

make the appropriate determination of whether there is a lack of market power.”² NGSA expressed concern over the Commission’s proposed modification of the market power test to incorporate non-storage substitutes, such as pipelines and LNG terminals, in the threshold market power analysis, noting that the Commission itself previously has stressed the differences in terms of price regulation between storage and transportation. Specifically, NGSA emphasized the potential for “unwarranted and unsupported extrapolation” of the NOPR proposals to other non-storage situations.³

Simply put, there are no good substitutes for storage. The primary purpose served by storage hinges on timing and certainty, which is difficult if not impossible to replicate from any other source. Unlike other suggested “alternatives,” storage allows the industry (or storage customers) to match supply, which is relatively stable and predictable over time, with demand, which can be highly variable and uncertain over time. In periods when demand exceeds supply, storage is absolutely necessary to allow supply to meet demand without interruption. Producing fields cannot be efficiently “cycled” or “switched on” to match production with demand requirements at any given time. Similarly, LNG imports cannot be expected to arrive at precisely those times when demand is high and the supply is required.

Moreover, transportation capacity (whether firm or released) is no substitute for storage in the aggregate total. In periods of low demand, transportation can only serve to deliver excess supplies from one region to another, where one would have to presume that either more storage is available or demand is sufficient to require those supplies. For these reasons, NGSA is highly suspect of how one can show that these proposed alternatives could substitute for the services provided by storage.

² *Rate Regulation of Certain Underground Storage Facilities*, Docket No. RM05-23-000, “Comments of the Natural Gas Supply Association,” at p. 22 (filed Feb. 27, 2006).

³ *Id.* at 26.

INGAA has proposed changes that go well beyond what is necessary to provide incentives for new storage development. Instead, its comments seek to expand exponentially the scope of the Commission's NOPR by relaxing the long-standing market power test and attempting to broaden unnecessarily the opportunities for and likelihood of market-based rates. INGAA's proposals are an obvious and undisguised effort to make it easier for existing storage and pipelines to pass the market power test. INGAA's proposals include: (1) the amendment of the proposed regulations to eliminate the requirement that the capacity of a market-based rate applicant's affiliates is automatically to be included in the market share calculated for the applicant; (2) the adoption of a Herfindahl-Hirschman Index ("HHI") level of 2500 rather than the 1800 the Commission long-employed as a benchmark for measuring market concentration; and (3) the elimination of the proposed automatic 5-year market power review under 18 C.F.R. § 284.504 for storage operators that have demonstrated they lack market power. Moreover, INGAA also has asserted positions in its comments that extend the scope of those requirements enacted by EPart well beyond the intended bounds, specifically urging the Commission to give § 312 an improperly broad interpretation that would include new storage capacity that results from the expansion of existing fields or reservoirs, and arguing for the elimination of the threshold presumption that an applicant has market power.⁴

NGSA does not respond here to all of these specific assertions and proposals, as it believes that this proceeding is neither the appropriate time nor place for such extraneous arguments. In fact, INGAA's proposals confirm that making any changes to the current market power test will only open up a Pandora's Box with regards to the application of that test. Undoubtedly, any modification of the current market power test would place the natural gas industry on the precipice of a very slippery slope. Just as new storage developers would seek to

⁴ See NGSA Initial Comments at pp. 6-7.

use the modified market power test, so too would pipelines attempt to apply the new test in other unsuitable contexts. NGSAs also is concerned that in asking FERC to eliminate the rebuttable assumption that an applicant has market power, INGAA not only fails to assist FERC in its mandate to mitigate market power, but actually weakens any protections by inappropriately placing the burden of proof on the storage provider's customers. Again, this proceeding, which is intended to encourage the development of new underground storage facilities, is not the proper vehicle for INGAA to raise such dramatic changes to the existing market power test. These types of wholesale changes should not be permitted, and certainly should not be considered in the context of a proceeding specifically aimed at encouraging additional underground storage facilities.

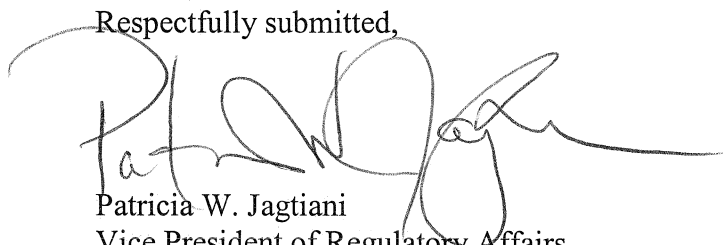
Moreover, NGSAs strongly believes that such a liberalization of the market power test would not be consistent with the Commission's larger regulatory philosophy to protect the public interest and urges the Commission to refrain from broadening the rule in a manner that virtually negates the law under EPAct. As noted in NGSAs's initial comments, the existing market power test has been working effectively for years and has provided certainty and predictability in developers' efforts to obtain market-based rates. As if this circumstance is not enough, Congress, by means of Section 312 of EPAct, has provided the Commission with an important, additional procedure to encourage the development of new storage facilities. It is exactly that predictability that provides the most solid foundation for storage infrastructure development. Sacrificing that predictability and well-established law under the traditional market power test, all in the name of "more storage," is unsupportable, especially when no detriment has been shown by the existing structure. The Commission's obligation is to mitigate harm to the rate payers, and thus the Commission should be cautious not to over-reach its statutory mandate.

Again, NGSА respectfully urges the Commission to recognize the far-reaching impacts of its proposal to modify the market power test. The Commission must not be persuaded by arguments that combine and confuse separate issues and that have the intent of obtaining much more than market-based rates for new storage facilities. Moreover, the Commission appears to have reached far beyond its stated goal of encouraging investment in new storage facilities, as well as beyond what is required or intended by Congress for storage developers to attain market-based rates. For this reason, we ask the Commission to stick to its stated goal and refrain from diminishing critical customer protections by unnecessarily modifying its well-established market power test.

CONCLUSION

As in its initial comments, NGSА here requests that the Commission move forward with implementation of the new EРAct provisions regarding the development of new storage facilities as suggested herein and convene a technical conference to develop the specific details of implementation. Moreover, as discussed above, NGSА urges the Commission to refrain from making proposed changes to liberalize the traditional market power test.

Respectfully submitted,



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