

155 FERC ¶ 61,279  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

ANR Storage Company

Docket No. RP12-479-001

ORDER ON REHEARING

(Issued June 16, 2016)

1. On October 15, 2015, the Commission issued Opinion No. 538,<sup>1</sup> which denied a request from ANR Storage Company (ANR Storage) for market-based rate authority for natural gas storage service. On November 16, 2015, a Request for Rehearing of Opinion No. 538 was filed by ANR Storage, and a Joint Request for Clarification and Rehearing was filed by the Joint Intervenor Group.<sup>2</sup> The Commission denies ANR Storage's Request for Rehearing. The Commission grants in part, and denies in part the Joint Request for Clarification and Rehearing, as discussed in the body of this order.

**Background**

2. The general background of this proceeding is set forth in Opinion No. 538.<sup>3</sup> Opinion No. 538 found that ANR Storage failed to meet its evidentiary burden to show

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<sup>1</sup> *ANR Storage Co.*, Opinion No. 538, 153 FERC ¶ 61,052 (2015). Opinion No. 538 addressed *ANR Storage Co.*, 146 FERC 63,007 (2014) (Initial Decision).

<sup>2</sup> The Joint Intervenor Group consists of: the Canadian Association of Petroleum Producers (CAPP), Northern States Power Company-Minnesota, Northern States Power Company-Wisconsin (jointly, NSP), Tenaska Gas Storage, LLC (Tenaska), and BP Canada Energy Marketing Corp., (BP Canada).

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

that it lacked significant market power.<sup>4</sup> The requests for rehearing concern several rulings set forth in Opinion. No. 538, as discussed below.

### **Request For Rehearing**

3. ANR Storage states that the Commission erred in finding that it had not met its evidentiary burden to show it lacks significant market power in the relevant markets based on ANR Storage's size in relation to the market, the relative lack of current competitors providing firm interstate storage service, the need for a substantial number of other facilities among the good alternatives to shift operations in order to offer firm interstate service, and ANR Storage's status as an incumbent rather than a new entrant.<sup>5</sup>

4. ANR Storage also argues that the Commission erred in finding that ANR Storage had not met its burden in demonstrating that interruptible service should be included in the relevant product market.<sup>6</sup> ANR Storage states that it filed direct and rebuttal evidence, which included interruptible service in the relevant product market when such services were "good alternatives" to firm storage service.<sup>7</sup> ANR Storage states that marketers can use interruptible storage as part of a portfolio to provide service to customers, and interruptible storage providers can offer firm service if properly incentivized.<sup>8</sup>

5. ANR Storage states that the Commission also erred in concluding that other factors presented by ANR Storage did not demonstrate that it lacked market power.<sup>9</sup> ANR Storage argues that ease of entry into the relevant geographic market addressed potential market power concerns associated with ANR Storage.<sup>10</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> ANR Storage Request for Rehearing at 12-13.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.* at 58 (citing Ex. ANR-153 at 18:15-17).

<sup>8</sup> ANR Storage Request for Rehearing at 58-59.

<sup>9</sup> *Id.* at 13.

<sup>10</sup> ANR Storage Request for Rehearing at 60-61.

6. ANR Storage also argues that the Commission erred in calculating the Herfindahl-Hirschman Index (HHI) for the Central Great Lakes Market, when it allocated Eaton Rapids' working gas capacity between SEMCO Energy Inc. and TransCanada Corporation (TransCanada); and when relying on data contained in ANR Storage's original application rather than the updated data included in ANR Storage's rebuttal testimony.<sup>11</sup>

7. Finally, ANR Storage contends that the Commission erred by failing to appropriately consider ANR Storage's proposed mitigation measures. It argues the Commission should have approved market-based rates for ANR Storage based on its proposed mitigation measures.<sup>12</sup> ANR Storage states that customers with existing long-term recourse rates that extend beyond the date on which market-based rates would be implemented could continue to receive service at recourse rates for the duration of the contract.<sup>13</sup>

8. The Joint Intervenors, for their part, also request that the Commission grant rehearing on numerous rulings in Opinion No. 538. The Joint Intervenors argue that Opinion No. 538 erred when it allowed ANR Storage to supplement its direct case through rebuttal testimony,<sup>14</sup> and when it overturned the Initial Decision's weighting of ANR Storage's rebuttal evidence.<sup>15</sup>

9. The Joint Intervenors argue that the Commission erred in its ruling concerning the relevant product market. Joint Intervenors state that the Commission erred in determining that deficiencies in the evidence provided by ANR Storage need only be corrected in order for interruptible and firm storage services to be found reasonably interchangeable.<sup>16</sup> Joint Intervenors also argue that the Commission erred in finding that

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<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Id.* at 62-63.

<sup>14</sup> Joint Request for Clarification and Rehearing of the Joint Intervenor Group at 2 (Joint Request).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

the Presiding Judge failed to perform the type of analysis required under the “reasonable interchangeability” standard.<sup>17</sup>

10. The Joint Intervenors also contend that the Commission erred in finding that intrastate storage providers that do not possess the authority to provide interstate service should be included in the relevant product market, and in concluding that the existence of intrastate storage capacity in the geographic market supports including that capacity in the product market and as a good alternative.<sup>18</sup> Joint Intervenors similarly maintain that the Commission erred in relying on language set forth in Order No. 720 to support the inclusion of intrastate storage in the relevant product market, and in reversing the Presiding Judge’s finding that certain intrastate storage capacity did not qualify for inclusion in the relevant product market or qualify as a good alternative.<sup>19</sup>

11. The Joint Intervenors state that the Commission erred by endorsing the Central Great Lakes Market (CGLM) as the relevant geographic market and rejecting the Initial Decision’s use of the geographic market adopted in *Bluewater Gas Storage*.<sup>20</sup> The Joint Intervenors state that the Commission erred by departing from prior precedent without explanation, failing to articulate a rational test for determining the relevant geographic market, and adopting the CGLM without a sufficient evidentiary basis in the record.<sup>21</sup>

12. Concerning competitive alternatives, the Joint Intervenors argue that the Commission erred by reversing the Initial Decision’s findings with respect to the availability of fully-subscribed storage capacity, and erred by finding that storage facilities that are physically unavailable to ANR Storage customers may nevertheless be considered good alternatives.<sup>22</sup> Joint Intervenors contend that the Commission failed to

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<sup>17</sup> Joint Request at 4.

<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 5-6 (citing *Bluewater Gas Storage*, 117 FERC ¶ 61,122 (2006) (*Bluewater*)).

<sup>21</sup> *Id.* at 52-53.

<sup>22</sup> *Id.* at 6.

adequately explain why fully-subscribed interstate storage providers should be included as good alternatives.<sup>23</sup> The Joint Intervenors also allege that the Commission erred by not requiring ANR Storage to demonstrate that a significant amount of capacity had actually been released in order to include fully subscribed capacity alternatives as good alternatives.<sup>24</sup>

13. Finally, the Joint Intervenors argue that the Commission erred by not allocating 100 percent of the working gas and daily deliverability capacity of the Eaton Rapids facility to TransCanada.<sup>25</sup> According to the Joint Intervenors, ANR Storage's parent company, TransCanada, has a 50 percent ownership in Eaton Rapids.<sup>26</sup> The Joint Intervenors argue that the Commission erred in not applying the *Alternative Rate Policy Statement*,<sup>27</sup> which establishes a presumption that a voting interest of ten percent or more in an entity confers control.<sup>28</sup>

## **Discussion**

### **Rebuttal Testimony**

14. The Joint Intervenors argue that the Commission erred when it allowed ANR Storage to supplement its direct case through rebuttal testimony. The Commission denies rehearing on this point. The Commission explained the proper role of rebuttal testimony in Opinion No. 538.<sup>29</sup> The Commission found that the purpose of the hearing concerning

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<sup>23</sup> *Id.* at 65-66.

<sup>24</sup> Joint Request at 66-67.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.* at 73.

<sup>27</sup> *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (Alternative Rate Policy Statement), *reh'g and clarification denied*, 75 FERC ¶ 61,024 (1996); *petitions denied and dismissed, Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998).

<sup>28</sup> *Id.*

<sup>29</sup> Opinion No. 538, 153 FERC ¶ 61,052 at PP 42-57.

ANR Storage's application for market-based rate authority was to develop the evidentiary record beyond what was initially filed by both ANR Storage and the Intervenors.<sup>30</sup> The Commission set forth the proper procedures for filing testimony in such hearings, including the opportunity to file proper rebuttal testimony.<sup>31</sup> The rulings concerning the proper scope of rebuttal testimony in the Order on Initial Decision are based on established Commission and court precedent.<sup>32</sup>

15. The Commission found that the underlying flaw in the Initial Decision concerning rebuttal testimony was the determination that ANR Storage could use only its pre-filed testimony to meet its ultimate burden of proof in this proceeding.<sup>33</sup> The Initial Decision's conclusion was based, not on the content of ANR Storage's rebuttal, but on the fact that it was filed as rebuttal testimony rather than as pre-filed direct testimony.<sup>34</sup> This ruling was inconsistent with Commission policy, and constituted clear error. As the Joint Intervenors state in their request for rehearing, ANR Storage was entitled to file proper rebuttal testimony.<sup>35</sup>

16. The Commission's rulings as to rebuttal testimony are in no way a suggestion that any party may "game the system," as the Joint Intervenors allege.<sup>36</sup> The Commission correctly noted that the Joint Intervenors failed to make any effort to strike testimony they believed improper,<sup>37</sup> and the rebuttal testimony was included in the record by the Presiding Judge.<sup>38</sup> These are factual statements relevant to the issue of the proper

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<sup>30</sup> *Id.* P 46.

<sup>31</sup> *Id.* P 51.

<sup>32</sup> Opinion No. 538, 153 FERC ¶ 61,052 at PP 53-56.

<sup>33</sup> *Id.* P 54.

<sup>34</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 55.

<sup>35</sup> Joint Request at 10.

<sup>36</sup> *Id.*

<sup>37</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 57.

<sup>38</sup> *Id.*

treatment of ANR Storage's rebuttal testimony, not a critique of litigation strategy, as the Joint Intervenors allege.<sup>39</sup> The Commission raised these statements in support of its ruling that the issue of whether ANR Storage's rebuttal testimony was proper rebuttal was not in fact before it.<sup>40</sup> Rehearing on this issue is denied.

### **Relevant Product Market**

17. The Joint Intervenors seek clarification concerning what evidence is necessary to affirmatively demonstrate that interruptible service should be included in the relevant product market.<sup>41</sup> The Commission's ruling concerning interruptible service involved only ANR Storage's inconsistent testimony on the matter. The Commission stated that this inconsistency resulted in ANR Storage not meeting its burden to show that interruptible service should be included in the relevant product market.<sup>42</sup> The Commission did not establish any standard as to the type of evidence that would otherwise have been necessary.<sup>43</sup> The determination of a relevant product market is made on a case-by-case basis. The Commission therefore will not provide further clarification on this issue.

18. The Commission also denies the Joint Intervenors' request for clarification concerning the Presiding Judge's use of the term "equal value."<sup>44</sup> In the Initial Decision the Presiding Judge stated that "if firm storage alone is a valuable product, and if interruptible storage is equal in value only with the addition of firm flowing supplies, then interruptible storage standing alone cannot be of equal value to firm storage."<sup>45</sup> The Commission overturned the Initial Decision on this point and held that services need not

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<sup>39</sup> Joint Request at 10.

<sup>40</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 57.

<sup>41</sup> Joint Request at 17.

<sup>42</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 78.

<sup>43</sup> *Id.* PP 77-78. The Commission only noted that some of the arguments raised by ANR Storage concerning interruptible service "may have merit."

<sup>44</sup> Joint Request at 18.

<sup>45</sup> Initial Decision, 146 FERC ¶ 63,007 at P 450.

be of equal value to be included in the same product market.<sup>46</sup> As the Commission held, inclusion in the product market is not based solely on whether a service is of equal value as the applicant's service, but whether customers will be able to substitute one service for the other, given an attempt by the applicant to raise prices.<sup>47</sup> The Commission denies rehearing.

19. The Joint Intervenors make several requests for rehearing of the determination of the relevant product market. Joint Intervenors argue at length that certain storage providers were improperly included in the relevant product market,<sup>48</sup> and argue that it is inappropriate to consider supply substitution when defining a proper product market.<sup>49</sup>

20. The Commission denies rehearing. First, throughout their request for rehearing, Joint Intervenors improperly conflate the concept of a product market with the concept of a geographic market and the identification of good alternatives.<sup>50</sup> The determination of whether intrastate storage is properly included in the relevant product market, for example, is a separate process from whether certain intrastate storage providers are good alternatives. The Joint Intervenors thus incorrectly state that the Commission's inclusion of intrastate storage in the relevant product market equates to a finding that "all intrastate capacity should be treated as a good alternative to [ANR Storage]."<sup>51</sup> Inclusion of a service in the relevant product market is not a finding that any provider of that service is a good alternative.

21. The Joint Intervenors also incorrectly disregard supply substitution in defining the relevant product market.<sup>52</sup> Instead of being a "novel, amalgamated theory" as Joint

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<sup>46</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 74.

<sup>47</sup> *Id.* P 76.

<sup>48</sup> Joint Request at 19, 30-51.

<sup>49</sup> *Id.* at 20.

<sup>50</sup> *Id.* at 19, 30-51.

<sup>51</sup> *Id.* at 21.

<sup>52</sup> Joint Request at 19-24.

Intervenors argue,<sup>53</sup> the relevance of the cross-elasticity of supply in determining the product market is a well-accepted practice.<sup>54</sup> The Supreme Court has long held that the cross-elasticity of production facilities may be an important factor in defining a product market,<sup>55</sup> as have numerous federal courts.<sup>56</sup> The United States Court of Appeals for the District of Columbia Circuit held that a product market need not be defined solely by reference to consumer demand, and that the substitutability of supply is also relevant.<sup>57</sup> Similarly, the United States Court of Appeals for the Second Circuit held as follows: “[a]lso relevant to the delineation of a relevant product market is cross-elasticity of supply, which depends on the extent to which producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product.”<sup>58</sup> To support their argument, Joint Intervenors cite the U.S. Department of Justice’s 1992 Merger Guidelines, which state that market definition focuses solely on demand substitution factors.<sup>59</sup> Yet even the Merger Guidelines contain an exception for similar products. If production substitution between a group of products is nearly universal, state the Guidelines, then those products can be included in the same

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<sup>53</sup> *Id.* at 20.

<sup>54</sup> See Phillip Areeda & Herbert Hovenkamp, *FUNDAMENTALS OF ANTITRUST LAW* 5-61 (Wolters Kluwer, 4<sup>th</sup> ed. 2016) (To have separate markets between two products, one must find that a significant price increase beyond the competitive level for one product would *neither* induce customers of the first product to purchase the second product instead, nor induce producers of the second product to produce the first.);

<sup>55</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 n.42 (1962).

<sup>56</sup> See *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216 (2d Cir. 1999); see also *F.T.C. v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 46 (D.D.C. 1988), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988) (“The second main factor to examine in determining the relevant product market is cross-elasticity of supply, *i.e.*, whether there is production substitution among sellers”).

<sup>57</sup> *SBC Communications Inc. v. F.C.C.*, 56 F.3d 1484, 1493 (D.C. Cir. 1995).

<sup>58</sup> *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999), cited in Opinion No. 538, 153 FERC ¶ 61,052 at P 59.

<sup>59</sup> Joint Request at 20 (citing Dept. of Justice 1992 Horizontal Merger Guidelines § 1.0).

product market.<sup>60</sup> The similarity in facilities providing inter- and intra-state storage service meets this exception.

22. A product market should be defined broadly enough to account for production substitution, where a firm that is engaged in the production of one good or service can shift its operations quickly and inexpensively to produce another good or service.<sup>61</sup> The decision to include substitutes depends upon the speed with which a shift in operations can occur and the extent of sunk costs likely to be incurred.<sup>62</sup> The Commission has long held that potential suppliers of one product that could enter the market of the applicant's product within a relatively short time may be included in the market power analysis.<sup>63</sup> The inclusion of intrastate storage in the product market is consistent with this long-standing Commission policy, as noted by ANR Storage in its Brief on Exceptions.<sup>64</sup> Joint Intervenors make no attempt to address this precedent. Rehearing is denied.

23. ANR Storage's sole request for rehearing concerning the relevant product market alleges that interruptible service should have been included in the relevant product market.<sup>65</sup> As the Commission noted, ANR Storage's testimony concerning the inclusion of interruptible service in the relevant product market was inconsistent.<sup>66</sup> ANR Storage

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<sup>60</sup> U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* at n.14 (1992, revised 1997) (Merger Guidelines) (If production substitution among a group of products is nearly universal among the firms selling one or more of these products, however, the Agency may use an aggregate description of those markets as a matter of convenience.).

<sup>61</sup> Merger Guidelines at § 1.321.

<sup>62</sup> *Id.*

<sup>63</sup> *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385, at 62,302 (1994). ANR Storage established that intrastate storage providers could shift production to interstate storage within this time period. ANR Storage Brief on Exceptions at 81.

<sup>64</sup> ANR Storage Brief on Exceptions at 81-84.

<sup>65</sup> *Id.* at 58.

<sup>66</sup> Opinion No. 538, 153 FERC ¶ 61,052 at PP 77-78.

fails to address the inconsistencies in its testimony that resulted in the Commission excluding interruptible service.<sup>67</sup> The Commission denies rehearing.

### **Relevant Geographic Market**

24. The Joint Intervenors seek rehearing on the Commission's acceptance of the CGLM. Joint Intervenors argue instead that the Commission should have adopted the same geographic market as that adopted in *Bluewater*. Joint Intervenors argue that the Commission departed from prior precedent without explanation, and failed to clearly state the criteria for determining an appropriate geographic market.<sup>68</sup> The Commission denies rehearing.

25. In this proceeding, the Commission's acceptance of the CGLM geographic market is well supported. As the Commission held, areas in close geographic proximity that are reachable over an interconnected system represent a reasonable extent of the geographic market.<sup>69</sup> The Commission found that the Initial Decision's approach to defining the relevant geographic market was flawed.<sup>70</sup> The Initial Decision ruled that the determination of the geographic market was merely an analogue to the determination of good alternatives, and "adds little, if anything, to the substantive determinations regarding the existence of market power."<sup>71</sup> In Opinion No. 538 the Commission ruled that the determination of the geographic market is a necessary separate step in the market power analysis, and further ruled that the extent of a geographic market is not dependent on the existence of competitive alternatives within that area.<sup>72</sup>

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<sup>67</sup> See *id.* P 78 ("ANR Storage's argument on this issue is contradictory and confusing.").

<sup>68</sup> Joint Request at 52-53.

<sup>69</sup> *Id.* P 139. The Commission separately ruled that storage providers that are interconnected to, and in close proximity with, the applicant are adequately comparable in terms of price. *Id.* P 160.

<sup>70</sup> *Id.* PP 140-141.

<sup>71</sup> Initial Decision, 146 FERC ¶ 63,007 at P 468.

<sup>72</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 140.

26. The Commission's analysis in this proceeding is consistent with the Commission's rulings in *Bluewater*.<sup>73</sup> In *Bluewater*, the applicant proposed a geographic market consisting of Michigan, northern Indiana, northern Illinois, northern Ohio and western Ontario.<sup>74</sup> The Commission analyzed potential alternatives in northern Ohio, consistent with a determination that such alternatives could be in the relevant geographic market, but held that it would not include storage alternatives located in northern Ohio as good alternatives because the applicant did not provide evidence that such storage alternatives were available to the market, and the potential alternatives were not physically connected to the applicant.<sup>75</sup> The Commission in *Bluewater* did not make a separate, distinct ruling defining the geographic market, nor did it narrow the geographic market based on the existence of good alternatives, but it did analyze the geographic market proposed by the applicant, including northern Ohio, when determining good alternatives.

27. In Opinion No. 538, the Commission did explicitly analyze the geographic market as a separate and distinct step prior to any analysis concerning competitive alternatives, but the general approach of analyzing potential alternatives within a geographic market was consistent with that followed in *Bluewater*. In that analysis, the Commission determined that relevant factual differences were present between *Bluewater* and ANR Storage. First and foremost, ANR Storage demonstrated that it is in fact physically connected to the facilities eliminated as good alternatives in *Bluewater*.<sup>76</sup> This factual difference supports the Commission adopting a broader geographic market than that adopted in *Bluewater*.

28. In addressing the Joint Intervenor's request for providing clear criteria for determining geographic markets, the Commission notes that it reviews all applications for market-based rate authority on a case-by-case basis.<sup>77</sup> Geographic markets are determined on a case-by-case review based on the specific facts and circumstances

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<sup>73</sup> See Opinion No. 538, 153 FERC ¶ 61,052 at P 133.

<sup>74</sup> 117 FERC at P 24.

<sup>75</sup> *Id.* PP 25-26.

<sup>76</sup> Ex. ANR-1 at 27-28.

<sup>77</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 135.

presented in each proceeding.<sup>78</sup> Consequently, the Commission cannot reasonably establish a bright-line test for determining the geographic market applicable to all proceedings.<sup>79</sup> The Commission also will not, as requested by Joint Intervenors,<sup>80</sup> reject the “two-pipeline” test, as there is no basis for rejecting such a test’s applicability in future proceedings.<sup>81</sup> As the Commission has explained, in evaluating geographic markets, the number and extent of pipeline connections, while relevant, cannot alone determine the proper scope of a geographic market.<sup>82</sup> Ultimately, the guidance provided in Opinion No. 538, as well as other precedent, provided a sufficient basis for determining the appropriate geographic market.<sup>83</sup> Rehearing on the issue of the proper geographic market is denied.

### **Competitive Alternatives**

29. The Joint Intervenors argue that the Commission erred in finding that fully-subscribed alternatives can still be included as good alternatives.<sup>84</sup> The Commission denies rehearing. The Commission’s inclusion of fully-subscribed storage capacity is well supported in Opinion No. 538. The Commission ruled that if an alternative is fully subscribed, and there is no ability to release or otherwise re-assign capacity, that alternative is not a good alternative.<sup>85</sup> However, fully-subscribed storage capacity that is subject to the Commission’s capacity release requirements should be included in the market power analysis.<sup>86</sup> ANR Storage met its evidentiary burden to show that sufficient

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at P 141.

<sup>80</sup> Joint Request at 56.

<sup>81</sup> *See* Opinion No. 538, 153 FERC ¶ 61,052 at P 113 (describing the two-pipeline test).

<sup>82</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 137.

<sup>83</sup> *Id.* PP 135-138.

<sup>84</sup> Joint Request at 65.

<sup>85</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 162.

<sup>86</sup> *Id.*

subscribed capacity was subject to capacity release or re-assignment to include fully-subscribed storage providers as competitive alternatives.<sup>87</sup>

30. The Joint Intervenors also argue that the Commission erred in including in the list of good alternatives storage facilities that are physically unavailable to ANR Storage customers.<sup>88</sup> The Commission will grant rehearing on this issue. Opinion No. 538 ruled that storage providers that are interconnected to, and in close proximity with, the applicant are adequately comparable in terms of price.<sup>89</sup> To demonstrate that non-interconnected alternatives, or other alternatives with physical limitations to availability are good alternatives in terms of price, an applicant for market-based rate authority must provide additional cost data on the anticipated costs of interconnecting to what/who. ANR Storage did not provide this information. The Commission's statement in Opinion No. 538 that Dominion Transmission and NiSource, Inc. could become physically available with minimal financial investment was not, upon further review, adequately supported by the record evidence.<sup>90</sup> Removal of Dominion Transmission and NiSource, Inc. from the list of good alternatives would result in an increase in market share and market concentration metrics of ANR Storage. As the Commission denied ANR Storage's application based on the market metrics prior to the removal of Dominion and NiSource, granting rehearing will not alter the Commission's reasoning for denial.

### **Market Metrics**

31. Both ANR Storage and Joint Intervenors dispute the Commission's market share calculations concerning Eaton Rapids. In Opinion No. 538 the Commission ruled that ANR Storage did not have control over Eaton Rapids, and therefore, only its percentage of ownership (50 percent) should be included in TransCanada's market share.<sup>91</sup> ANR Storage states that the Commission improperly calculated the capacity of Eaton Rapids attributed to SEMCO, resulting in lower market share for SEMCO and subsequent larger

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<sup>87</sup> See ANR-65 at 34, 52, 58.

<sup>88</sup> Joint Request at 67.

<sup>89</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 160.

<sup>90</sup> Opinion No. 538, 153 FERC ¶ 61,052 at PP 191, 202.

<sup>91</sup> *Id.* P 206.

share for TransCanada.<sup>92</sup> The Joint Intervenors argue that ANR Storage has control over Eaton Rapids, and therefore 100 percent of Eaton Rapids capacity should be allocated to ANR Storage.<sup>93</sup>

32. The Commission grants rehearing. In the Alternative Rate Policy Statement,<sup>94</sup> the Commission stated that capacity on pipeline systems owned or controlled by the applicant's affiliates should not be considered among the customer's good alternatives.<sup>95</sup> Traditionally, the Commission has found that a voting interest of ten percent or more creates a rebuttable presumption of control.<sup>96</sup> In Opinion No. 538, the Commission found that TransCanada's ownership interest in SEMCO was not sufficient to establish control because it was unclear the share of ownership of SEMCO that another entity or entities owned.<sup>97</sup> Upon review, the Commission finds that the burden should not have been on the Joint Intervenors to prove control. ANR Storage did not overcome the presumption that a voting interest of ten percent or more creates a rebuttable presumption of control. Consistent with the Commission's granting rehearing for Joint Intervenors on this issue, the request for rehearing of ANR Storage concerning Eaton Rapids is denied. Allocating 100 percent of Eaton Rapids capacity to ANR Storage will result in an increase in the market share and market concentration metrics associated with ANR Storage. As the Commission denied ANR Storage's application based on the market metrics prior to the 100 percent allocation of Eaton Rapids, granting rehearing will not alter the Commission's reasoning for denial.

33. ANR Storage next argues that the Commission made two additional errors when calculating market metrics: (1) miscalculating the HHIs for working gas and deliverability, and (2) failing to use updated data in the record.<sup>98</sup> The Commission denies

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<sup>92</sup> ANR Storage Request for Rehearing at 15.

<sup>93</sup> Joint Request at 73-74.

<sup>94</sup> Alternative Rate Policy Statement, 74 FERC ¶ 61,076.

<sup>95</sup> Alternative Rate Policy Statement, 74 FERC at 61,234 n.59.

<sup>96</sup> *WPS-ESI Gas Storage, LLC*, 108 FERC ¶ 61,061, at P 14 (2004).

<sup>97</sup> *See* Opinion No. 538, 153 FERC ¶ 61,052 at P 206.

<sup>98</sup> ANR Storage Request for Rehearing at 14-16.

rehearing on these issues. The Commission utilized the data set forth in the Initial Decision in its market metric calculations.<sup>99</sup> The numbers set forth in ANR-116, even if utilized by the Commission, would not materially change the ruling that ANRS failed to meet its evidentiary burden in this proceeding. For example, the HHI calculations set forth in ANR-116 are 969 for working gas and 1,084 for daily deliverability, which is higher than the HHIs calculated in Opinion No. 538.<sup>100</sup> Conversely, the market shares for ANR Storage/TransCanada are slightly lower in ANR-116, 14.92 percent for working gas and 14.28 percent in daily deliverability, than in Opinion No. 538, where the Commission calculated ANR Storage/TransCanada's market share as 16.12 percent of working gas and 15.16 percent for daily deliverables.<sup>101</sup> These slightly lower market shares set forth in ANR-116, even if accepted by the Commission, would not alter the rulings in Opinion No. 538. Rehearing is denied.

34. ANR Storage claims that the Commission erred in stating that it was “the largest storage provider in the market.”<sup>102</sup> ANR Storage argues that it does not have the largest market share in daily deliverability, and that the statement is duplicative of the market metrics.<sup>103</sup> The Commission denies rehearing. The statement in Paragraph 215 specifically involves ANR Storage's market share for working gas.<sup>104</sup> Further, the statement is not *duplicative of* the market metrics; rather it is based upon the market metrics, and is a statement of fact as determined and supported by the market metrics.

35. ANR Storage claims that the Commission added an additional hurdle to ANR Storage's burden associated with its position as an incumbent with the largest market share.<sup>105</sup> The Commission's acknowledgement of ANR Storage's position in the market

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<sup>99</sup> Initial Decision, 146 FERC ¶ 63,007 at P 499.

<sup>100</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 213. The Commission calculated HHIs of 951 for working gas and 1,010 for daily deliverability.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* P 215.

<sup>103</sup> ANR Storage Request for Rehearing at 24-26.

<sup>104</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 215.

<sup>105</sup> ANR Storage Request for Rehearing at 26.

does not create any additional burden on ANR Storage. The Commission's decision to deny ANR Storage's request for market-based rates was based on the market metrics. Opinion No. 538 noted ANR Storage's status as an incumbent in reference to prior cases where the applicant had similar market shares and market-based rate authority was approved.<sup>106</sup> In those cases, the applicant was entering a market where an existing incumbent had a large market share and charged cost-based rates. In this proceeding, ANR Storage was not entering such a market. ANR Storage is the incumbent and is the largest storage provider in the market.<sup>107</sup> This is a relevant distinction from prior precedent. The Commission denies rehearing.

### **Market Power**

36. ANR Storage requests rehearing of the Commission's ultimate determination that ANR Storage failed to demonstrate that it lacked significant market power. ANR Storage argues that its market shares are sufficiently low to show that it lacks significant market power.<sup>108</sup> ANR Storage criticizes the Commission's statements that the market metrics should be viewed with an understanding that many alternatives in the relevant markets would need to shift production in some way in order to discipline a potentially anti-competitive price increase by ANR Storage.<sup>109</sup>

37. The Commission denies rehearing. The Commission included in the relevant markets intrastate facilities and facilities that were fully subscribed based on two factors: the impact on demand of these interstate facilities as well as the impact on supply.<sup>110</sup> It was not solely that these facilities currently provide intrastate storage, which customers of interstate storage could turn to and therefore lessen demand for interstate storage in response to a price increase by ANR Storage, but that some facilities could also either shift production from intrastate to interstate or could release capacity in response to such

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<sup>106</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 215.

<sup>107</sup> *Id.*

<sup>108</sup> ANR Storage Request for Rehearing at 16-24.

<sup>109</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 219.

<sup>110</sup> *Id.*

a price increase.<sup>111</sup> ANR Storage did not establish that the existence of intrastate storage and fully subscribed interstate capacity subject to release, in itself, provided a sufficient check on a potential anti-competitive price increase by ANR Storage if it were granted market-based rate authority. Such a check would require additional supply of interstate firm storage, either through actual capacity release or through intrastate storage providers entering the interstate market.<sup>112</sup> ANR Storage failed to demonstrate that sufficient capacity would become available to discipline a potential anticompetitive price increase by ANR Storage if granted market-based rate authority. Rehearing on this issue is therefore denied.

38. ANR Storage also argues that companies with similar market shares in prior cases have been granted market-based rate authority.<sup>113</sup> As stated in Opinion No. 538, the Commission reviews applications for market-based rate authority on a case-by-case basis.<sup>114</sup> Opinion No. 538 addressed the specific concerns of this case in relation to prior cases involving similar market metrics.<sup>115</sup>

### **Conclusion**

39. For the reasons set forth above, the Commission finds that Joint Intervenors' Request for Clarification and Rehearing should be granted, in part, and denied, in part. ANR Storage's Request for Rehearing is denied.

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<sup>111</sup> *Id.*

<sup>112</sup> Opinion No. 538, 153 FERC ¶ 61,052 at PP 219-220.

<sup>113</sup> ANR Storage Request for Rehearing at 16-24.

<sup>114</sup> Opinion No. 538, 153 FERC ¶ 61,052 at P 135.

<sup>115</sup> Opinion No. 538, 153 FERC ¶ 61,052 at PP 215-220.

The Commission orders:

Joint Intervenors' Request for Clarification and Rehearing are granted in part, and denied, in part; ANR Storage's Request for Rehearing is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.