴² *Arcadia Gas Storage, LLC*, 155 FERC ¶ 61,161, at P 6 (2016).

14. Consistent with the methodology provided by the Alternative Rate Policy Statement, the Commission's analysis of whether an applicant has the ability to exercise market power includes three major steps.⁴³ First, the Commission will review whether the applicant has specifically and fully defined the relevant markets to determine which specific products or services are identified, and the suppliers of the products and services that provide good alternatives to the applicant's ability to exercise market power.⁴⁴ Additionally, as part of this first step, the Commission will identify the relevant geographic market. Second, the Commission will assess the applicant's market share and market concentration. The Commission uses market share and HHI as screens in assessing whether a pipeline has the ability to exercise market power in defined product and geographic markets:

The Commission has used an HHI of 1,800 as an indicator of the level of scrutiny to be given to an applicant for market-based rates. The Commission has explained that an HHI at this level indicates that there are four or five good alternatives to the applicant in the relevant market. An HHI above 1,800, however, indicates a higher level of concentration and will cause the Commission to increase its scrutiny of other factors including the applicant's market share, ease of entry into the market, the relative size of the applicant's capacity, and the sustainability of a potential attempt by the applicant to exercise market power.⁴⁵

15. In cases where the HHI was higher than 1,800, the Commission has performed further review to determine whether other competitive factors nevertheless will prevent the applicant from being able to exercise market power.⁴⁶ The Alternative Rate Policy Statement recognizes that having a large market share in a concentrated market does not constitute market power if ease of entry and other competitive factors can prevent the

⁴³ *Id.* P 7.

⁴⁴ "The relevant product market consists of the applicant's service and other services that are good alternatives to the applicant's services." *Golden Triangle*, 152 FERC ¶ 61,158 at P 11, n.8.

⁴⁵ *Worsham-Steed Gas Storage, L.P.*, 119 FERC ¶ 61,128, at P 17 (2007).

⁴⁶ See, e.g., *UGI Storage Co.*, 133 FERC ¶ 61,073 (2010); *Arlington Storage Co., LLC*, 125 FERC ¶ 61,306 (2008); *Rendezvous Gas Services, L.L.C.*, 112 FERC ¶ 61,141 (2005).

applicant from exercising significant market power.⁴⁷ Third and lastly, the Commission will evaluate other relevant factors such as ease of entering the market.

16. In the relevant product market in the Central Great Lakes region, the Commission calculated HHIs of 951 for working gas and 1,010 for daily deliverability.⁴⁸ These numbers indicate an unconcentrated market. While the 1,800 HHI screen is not dispositive, in cases where market concentration numbers are this far below 1,800, the Commission would deny a storage facility's application only upon a showing that the applicant itself is in an unusual position of power in this otherwise unconcentrated market.

17. We continue to believe that an unusually dominant applicant should warrant higher scrutiny despite a low HHI. Nonetheless, based on our review of the record we find that the Commission erred in Opinion No. 538 by considering ANR Storage as an unusually dominant applicant. With DTE included in the comparison, ANR Storage's position is not the "unquestioned"⁴⁹ market leader. As the Court noted, ANR Storage holds 15.16 percent of the market for daily deliverability, which is less than DTE's 18.02 percent.⁵⁰ Because Order No. 538 also found that none of the qualitative factors affected its analysis, we conclude that ANR Storage is not more dominant in the Central Great Lakes natural gas storage market than DTE.

18. As the Court noted, the fact that the applications from DTE's storage affiliates took the form of an unopposed application and an unopposed settlement "fails to provide any reasonable justification for treating ANR and DTE differently," because the Commission cannot lawfully grant an unopposed application for "market-based rate authority unless it concluded that the company lacked power in the relevant market."⁵¹ Reviewing again the record in those two DTE cases and our case law, we find nothing anomalous that would require us to reconsider our orders granting market-based rate authority to DTE's storage affiliates. In both the DTE cases and in the instant ANR Storage case, we find that a natural gas storage market in which the two strongest competitors each holds roughly one-sixth of the market, and each has an HHI that is

⁴⁷ See Alternative Rate Policy Statement, 74 FERC at 61,234; *Golden Triangle*, 152 FERC ¶ 61,158 at P 11, n.10.

⁴⁸ Opinion No. 538, 153 FERC ¶ 61,052 at P 213.

⁴⁹ *Id.* P 216.

⁵⁰ *ANR Storage Co. v. FERC*, 904 F.3d 1020 at 1025.

⁵¹ *Id.*

barely one-half of our usual screen for market concentration, does not exhibit the quantitative signals that a grant of market-based rate authority could lead to the potential to exercise market power. We further uphold Opinion No. 538's holding that the qualitative evidence on the record does not significantly affect our analysis in this particular case. Therefore, we find that ANR Storage has met its burden of proof, and we grant its request for market-based rate authority.

19. We also clarify the apparent inconsistencies that the Court found in the Commission's statements about whether intrastate facilities and facilities that were fully subscribed could serve as good competitive alternatives. Our regulations state that "proposed alternatives may include an appropriate combination of other storage, local gas supply, LNG, financial instruments, and pipeline capacity."⁵² While it is up to the applicant to demonstrate that each competitive alternative (which may include intrastate facilities and capacity release) is "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," as a class these alternatives qualify as good alternatives.

20. To the extent that the Commission was expressing concern about the relative size of the competitors, we reaffirm that this is a factor in our analysis. It may be the case that a rival facility is too small to effectively compete for business, for instance if a shipper's requirements are larger than the facility can handle. Such facilities may be good enough alternatives to merit inclusion in a review of the relevant market, but not good enough to realistically check a larger competitor's ability to raise prices.

21. We find that the analysis was inconsistent, however, to the extent that it suggested that intrastate competitors are less viable alternatives than interstate competitors. The most salient legal difference between the two types of facilities is that it is easier for an intrastate facility to enter the market as a Commission-jurisdictional facility than it is for an interstate facility, because only the latter are subject to the NGA section 7 certification process. Accordingly, there should be less concern about any regulatory barriers preventing intrastate competitors from effectively competing against a market-based rate facility. Once an intrastate facility has Commission certification, it is, for the purpose of market-based rate applications for natural gas storage, the same as an NGA facility.⁵³ Before the Court, intervenors argued that intrastate providers may not qualify as good competitive alternatives because non-Federal laws may restrict their ability to compete in interstate commerce.⁵⁴ However, the record evidence, restated in Opinion No. 538,

⁵² 18 C.F.R. § 284.503(b)(4) (2019).

⁵³ *See Arcadia Gas Storage, LLC*, 155 FERC ¶ 61,161 at P 6.

⁵⁴ *Id.* at 1028.

demonstrates that intrastate providers, as a class of competitors, are “available soon enough, have a price low enough, and have a quality high enough to permit customers to substitute the alternative for the applicant’s service.”⁵⁵ The record shows that even if these non-Federal impediments may slow a particular competitor, they can still react “soon enough to potentially discipline any attempt by [ANR Storage] to raise prices above competitive levels.”⁵⁶ Accordingly, we find both that intrastate competitors, as a class, are eligible to qualify as good competitors under Commission policy, and that the record shows that the actual intrastate competitors of ANR Storage do indeed qualify as good competitors in this particular case.

22. Likewise, we find Opinion No. 538 was inconsistent to the extent that it suggested that capacity release is a less viable form of competition. The Commission has found that the “institution of capacity release created competition between shippers and the pipeline with respect to unused capacity,” and that pipelines respond to that increased competition by discounting prices.⁵⁷ These classes of competition, we conclude, meet the definition of good alternatives. Applied to the facts of ANR Storage’s application, we find that the fact that much of ANR Storage’s competition comes from intrastate facilities and from capacity release at interstate facilities does not mean that the market is less competitive than the quantitative analysis in the underlying order indicates.

The Commission orders:

(A) We grant ANR Storage’s application for market-based rate authority, effective as of the date of this order.

(B) If ANR Storage elects to provide storage at market-based rates it must make a compliance filing via eTariff revising its tariff accordingly.

(C) If ANR Storage elects to provide service at market-based rates, it must notify the Commission, as required by section 284.504(b) of the Commission’s regulations, if future changes in circumstances affect its market power status. ANR

⁵⁵ Opinion No. 538, 153 FERC ¶ 61,052 at P 142.

⁵⁶ Opinion No. 538, 153 FERC ¶ 61,052 at P 163.

⁵⁷ *Policy for Selective Discounting by Nat. Gas Pipelines*, 111 FERC ¶ 61,309, at P 5 (2005).

Storage must notify the Commission within 10 days of acquiring knowledge of any such changes. The notification must include a detailed description of the new facilities and their relationship to ANR Storage.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.