

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Rate Regulation of Certain) Docket Nos. RM05-23-000
Natural Gas Storage Facilities) and AD04-11-000

**SUPPLEMENTAL COMMENTS AND
REQUEST FOR CLARIFICATION AND/OR REHEARING
OF THE NATURAL GAS SUPPLY ASSOCIATION, AMERICAN
PUBLIC GAS ASSOCIATION, PROCESS GAS CONSUMERS GROUP
AND AMERICAN FOREST & PAPER ASSOCIATION**

Pursuant to Section 19(a) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(a)(1994), and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.713 (2005), the Natural Gas Supply Association, American Public Gas Association, Process Gas Consumers Group and American Forest & Paper Association (collective referred to as “Petitioners”), hereby seek clarification and/or rehearing of the Commission’s Final Rule, Order No. 678, issued June 19, 2006, in this proceeding.¹ In support hereof, Petitioners state as follows:

I. Summary

The Final Rule sets forth criteria that the Commission will use in evaluating applications for market-based rates where the applicant can demonstrate a lack of market power. In that regard, the Final Rule modified the traditional market power analysis to include non-storage products in an expanded definition of the relevant product market. In addition, the Final Rule implements new NGA Section 4(f) enacted as part of the Energy

¹ *Rate Regulation of Certain Natural Gas Storage Facilities*, 115 FERC ¶ 61,343 (2006)(“Order No. 678”).

Policy Act of 2005 (“EPAAct 2005”).² Section 312 of EPAAct 2005 authorized the Commission to grant market-based rates for new storage capacity at new facilities, notwithstanding the fact that the storage provider could not show that it lacks market power. This provision contained several important consumer protections, however, including limiting the applicability of the provision, requiring adequate measures to protect storage customers, and requiring periodic review on the part of the Commission. The stated purpose of the Final Rule was to facilitate the development of new natural gas storage capacity while protecting customers.

Petitioners strongly support the Commission’s efforts to encourage infrastructure investments to meet existing and future natural gas demand and to make the natural gas market more efficient. In the end, however, the Final Rule needs to go further in providing adequate protections for customers. Petitioners, therefore, request that the Commission grant rehearing and modify the Final Rule as set forth herein to fulfill its statutory mandate under the NGA to protect customers from the exercise of market power.³

On rehearing, the Commission should take the following measures to afford greater protections to storage service customers:

- (1) find that non-storage products, such as local gas production, LNG suppliers and pipeline capacity under the expanded market power analysis, are not good alternatives for customers that use storage service to physically store gas;

² Energy Policy Act of 2005, Pub. L. No. 109-58 § 312, 119 Stat. 594, 688 (Aug. 8, 2005)(codified at Natural Gas Act § 4(f), 15 U.S.C. § 717c(f)).

³ See *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)(“The primary aim of [the NGA] was to protect consumers against exploitation at the hands of natural gas companies.”); see also, *Atlantic Ref. Co. v. Public Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959)(“The [NGA] was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.”).

(2) in the alternative to (1) above, clarify that a market-based rate applicant using a market power analysis that includes non-storage products must show that such products are good alternatives for all customers, including customers that use storage services to physically store gas;

(3) clarify that in order for a non-storage product to be considered a good alternative, it must be available for customers that use storage service to physically store gas during the periods in which such customers seek to inject gas, not just during peak demand periods;

(4) find that storage providers cannot obtain market-based rate authority under the expanded market power analysis for services from existing facilities;

(5) in the alternative, clarify that customers of existing storage facilities that obtain market-based rate authority would have the option of having their cost-based contracts grandfathered or being given an early termination right;

(6) require all storage providers with market-based rates that have a ten percent or greater market share to file updated market power analyses every five years;

(7) interpret new NGA Section 4(f) to apply only to new storage caverns, reservoirs or aquifers;

(8) in the alternative to (7) above, explicitly require applicants under new NGA Section 4(f) to show that market-based rate authority will not adversely impact existing customers or provide an existing storage facility a competitive advantage over other storage providers if the expansion is subsidized at the expense of existing customers;

(9) require applicants under new NGA Section 4(f) to report at least every five years on the adequacy of the customer protections put into place as a condition of market-based rate authority.

II. Background

In Section 312 of EAct 2005, Congress amended the NGA to add Section 4(f) authorizing the Commission to grant market-based rates for new storage capacity at new facilities, notwithstanding the fact that the storage provider cannot show that it lacks market power, if the Commission determines that market-based rates are in the public interest and necessary to encourage the construction of storage capacity in the area needing storage services.⁴ New NGA Section 4(f) includes important customer protections including limiting the applicability of the provision to “new storage capacity related to a specific facility placed in service after the date of enactment.”⁵ New NGA Section 4(f) also requires the Commission to determine that customers would be adequately protected before granting market-based rates and affirmatively directed the Commission to review periodically the market-based rates.

⁴ EAct 2005 § 312 added a new § 4(f) to the NGA as follows:

(f)(1) In exercising its authority under this Act 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 the date of enactment of the Energy Policy Act of 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.

⁵ *Id.*

On December 22, 2005, the Commission issued a Notice of Proposed Rulemaking in this proceeding, the stated purpose of which was to facilitate the expansion of gas storage capacity while continuing to protect customers from the exercise of market power.⁶ In the NOPR, the Commission went beyond the mandates of EAct 2005 and proposed to broaden the entities that may obtain market-based rates for storage services by expanding the definition of the products that would be considered good alternatives to the storage services offered by the applicant to include such non-storage products as local gas production, LNG supplies and pipeline capacity. The Commission reasoned that competition for storage may come from the ability to deliver gas into the same market as the storage facility.⁷ The NOPR set forth specific filing procedures for applicants seeking market-based rate authority, and required storage providers with market-based rates to file updated market power analyses every five years.⁸

The NOPR also proposed to implement EAct 2005 § 312 by proposing that only new storage caverns, reservoirs or aquifers, and not expansions of existing storage facilities, would qualify for market-based rates under new NGA Section 4(f). The Commission reasoned as follows: new NGA Section 4(f) provides that market-based rates may be available for “new storage capacity related to a specific facility placed in service after the date of enactment;” the phrase “placed in service after the date of enactment” modifies “facility” and not “capacity;” and interpreting the term “facility” to include a new cavern, reservoir or aquifer, as opposed to an existing storage facility, was

⁶ *Rate Regulation of Certain Underground Storage Facilities*, 70 Fed.Reg. 77,079 (Dec. 29, 2005), IV FERC Stats. & Regs., Proposed Regs. ¶ 32,595 at P 3 (Dec. 22, 2005)(“NOPR”).

⁷ *Id.* at P 25.

⁸ *Id.* at PP 32-34.

most consistent with the wording of new NGA Section 4(f).⁹ The NOPR also proposed to require applicants for market-based rates under new NGA Section 4(f) to propose customer protection measures but did not specify any particular measures that must be adopted. Finally, with regard to periodic review, the NOPR proposed not to impose any formal review process but to rely on monitoring of storage reports by both the Commission and storage customers. The Commission asserted that “it must balance the benefits of additional options new storage will bring to wholesale customers against the burdens of various forms of periodic review.”¹⁰

Numerous comments were filed arguing, among other things, that the Commission should focus its attention on properly implementing EAct 2005 and not engaging in an unnecessary effort to revise the traditional market power analysis, which has been proven to be both flexible and successful in allowing for the development of new storage capacity. Several commenters argued that the non-storage products included in the proposed expanded market power analysis would not provide storage customers with equivalent services and should not be considered good alternatives to storage service. Commenters further believed that the Commission should apply the new market power test only to new storage projects.

With regard to implementation of EAct 2005, commenters supported the Commission’s interpretation arguing that new NGA Section 4(f) should not apply to expansions of existing storage facilities. Commenters also argued that the Commission should include a mechanism for periodic review of market-based rates as required by the statute, pointing out the illogic of requiring updated market power analyses every five

⁹ *Id.* at PP 36-37.

¹⁰ *Id.* at P 48.

years for applicants that have been shown not to have market power but not requiring applicants under new NGA Section 4(f) that are presumed to have market power to report at all.

The Commission issued the Final Rule in this proceeding on June 19, 2006. The Final Rule continues to permit market-based rate applicants to show that they lack market power with respect to the provision of storage services based on the presence in the relevant markets of non-storage products such as local gas production, LNG supplies and pipeline capacity.¹¹ In the Commission's view, "[f]rom an end-use customer's perspective, gas is fungible, whether it comes from storage, local production or more distant supplies transported by pipelines."¹² The Final Rule requires a market-based rate applicant to show that during peak demand periods, storage customers will be able to choose the non-storage products as a comparable substitute for the storage services offered by the applicant.¹³ Over the objections of some commenters, the Final Rule explicitly permits existing storage providers to seek market-based rate authority using the modified market power analysis.¹⁴ Further, the Final Rule reverses its determination regarding updated market power analyses, determining not to impose any generic five-year reporting requirement but concluding that for storage providers with a market share greater than ten percent, a reporting requirement may be imposed in individual cases as the specific facts and circumstances warrant.¹⁵

With regard to implementing new NGA Section 4(f), the Final Rule similarly reversed its original interpretation to conclude that expansions of existing storage

¹¹ Order No. 678 at 25.

¹² *Id.* at P 26.

¹³ *Id.* at P 48.

¹⁴ *Id.* at P 39.

¹⁵ *Id.* at PP 90-91.

facilities could qualify for market-based rate treatment. The Final Rule considered the meaning of new NGA Section 4(f) to be ambiguous and interpreted the term “facilities” broadly to encompass everything for which a natural gas company must obtain a certificate.¹⁶ The Final Rule continues to leave to the discretion of the applicant what customer protection measures would be appropriate.¹⁷ Finally, the Final Rule rejects any formal periodic review requirement, holding instead that monitoring of storage reports by the Commission and storage customers satisfies the statutory requirements.¹⁸

III. Specifications Of Error

1. The Final Rule erred in considering only the perspective of downstream consumers, and not how storage service customers actually use storage services, and erroneously concluded that local production, LNG supply, and pipeline capacity may be considered good alternatives to the ability to physically store gas;
2. The Final Rule erred in ruling, arbitrarily, capriciously and contrary to law, that storage providers may seek market-based rate authority under the expanded market power analysis for services from existing storage facilities;
3. The Final Rule erred in failing to consider the impact of allowing existing storage facilities under cost-of-service rates to seek market-based rate authority under the expanded market power analysis on the allocation of contract risks between the storage providers and existing storage service customers, including the impact on the rights-of-first-refusal in such contracts;
4. The Final Rule erred in effectively altering the terms of existing storage customers’ contracts without complying with the requirements of NGA Section 5;
5. The Final Rule arbitrarily, capriciously and without record support eliminated, except in individual cases, any requirement of periodic review of market power, potentially subjecting customers to the exercise of market power;
6. The Final Rule erred in interpreting, contrary to the plain language and legislative history of the statute, the term “facilities” in new NGA section 4(f) to include expansions of existing storage projects;

¹⁶ *Id.* at P 115.

¹⁷ *Id.* at P 153.

¹⁸ *Id.* at P 172-77.

7. The Final Rule erred, contrary to the express language of new NGA Section 4(f), in relying on monitoring of existing reports instead of requiring periodic review to support continued market-based rate authority.

IV. Statement Of Issues

1. Whether the Commission should consider not only the perspective of downstream consumers, but also the perspective of the storage service customers that actually use storage services, *i.e.*, to physically store gas, and rule that (i) local production, LNG supply, and pipeline capacity may not be considered good alternatives under a market power analysis for customers that use storage services to physically store gas and (ii) that storage providers in seeking market-based rate authority under the expanded market power analysis are required to show that any non-storage products included in a market power analysis are good alternatives for all storage customers (including those customers that use storage service to physically store gas) before granting market-based rate authority; *see Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Great Lakes Gas Transmission LP v. FERC*, 984 F.2d 426, 433 (D.C. Cir. 1993); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1572 (D.C. Cir. 1993);
2. Whether the Commission should consider, in requiring applicants to show the availability of good alternatives during the “peak” period, that the “peak” period for customers that use storage services to physically store gas may not coincide with peak gas demand usage; *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995);
3. Whether the Commission should rule that existing storage facilities under cost-of-service rates may not seek market-based rate authority under the expanded market power analysis, given that allowing existing storage facilities to obtain market-based rates does not fulfill the stated purpose of the Final Rule to facilitate new storage development; *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1485-86 (10th Cir. 1995); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995);
4. Whether the Commission should consider that not all existing customers of existing storage facilities under cost-of-service rates may have competitive alternatives to the service provided, or may be able to use local production, LNG supply, or pipeline capacity to meet their storage service needs, *e.g.*, to physically store gas; *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1485-86 (10th Cir. 1995); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995);
5. Whether the Commission should consider the impact of allowing existing storage facilities under cost-of-service rates to seek market-based rate authority under the expanded market power analysis on the allocation of contract risks between

- storage providers and storage customers including the rights-of-first-refusal in such contracts; *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1485-86 (10th Cir. 1995); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Complex” Consolidated Edison of New York, Inc. v. FERC*, 165 F.3d 992, 1001 (D.C. Cir. 1999); *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 161 (D.C. Cir. 1997); *Texaco Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998); *Interstate Natural Gas Ass’n of Am. v. FERC*, 285 F.3d 18, 37 (D.C. Cir. 2002);
6. Whether, in the alternative, the Commission should require applicants with existing storage facilities seeking market-based rate authority to protect existing customers by offering them the choice of grandfathering the existing cost-of-service rates for the remaining term of the contract or providing an early termination right;
 7. Whether the Commission should require as part of the final rule in this proceeding (as opposed to considering as an option) that all storage providers that have been granted market-based rate authority and that have a market share of ten percent or greater to provide an updated market power analysis every five years; *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *Atlantic Ref. Co. v. Public Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1958); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); *Liberty Gas Storage*, 113 FERC ¶ 61,247 (2005); *Rendezvous Gas Services, LLC*, 112 FERC ¶ 61,141, *reh’g denied*, 113 FERC ¶ 61,169 (2005); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, IV FERC Stats. & Regs., Regs. Preambles ¶ 32,602 (2006); *North Carolina Utilities Comm’n v. FERC*, 42 F.3d 659, 666 (D.C. Cir. 1994);
 8. Whether the Commission should properly interpret the term “facilities” in new NGA section 4(f) to include only new storage caverns, reservoirs or aquifers; *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984); *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166-67 (2004);
 9. Whether the Commission should provide adequate protections for existing customers in allowing existing storage service providers to seek market-based rate authority for expansions of existing storage projects under new NGA Section 4(f) and prevent existing storage facilities from gaining a competitive advantage over other storage providers if the expansion is subsidized at the expense of existing customers; *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995); and
 10. Whether the Commission should properly interpret new NGA Section 4(f) and require periodic reporting of the adequacy of customer protections underlying a grant of market-based rate authority, as opposed to merely relying on monitoring; *Chevron U.S.A., Inc. v. NDRC*, 467 U.S. 837, 843 (1984); *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995).

V. The Commission Should Revise Its Market Power Test.

A. The Commission should require applicants to show that good alternatives exist for all customers before granting market-based rate authority.

Under long-standing policy, absent a showing that a storage provider lacks market power or that sufficient regulatory safeguards are in place to prevent the exercise of market power, the Commission cannot allow the storage provider to charge market-based rates for its services.¹⁹ Before the Commission can permit a storage provider to charge market-based rates “it must either (1) find that there is a lack of market power because customers have sufficient good alternatives or (2) mitigate the market power.”²⁰ A “good alternative” has been defined as one “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.”²¹

The Final Rule expands the definition of relevant products that may be considered good alternatives to storage service to include pipeline capacity, local production and LNG supplies (“non-storage products”).²² In support, the Commission explains that “[f]rom an end-user’s perspective, gas is fungible, whether it comes from storage, local production or more distant supplies transported by pipelines.”²³ The end-user’s perspective, however, is not the only, or even the most, relevant perspective in evaluating whether good alternatives exist for the services being offered. Rather, good alternatives must exist for *storage service customers*.

¹⁹ See *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,229 (1996), *reh’g denied*, 75 FERC ¶ 61,024 (1996), *petitions denied and dismissed sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998).

²⁰ 74 FERC at 61,230.

²¹ *Id.* at 61,231.

²² Order No. 678 at P 25.

²³ *Id.* at P 26.

From the perspective of storage service customers, other supply sources or pipeline capacity cannot substitute for the physical ability to store natural gas. Customers use storage services to hold physical gas supplies for a time to be delivered at a later time in order to continue steady production of gas during non-peak periods or to utilize the injected gas in a manner that takes into consideration the value of the commodity. Good alternatives for any particular storage service include other services offering the ability to store physical gas supplies. For a customer desiring to store gas, local gas production or LNG supplies provide no alternative to storage service. Pipeline capacity, whether primary capacity or released capacity on the secondary market, allows a customer to move gas from a receipt point to a delivery point on the pipeline's system. Pipeline capacity does not allow a customer to store gas. While some pipelines may be able to use line pack to "store" gas, the park and loan services offered by the pipelines for imbalance management purposes provide no alternative to the ability to store large volumes of gas for delivery at a later time. Even more removed from the ability to store gas are financial market instruments such as futures contracts.²⁴

The Final Rule is thus arbitrary and capricious in concluding that non-storage products – local gas production, LNG supplies and pipeline capacity – can be considered good substitutes for storage services.²⁵ The Final Rule improperly views storage from the perspective of an end user choosing among gas supplies to serve load. The Final Rule fails to explain how non-storage products can substitute for the physical ability to store

²⁴ See Order No. 678 at P 48-50 (suggesting that pipeline capacity in combination with financial market instruments such as futures contracts may act as a substitute for storage service).

²⁵ See *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995)(reviewing FERC orders to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," citing Administrative Procedure Act § 706(2)(A), 5 U.S.C. § 706(2)(A)).

gas.²⁶ Accordingly, unless the Commission can support its determination that non-storage products can be considered as good alternatives from the perspective of storage service customers, it cannot grant market-based rate authority on the basis of an expanded product market that includes these non-storage products.

The Final Rule recognizes that local production, LNG supplies and pipeline capacity may not be good alternatives in all instances, and places the burden on the market-based rate applicant to demonstrate that the non-storage products used in a market power analysis are good substitutes.²⁷ In light of the above, a market-based rate applicant cannot simply rely on the presence of non-storage products located in its proposed geographic market to demonstrate the lack of market power. Rather, the applicant must show that the non-storage products included in its market power analysis are good alternatives for all storage service customers, including storage service customers that would use the facility for the physical storage of gas.

To the extent good alternatives do not exist for the customers that would use a proposed storage service for the physical storage of gas, then the applicant would be able to exert market power as to these customers, regardless of whether the applicant lacks market power with respect to other customers by virtue of the presence of non-storage products in the geographic market. The Commission cannot grant market-based rate authority on the basis that an applicant lacks market power with respect to some customers but not all customers. In those circumstances, market-based rates could not be considered just and reasonable for the customers that lack good alternatives, and the

²⁶ See *id.* (the Commission must “reveal the reasoning that underlies its conclusions,” citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970); see also *Great Lakes Gas Transmission LP v. FERC*, 984 F.2d. 426, 433 (D.C. Cir. 1993)(“A full and rational explanation is especially important” when it reflects a shift in agency policy.).

²⁷ Order No. 678 at P 27.

storage provider would be able to unduly discriminate against such customers, all in contravention of NGA Sections 4 and 5.²⁸

Accordingly, on rehearing the Commission should rule that non-storage products, such as local gas production, LNG suppliers and pipeline capacity under the expanded market power analysis, are not good alternatives for customers that use storage service to physically store gas. In the alternative, the Commission should clarify that a market-based rate applicant using a market power analysis that includes local production, LNG supplies or pipeline capacity must show that such non-storage products are good alternatives for all storage service customers, including those customers that use storage service to physically store gas, before granting market-based rate authority.

Further, the Final Rule holds that in order to show that a non-storage product is a good alternative, the market-based rate applicant must demonstrate that for peak demand periods customers will be able to choose the non-storage product as a comparable substitute for the storage services of the applicant.²⁹ Here again, the Final Rule improperly focuses solely on the value of storage as fungible gas supply to meet end use load, and fails to consider the needs of storage services customers to physically store gas.

The traditional injection cycle for physical storage of gas generally does not coincide with the period of peak end use demand. As the Commission has found, gas is typically injected into storage during the spring, summer and fall, and withdrawn during the winter to meet peak heating demand.³⁰ However, as the Commission further

²⁸ 15 U.S.C. §§ 717c & 717d; *see also Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993)(considering a competitive market to be a necessary predicate for the ability to rely on market-based rates to assure a just and reasonable result); *see also Western Resources Inc. v. FERC*, 9 F.3d 1568, 1572 (D.C. Cir. 1993)(judicial review under the arbitrary and capricious standard includes ensuring that the Commission “has acted consistently with the statutory framework.”).

²⁹ Order No. 678 at P 48.

³⁰ NOPR at P 5.

recognized, demand patterns and storage capabilities have been changing. Increased use of natural gas for electric generation has changed the demand curve, while high deliverability storage facilities offer multiple injection-withdrawal cycles throughout the year.³¹ In this environment, for a storage service customer that seeks to use storage to physically store gas, a good alternative must be one that would allow the customer to store gas when it is economic to do so.

Overall, Petitioners strongly support the Commission's determination that alternatives, in order to be considered good alternatives, must be available during peak periods. The Final Rule, however, errs to the extent it only considers the availability of an alternative during the periods of peak end use demand.³² For customers that use storage to physically store gas, an alternative must be available during periods in which the customer seeks to inject gas into storage, which may not coincide with peak end-use demand. Accordingly, the Commission should clarify that in order for an alternative to meet the criteria, it must be available for customers that use storage to physically store gas during periods in which such customers seek to inject gas into storage.

B. The Commission should not apply the expanded market power analysis to existing storage capacity under cost-of-service rates.

The Final Rule permits existing storage service providers under cost-based rates to apply for market-based rate authority using the expanded market power test.³³ No purpose is served by allowing storage providers to charge market-based rates for services from existing facilities. Moreover, the Commission has failed to consider the impacts of such a change on existing customers.

³¹ *Id.* at PP 5-6.

³² *See Transcontinental*, 54 F.3d at 898.

³³ Order No. 678 at P 39.

The stated purpose of the Final Rule is “to facilitate the development of new natural gas storage capacity.”³⁴ The Final Rule fails to show how permitting storage providers of *existing* facilities to charge market-based rates will fulfill the purpose of the rule, *i.e.*, to facilitate the development of *new* storage capacity. There is no rational connection between the stated purpose and the action taken in the Final Rule.³⁵ Accordingly, the Final Rule is arbitrary and capricious in permitting storage providers to charge market-based rates for existing facilities.

Further, allowing storage providers to change from cost-based rates to market-based rates under an expanded market power analysis may adversely impact existing storage service customers. As shown below, such a change would create such confusion and uncertainty as to outweigh any potential regulatory benefit. The Final Rule would allow a storage provider that has market power under the traditional market power analysis to gain market-based rate authority if it can show that it lacks market power under the expanded market power analysis. In particular, a storage provider that has market power in the provision of storage services would be able to charge market-based rates if it can show that it lacks market power given the presence in the market of non-storage products such as local production, LNG supplies or pipeline capacity. Such a result, however, can only lead to just and reasonable results if it can be shown that non-storage products included in the expanded market power analysis are “good alternatives” for all existing customers.

³⁴ Order No. 678 at P 10. *See also*, NOPR at PP 7-12.

³⁵ *See Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1485-86 (10th Cir. 1995)(holding that “[a]n agency decision may be arbitrary and capricious if it fails to consider important relevant factors or if there is no ‘rational connection between the facts found and the choice made,’” *citing Woods Petroleum Corp. v. Dep’t of Interior*, 47 F.3d 1032, 1037 (10th Cir. 1995); *accord Transcontinental*, 54 F.3d at 898.

As noted above, non-storage products such as other gas supplies and pipeline capacity have only been considered as good alternatives from the end-use perspective of serving load and have not been shown to be good alternatives for storage customers that use storage service to physically store gas. By allowing a storage provider to obtain market-based rate authority on the basis of the presence of non-storage products in the market, the Final Rule would, in effect, allow the storage provider to exert market power over existing customers for whom these non-storage products are not good alternatives. The resulting rates to such customers thus could not be considered just and reasonable, and the storage provider would be able to unduly discriminate against such customers, in contravention of NGA Sections 4 and 5.³⁶

In addition, storage customers may have entered into long-term contracts for storage services from existing storage facilities under cost-based rates. For contracts at the maximum tariff rate, the customer would also be entitled to a right of first refusal at the expiration of the contract. If the customer were unable to negotiate rate change protection under *Mobile-Sierra*,³⁷ then under the Final Rule the storage provider could change the customer's rate from a regulated cost-of-service rate to whatever rate the market would bear. A storage customer may thus find itself in the position of being obligated to purchase storage service for the remaining term of a long-term contract at market rates with no means of obtaining rate relief. The Final Rule, therefore, improperly subjects storage customers to asymmetric contract risks.

³⁶ See *Elizabethtown Gas*, 10 F.3d at 870; *Western Resources*, 9 F.3d at 1572; *Hope Natural Gas*, 320 U.S. at 610; *Atlantic Refining*, 360 U.S. at 388.

³⁷ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

A storage customer under a long-term, cost-based rate accepts the volume risk in exchange for rates constrained by a cost-of-service regulatory regime. At the same time, that regulatory regime provides the storage service provider with rates sufficient to attract the capital necessary to provide the service. Allowing a storage provider to obtain market-based rate authority for an existing facility upsets the balance of risks inherent in the cost-of-service regulatory regime with potentially adverse consequences to storage customers. Storage customers would retain the volume risk but be required to pay market rates that are above those required to provide a reasonable return on capital invested without the rate protections of regulation. The ability to release capacity during periods of constraint to mitigate the potentially high costs would be of little or no value to the storage customer that needs the service to physically store gas.

Furthermore, the storage customer may lose its entitlement to a right of first refusal upon the expiration of its contract. The Commission has held that a right of first refusal is only required for customers under a long-term contract at the maximum tariff rate.³⁸ A storage service customer that becomes obligated to pay market-based rates may lose its right of first refusal because it would no longer pay the maximum tariff rate. The Final Rule thus improperly fails to consider the impact on the contractual rights of existing customers in determining that storage providers may obtain market-based rate authority for existing facilities.³⁹

³⁸ 18 C.F.R. § 284.221(d)(2)(2005); *see also Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 1996-2001 FERC Stats. & Regs., Regs. Preambles ¶ 31,091 at 31,335-42 (2000), *order on reh'g*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099 at 31,629-47 (2000), *order denying reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in relevant part sub nom. Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18 (D.C. Cir. 2002).

³⁹ *See Northwest Pipeline*, 61 F.3d at 1485-86; *Transcontinental*, 54 F.3d at 898.

In all events, the Commission cannot alter the terms of a jurisdictional contract without satisfying the requirements of NGA Section 5, *i.e.*, first determining that the existing contract is no longer just and reasonable, and then finding that the change is just and reasonable.⁴⁰ By allowing a storage provider to obtain market-based rate authority with regard to services from an existing storage facility, the Final Rule is effectively modifying the pre-existing contracts between the storage provider and existing storage customers, permitting the storage provider to charge market-based rates. Under the Final Rule, an existing storage customer would not be able to rely on the rate protections of a cost-of-service regime to ensure that cost increases remain just and reasonable. In the absence of an agreed-upon rate, there may be no rate to which the customer is entitled, nor any mechanism to change an agreed-upon rate that a customer considers no longer just and reasonable. Under the NGA, sanctity of contracts must be preserved.⁴¹ The Final Rule makes no showing that existing storage service contracts are no longer just and reasonable that would justify subjecting existing storage customers to modification of their contracts.

For all of these reasons, the Commission should rule on rehearing that use of the expanded market power analysis to justify market-based rates is limited to new storage services. If the Commission on rehearing continues to permit storage providers to obtain

⁴⁰ See “Complex” *Consol. Edison of New York, Inc. v. FERC*, 165 F.3d 992, 1001 (D.C. Cir. 1999)(the court “has strictly policed the statutory line that separates action taken under NGA section 4 from that taken under NGA section 5.”).

⁴¹ See *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 161 (D.C. Cir. 1997)(where the parties have negotiated rate change protection under *Mobile-Sierra*, FERC may abrogate an existing contract “only where the public interest ‘imperatively demands’ such action,” citing *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 856 n. 29 (D.C. Cir. 1979); see also *Texaco Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998). Even where the just and reasonable standard applies, “Section 5 of the Natural Gas Act requires that where the Commission seeks to replace an existing rate or practice with a new one, it must demonstrate by substantial evidence that the existing rate or practice has become unjust or unreasonable, and that the proposed one is both just and reasonable.” *Interstate Natural Gas Ass’n of Am.*, 285 F.3d at 37.

market-based rate authority for their existing storage services, then the Commission should afford storage customers protection against the adverse consequences of a change in rate regimes and the imposition of asymmetric contract risks. The Commission should provide existing customers the option of having their contracts grandfathered (*i.e.*, retaining the volume risk under cost-of-service rates), or being given an early termination right (*i.e.*, accepting the price risk but without the volume risk). Providing customers such an option would impose no burden on existing storage providers; it would merely level the playing field.

C. The Commission should include as a requirement, not just an option, that any market-based rate storage provider with ten percent market share or more submit an updated market power analysis every five years.

The Final Rule completely eliminates any requirement for a storage provider with market-based rates to update its market power analysis, stating only that the Commission may impose such a requirement in an individual case of a storage provider with greater than ten percent market share. This reversal from the NOPR is inadequate to protect customers from the exercise of market power contrary to Commission's obligations under the NGA.⁴² On rehearing, the Commission should at least require storage providers with ten percent market share or greater, in all instances, to file updated market power analyses every five years.

The Commission originally proposed to require all storage applicants receiving market-based rate authority on the basis of a market power analysis to file updated market power analyses every five years. The Commission's proposal is consistent with

⁴² See *Hope Natural Gas*, 320 U.S. at 610; *Atlantic Refining*, 360 U.S. at 388.

recent actions taken in individual proceedings under the NGA.⁴³ In the NOPR, the Commission asserted that imposition of a periodic review requirement was “necessary to ensure that our grant of market-based rates to an applicant remains just and reasonable.”⁴⁴ Inexplicably, the Final Rule comes to the opposite conclusion.

The Final Rule’s justification for eliminating any periodic review of a storage provider’s market power – that the benefits are outweighed by the costs given that existing reporting requirements and ongoing market monitoring programs generally provide sufficient information to know whether storage markets remain competitive – is lacking.⁴⁵ First, the Commission does not have available to it accurate, up-to-date, information regarding the entire storage market. By its own admission, the Commission only has jurisdiction over approximately one half of the underground storage facilities in the U.S.,⁴⁶ and the Commission does not have definitive numbers regarding the total amount of working gas storage capacity in the U.S.⁴⁷

Second, the requirement for storage providers to notify the Commission and parties of changes in circumstances does not provide a comprehensive look at the conditions in the market at any given time. The reporting requirement only focuses on changes, and even then only changes within the control of the storage provider. Changes could take place in the market that dramatically impact a storage provider’s ability to exercise market power that would not be addressed by the changed circumstances reporting requirement. For example, the market could become significantly more

⁴³ See, e.g., *Liberty Gas Storage*, 113 FERC ¶ 61,247 at P 51 (2005); *Rendezvous Gas Services, LLC*, 112 FERC ¶ 61,141 at P 40 (2005), *reh’g denied*, 113 FERC ¶ 61,169 (2005).

⁴⁴ NOPR at P 34.

⁴⁵ See *Transcontinental*, 54 F.3d at 898.

⁴⁶ NOPR at P 8, n.11 (stating that in 2003 there were 415 underground storage facilities and that approximately 200 were subject to the Commission’s jurisdiction).

⁴⁷ *Id.* (stating that estimates range up to 4.7 Tcf).

concentrated as a result of mergers and consolidations of other market participants. Moreover, the market could become constrained such that available pipeline capacity or capacity releases would no longer become good alternatives.⁴⁸ These types of changes would not normally be required to be reported as changed circumstances but could significantly impact whether a storage provider could exercise market power. Only by taking a comprehensive look on a periodic basis can the Commission and storage service customers be assured that market-based rate authority would continue to produce just and reasonable rates.

The Final Rule notes that a central factor in the Commission's decision to eliminate completely the periodic review requirement was the fact that storage providers have not had a large presence in the market in the majority of cases in which market-based rate authority has been granted.⁴⁹ The Final Rule thus draws a distinction between storage providers with a market share of ten percent or less and those with a market share greater than ten percent, completely exempting the former from any periodic review and potentially subjecting the later to the requirement if appropriate in an individual case.⁵⁰ The Commission explained that its approach was similar to its proposal regarding periodic review of the market power of electric utilities that have been granted with market-based rate authority.⁵¹ In that proceeding, the Commission proposed to create a category of power sellers that are unlikely to be able to exercise market power given a lack of substantial generating assets (500 MW or less) or transmission systems and non-

⁴⁸ See, e.g., *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 at 61,998 (2002)(describing how quickly the market conditions underlying the rate settlement had changed).

⁴⁹ Order No. 678 at P 91.

⁵⁰ *Id.*

⁵¹ *Id.* citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, FERC Stats. & Regs. ¶ 32,602 at P 152 (2006).

affiliation with a public utility with a franchised service territory.⁵² Those market-based rate sellers that meet the requirements would not be required to submit periodic updated market power analyses. Alternatively, those that do not meet the requirements would be required to file updated market power analyses every three years.

Reliance on the market-based rate proposal for electric utilities does not support the elimination of the periodic review requirement, except in individual cases, for all storage providers with market-based rate authority. To be consistent, the Commission should limit the category for which the requirement is lifted to those storage providers that are not affiliated with an entity with captive customers. More importantly, if the Commission were consistent it would impose the periodic review requirement on all storage providers with market-based rate authority that do not meet the requirements for exemption.

Accordingly, the Final Rule's elimination, except in individual cases, of any requirement of a periodic review of market power for all storage providers with market-based rate authority is unsupported and subjects customers to the potential exercise of market power.⁵³ On rehearing, the Commission should require storage providers with ten percent market share or greater, in all instances, to file updated market power analyses every five years.

⁵² *Id.*

⁵³ See *North Carolina Utils. Comm'n v. FERC*, 42 F.3d 659, 666 (D.C. Cir. 1994)(the Commission must sufficiently explain its departures from past cases).

VI. Interpreting New NGA Section 4(f), The Commission Should Protect Existing Storage Customers And Prevent Existing Storage Facilities From Gaining A Competitive Advantage.

A. The Commission must not apply new NGA Section 4(f) to expansions of existing storage facilities.

Section 312 of EAct 2005, amended the NGA to include a new Section 4(f) authorizing the Commission to grant market-based rate authority “for new storage capacity related to a specific facility placed in service after the date of enactment” of EAct 2005 even where the applicant cannot demonstrate a lack of market power.⁵⁴ The plain language of the statute demonstrates a clear intention to limit this extraordinary grant of authority to new storage facilities, *i.e.*, only to specific facilities placed in service after the date of enactment.⁵⁵ On rehearing, the Commission must not allow expansions of existing storage facilities to qualify for market-based rate treatment under new NGA Section 4(f).

In the NOPR, the Commission proposed that expansions of existing storage facilities would not qualify under new NGA Section 4(f). The Commission reasoned that the phrase “placed in service after the date of enactment” modified “facility” and not “capacity,” and interpreted the term “specific facility” to include “a new cavern, reservoir or aquifer that is developed after August 8, 2005,” believing such interpretation to be most consistent with the wording of new NGA Section 4(f).⁵⁶ The Final Rule reverses course, interpreting “facilities” broadly to include everything for which a natural gas

⁵⁴ EAct 2005 § 312, 119 Stat. 688.

⁵⁵ See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)(requiring an agency to “give effect to the unambiguously expressed intent of Congress.”)

⁵⁶ NOPR at P 37.

company must obtain a certificate.⁵⁷ In doing so, the Final Rule thus allows all new storage capacity to qualify for market-based rate treatment under new NGA Section 4(f). The Final Rule’s interpretation is contrary to the plain meaning of the statute and is inconsistent with Congressional intent.

New NGA Section 4(f) allows market-based rate treatment only for “new storage capacity related to a specific facility placed in service after the date of enactment.” By interpreting the term “facility” broadly to consider everything for which a natural gas company must seek certificate authorization, the Final Rule renders the phrase “related to a specific facility” mere surplusage. Under this interpretation all new storage capacity placed in service after the date of enactment would be entitled to qualify for market-based rate treatment. Had Congress intended such a result it would not have included the phrase “related to a specific facility” as a qualifier. Proper statutory construction requires the Commission to “construe a statute to give every word some operative effect.”⁵⁸ The Final Rule’s interpretation, therefore, violates canons of statutory construction and is contrary to the plain meaning of the statute.

Moreover, the legislative history supports not allowing expansions of existing storage facilities to qualify for market-based rate treatment under new NGA Section 4(f). As the Commission recognized in the Final Rule, early drafts of this provision would have allowed the Commission to authorize market-based rates for “new storage capacity placed in service after the date of enactment.”⁵⁹ The inclusion of the phrase “related to a specific facility” after the term “new storage capacity” in the final version that was enacted evinces a Congressional intent to limit the applicability of market-based rates to

⁵⁷ Order No. 678 at P 115.

⁵⁸ See *Cooper Indus., Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577, 584 (2004).

⁵⁹ Order No. 678 at P 114 (citing S. 10, 109th Cong. sec. 382 (2005)).

new storage facilities and prevent its applicability to existing storage facilities. Had Congress chosen to allow all new storage capacity to qualify for market-based rates, it would have continued to use the language in the earlier versions. The Final Rule’s interpretation to allow all new storage capacity to qualify under new NGA Section 4(f) is thus inconsistent with Congressional intent.

After reviewing this legislative history, the Commission fails to reconcile its interpretation with clear Congressional intent, relying simply on its belief that the “meaning of new NGA section 4(f) is ambiguous.”⁶⁰ As stated above, Congress’ intent as expressed in the plain language of the statute unambiguously prevents the Commission from permitting expansions of existing storage facilities to qualify for market-based rates under new NGA Section 4(f). Even if a court were to consider the provision “ambiguous,” it would owe no deference to an agency’s construction of the statute that is “arbitrary, capricious, or manifestly contrary to the statute.”⁶¹ To be sure, agencies are free to make reasonable accommodations of conflicting policy, “unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”⁶² Here, the legislative history makes clear that Congress would not have sanctioned allowing expansions of existing storage facilities to qualify for market-based rates. Accordingly, the Final Rule’s interpretation is an impermissible construction of the statute and cannot be sustained. On rehearing, the Commission should return to its original interpretation of “facility” and conclude that only a new cavern, reservoir or aquifer may qualify for market-based rate treatment under new NGA Section 4(f).

⁶⁰ *Id.*

⁶¹ *Chevron*, 467 U.S. at 844.

⁶² *Id.* at 845, quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961).

B. If the Commission allows new NGA Section 4(f) to be applied to expansions of existing storage facilities, then it must ensure adequate protections for existing storage customers and prevent existing storage facilities from gaining a competitive advantage over other storage providers if the expansion is subsidized at the expense of existing customers.

If the Commission does not return to the interpretation of “facility” set forth in the NOPR and continues to allow expansions of existing storage facilities to apply for market-based rate treatment, then the Commission should ensure the adequate protection of not only the expansion customers, but also the existing customers. The Final Rule leaves to the discretion of individual applicants what customer protection measures would be sufficient.⁶³ The Commission should provide clearer guidance as to the showing required of applicants that seek market-based rate authority for expansions of existing facilities. The Final Rule describes methods that an applicant might employ to satisfy the statutory requirement of adequate customer protections, including requiring applicants to: (1) ensure that existing customers will not be subject to additional costs, risks, or degradation of service resulting from providing new services under section 4(f); (2) separately account for the costs, services, and commitments provided under section 4(f) authorizations; and (3) provide non-discriminatory terms and conditions of service under an open access tariff.⁶⁴ The Final Rule, however, does not mandate the use of these or any other measures to protect customers. The Commission must fulfill its statutory mandate under NGA Sections 4 and 5 to ensure just and reasonable rates and prevent undue discrimination by requiring applicants under new NGA Section 4(f) to meet the requirements as set forth above. These requirements reflect the minimum measures necessary to assure adequate protection of existing customers and prevent an

⁶³ Order No. 678 at P 153.

⁶⁴ *Id.* at PP 156-58.

existing storage facility from gaining a competitive advantage over other storage providers if the expansion is subsidized at the expense of existing customers. On rehearing, if the Commission continues to permit expansions of existing storage facilities to qualify for market-based rate treatment under new NGA Section 4(f), the Commission should explicitly require applicants to meet these standards in addition to whatever further measures are required to adequately protect customers.

C. The Commission must provide for periodic review of market-based rate authority, and not simply rely on monitoring to satisfy the statutory mandate.

New NGA Section 4(f) mandates periodic review of market-based rates granted under that section. “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 and reasonable, and not unduly discriminatory or preferential.”⁶⁵ The Final Rule finds that staff monitoring of reports by storage providers satisfies this statutory requirement.⁶⁶ In other words, the Final Rule concludes that the Commission does not have to conduct *any* formal periodic review in order to comply with the clear statutory mandate that “the Commission shall periodically review” whether market-based rate authority complies with overall statutory standard in NGA Sections 4 and 5 that rates be just and reasonable and not unduly discriminatory or preferential. The Final Rule’s determination in this regard is arbitrary and capricious and contrary to the express language of the statute.

⁶⁵ NGA § 4(f)(3), 15 U.S.C. § 717c(f)(3).

⁶⁶ Order No. 678 at P 172.

The Commission must “give effect to the unambiguously expressed intent of Congress.”⁶⁷ The statute clearly requires the Commission to perform a periodic review. The Final Rule attempts to justify the determination not to perform such a review on the grounds that existing reporting requirements provide a wide range of information regarding storage service operations and rates.⁶⁸ Mere data collection, however, does not constitute periodic review. As noted above, the Commission does not have available to it accurate, up-to-date, information regarding the entire storage market. The Final Rule admits that the Commission only has jurisdiction over approximately one half of the underground storage facilities in the U.S.,⁶⁹ and does not have definitive numbers regarding the total amount of working gas storage capacity in the U.S.⁷⁰ The Commission cannot fulfill its obligations to Congress by simply obtaining a series of incomplete pictures of storage markets in the U.S.

The Final Rule also inappropriately attempts to shift the periodic review requirement onto storage customers by relying on monitoring by current or potential storage service customers, customer contacts to the Commission’s Enforcement Hotline and complaints under NGA Section 5 to satisfy the periodic review requirement.⁷¹ The statute clearly requires *the Commission* to conduct a periodic review of the market-based rates of storage companies providing service under NGA Section 4(f). The Final Rule thus impermissibly shifts the responsibility for periodic review from the Commission to the customers. It is arbitrary and capricious for the Commission to conclude that no

⁶⁷ *Chevron*, 467 U.S. at 843.

⁶⁸ Order No. 678 at P 173.

⁶⁹ NOPR at P 8, n.11 (stating that in 2003 there were 415 underground storage facilities and that approximately 200 were subject to the Commission’s jurisdiction).

⁷⁰ *Id.* (stating that estimates range up to 4.7 Tcf).

⁷¹ Order No. 678 at PP 177-78.

action is needed by the Commission to comply with this requirement as long as customers do not complain.⁷²

On rehearing, the Commission should require that storage providers that have been granted market-based rate authority under new NGA Section 4(f) to report at least every five years on the adequacy of the customer protections put into place in granting market-based rate authority. Such reports could include the procedures the storage provider has used to ensure compliance with all of the safeguard and remedies that have been implemented, whether there have been any instances of non-compliance and, if so, the corrective measures taken to return to compliance, an analysis of the transaction data showing that rates charged by the storage provider are “in line” with rates charged by other storage providers in the region that are authorized to charge market-based rates as a result of a finding of a lack of market power, as well as any changed circumstances that bear on the adequacy of the customer protections. Based on this information, and after public notice and an opportunity for comment, the Commission should make an affirmative determination that market-based rate authority for the storage provider continues to yield rates that meet the standards in NGA Sections 4 and 5, *i.e.*, that are just and reasonable and not unduly discriminatory or preferential.

⁷² See *Transcontinental*, 54 F.3d at 898.

VII. Conclusion

WHEREFORE, Petitioners seek clarification and/or rehearing of the Commission's Order No. 678 as described above and respectfully request that the Commission modify its Final Rule in this proceeding consistent with the comments submitted herein.

Respectfully submitted,

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