

141 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

ANR Storage Company

Docket No. RP12-479-000

ORDER ON PETITION FOR DECLARATORY ORDER AND ESTABLISHING
HEARING

(Issued November 5, 2012)

1. On March 6, 2012, ANR Storage Company (ANR Storage), filed a petition for a declaratory order, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure¹ and Part 284.501-505 of the Commission's Regulations requesting that the Commission grant ANR Storage authorization to charge market-based rates for natural gas storage services and seeking certain waivers of the Commission's cost-based regulations. For the reasons discussed below, the Commission sets this matter for hearing to ensure an adequate factual basis to determine whether lacks significant market power to charge market-based rates.

Background

2. ANR Storage provides firm and interruptible cost-based rate natural gas storage services to 12 firm customers providing open access storage service under section 7(c) of the Natural Gas Act (NGA) and Part 284 of the Commission's regulations. Gas from ANR Storage's fields is transported directly on the systems of its affiliates, ANR Pipeline Company (ANR Pipeline) and Great Lakes Gas Transmission Limited Partnership (Great Lakes) and indirectly via various pipelines that interconnect with ANR Pipeline and Great Lakes. ANR Storage along with ANR Pipeline, Great Lakes, and Blue Lake Gas Storage Company (Blue Lake) are wholly owned indirect subsidiaries of TransCanada American Investments Ltd. (TransCanada). ANR Storage operates four storage fields located in Kalkaska County in northern Michigan, providing 55.67 Bcf of working gas storage capacity, while its affiliates ANR Pipeline and Blue Lake also provide cost-based

¹ 18 C.F.R. § 385.207 (2012).

storage service in Michigan with ANR Pipeline providing 134.50 Bcf of working gas storage capacity, and Blue Lake providing 47.09 Bcf of working gas storage capacity.²

3. The Commission recently initiated, pursuant to section 5 of the NGA³ action against ANR Storage to determine whether ANR Storage's rates are just and reasonable and set the case for hearing. The Commission found in setting the case for hearing that based on ANR Storage's Form No. 2 data, ANR Storage returned an estimated return on equity of 130.38 percent in 2009 and 153.71 percent in 2010.⁴ After the case was set for hearing before an Administrative Law Judge, ANR Storage, its customers, and Commission staff agreed to a Settlement that ended the investigation by lowering ANR Storage's rates.⁵ The rate reductions were phased-in for firm and interruptible storage customers, with Phase 1 rate reductions beginning on July 1, 2012 and Phase 2 rate reductions commencing on June 1, 2013. Under Phase 1, ANR Storage's firm rates were reduced from \$2.39997 per Dth for monthly deliverability and \$0.02449 per Dth for monthly capacity to \$1.91998 per Dth for monthly deliverability and \$0.01959 per Dth for monthly capacity representing a reduction of 20 percent and 41 percent, respectively. Further, the Phase 2 rates reduced ANR Storage's rates to \$1.09240 per Dth for monthly deliverability and \$0.01325 per Dth for monthly capacity representing a 55 percent and 51 percent decrease, respectively, from the rates in effect prior to the Settlement. The Settlement at Articles I and V provides that parties in the instant declaratory order proceeding are free to make whatever arguments they could make in the absence of the Settlement, finding that this declaratory order proceeding can be handled separately by the Commission. Further, the Settlement requires at Article IV that ANR Storage file a new NGA Section 4 general rate case to be effective no later than July 1, 2016.

Description of the Filing

4. ANR requests a declaratory order granting authorization to charge market-based rates for natural gas storage service and approving various waiver requests for cost-based rate information. ANR Storage seeks authority to sell firm and interruptible natural gas

² See *Jurisdictional Storage Fields in the United States by Owner (Updated February 1, 2012)* published by the Energy Information Administration.

³ *ANR Storage Co.*, 137 FERC ¶ 61,136 (2011).

⁴ *Id.* PP 6 and 7.

⁵ *ANR Storage Co.*, 140 FERC ¶ 61,007 (2012), *order on contested settlement*, 140 FERC ¶ 61,134 (2012).

storage services at market-based rates contending that it is unable to exercise market power.

5. The Commission has approved market-based rates for storage services where applicants have demonstrated, consistent with the criteria in the Commission's Alternative Rate Policy Statement, that they lack significant market power or have adopted conditions that significantly mitigate market power.⁶ The Commission's framework for evaluating requests for market-based rates has two principal purposes: (1) to determine whether the applicant can withhold or restrict services and, as a result, increase price by a significant amount for a significant period of time; and (2) to determine whether the applicant can discriminate unduly in price or terms and conditions. To find that an applicant cannot withhold or restrict services, significantly increase prices over an extended period, or unduly discriminate, the Commission must find either that there is a lack of market power⁷ because customers have good alternatives,⁸ or that the applicant or the Commission can mitigate the market power with specified conditions. The Commission's analysis of whether an applicant has the ability to exercise market power includes three major steps: (1) definition of the relevant markets; (2) measurement of a firm's market share and market concentration; and (3) evaluation of other relevant factors.

6. The Commission uses the Herfindahl Hirschman Index (HHI) test to determine market concentration for natural gas pipeline and storage markets. The Alternative Rate Policy Statement states that a low HHI – generally less than 1,800 – indicates that sellers

⁶ *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), *criteria modified, Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220 (2006), *order on clarification and reh'g*, Order No. 678-A, 117 FERC ¶ 61,190 (2006).

⁷ “Market power” is defined as the ability to profitably maintain prices above competitive levels for a significant period of time. Alternative Rate Policy Statement, 74 FERC at 61,230.

⁸ A “good alternative” is an alternative that is available soon enough, has a price that is low enough, and has a quality high enough to permit customers to substitute the alternative for an applicant's service. *Id.* at 61,231.

cannot exert market power because customers have sufficiently diverse sources of supply in the relevant market. While a low HHI suggests a lack of market power, a high HHI – generally greater than 1,800 – requires closer scrutiny in order to make a determination about a seller’s ability to exert market power.⁹

7. In support of its request for market-based rate authority, ANR Storage included a market power study based on the criteria set forth in the Alternative Rate Policy Statement.¹⁰ ANR Storage’s market power analysis for the storage market defines the relevant product and a geographic market, measures market share and concentration, and evaluates other factors. The market power study defines the relevant geographic market as consisting of the Central Great Lakes Market which includes areas in Michigan, Illinois, Indiana, Ohio, and western Ontario with alternative storage facilities connected to pipelines that interconnect with its affiliates ANR Pipeline and/or Great Lakes. To provide additional support, ANR Storage also analyzed three alternative geographic markets in addition to the Central Great Lakes: Case 2 consists of the Central Great Lakes Market less storage facilities in Ohio; Case 3 consists of Case 2, less storage facilities in southern Illinois and southern Indiana; and Case 4 consists of Case 3, less Michigan local production.

8. ANR Storage’s Market Power Study with its four geographic market cases purportedly shows that the working gas capacity and daily deliverability market shares for ANR Storage and its affiliates in the Central Great Lakes Market are well below the market shares possessed by applicants that have been granted market-based rate authority by the Commission. ANR Storage explains that under Case 1, the Central Great Lakes Market results in HHIs of 951 and 1042 for working gas and daily deliverability and represents respective market shares for ANR Storage and its affiliate of 14.93 percent and 15.17 percent for working gas and daily deliverability. Cases 2 through 4 produce HHIs that range between 1120 and 1283 for working gas and 1271 and 1359 for daily deliverability, and market shares that range between 17.48 percent and 18.75 percent for working gas and 17.69 percent and 18.32 percent for daily deliverability. ANR Storage asserts the market share and HHI calculations indicate its inability to exert market power.

9. ANR Storage then defines the product market and provides the products or services that provide good alternatives to the applicant’s ability to exercise market power. ANR Storage states that the product market is natural gas storage. ANR Storage argues

⁹ Alternative Rate Policy Statement, 74 FERC at 61,235.

¹⁰ See Exhibit I (ANR Storage provided testimony by Edward C. Gallick, Alexander J. Kirk, Martin Wile, and Steven D. Jaskolski).

that Michigan local production serves as a non-storage alternative to storage services. ANR points out that Michigan local production is relatively modest, producing a change in market shares of less than one percentage point and showing a relatively minor impact on the results in the Market Power Study. ANR Storage contends that production is a good alternative to natural gas accessed through ANR Storage because it is readily available, the quality is identical to storage, and the local production price is comparable to natural gas storage and thus is a good alternative to ANR Storage service. Further, ANR Storage argues that local production satisfies the price component as a good alternative because the production price is less than or equal to 10 percent, the threshold price increase used by the Commission to identify good alternatives.¹¹

10. ANR Storage contends that it meets other requirements of the Alternative Rate Policy Statement to qualify for market-based storage rates. ANR Storage argues that there is ease of entry as reflected by the new storage capacity that will be in-service within two years, the number and size of existing storage providers, the increased local production within the geographic markets and increased non-local production outside the geographic market. Further, ANR Storage states that there is an increase in natural gas volumes supported by the rising Marcellus production within Pennsylvania and New York as well as the substantial potential for additional shale production within Ohio that is creating additional competition for ANR Storage.

Interventions, Protests, Comments and Answers

11. Notice of ANR Storage's Filing was issued on March 8, 2012. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 385.210. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2012), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. New Jersey Natural Gas Company and NJR Energy Services Company (collectively New Jersey Natural), Northern States Power Company, Minnesota and Northern States Power Company-Wisconsin (collectively Northern States), filed protests and BP Canada Energy Marketing Corp., (BP Canada), Canadian Association of Petroleum Producers (CAPP), Tenaska Gas Storage, LLC (Tenaska) (collectively Protestors) filed protests and request for dismissal or in the alternative hearing.

12. ANR Storage, Northern States, and CAPP filed answers and ANR Storage filed a reply to the answers. Although the Commission's Rules of Practice and Procedure do not permit answers to protest or answers to answers, the Commission finds good cause to

¹¹ Alternative Rate Policy Statement, 74 FERC at 61,231.

grant waiver of Rule 213(a) and admit these answers because they clarify the concerns raised by the protestors in their initial filings and provide information that has assisted in our decision-making, and admitting the answers will not cause undue delay or unfairly prejudice other parties.¹²

13. The Protesters contend that the application should be denied, that ANR Storage has failed to justify the switch from cost-based to market-based rates, its market-power study is flawed and does not support market-based rates, that market-based rates would withhold or restrict services resulting in a price increase and would discriminate in price or terms and conditions of service. BP Canada argues that ANR Storage's affiliate relationship with ANR Pipeline, Great Lakes, TransCanada and Blue Lake provides ANR Storage with the ability to exercise market power. BP Canada and New Jersey Natural argue that since ANR Pipeline owns 55 percent of the working gas capacity on ANR Storage, ANR Pipeline's cost-based FSS customers could be required to subsidize the cost of ANR Storage's market-based storage rates. BP Canada and New Jersey further argue that the Commission must consider whether an appropriate "market-based" rate can even be established given the affiliate relationship and whether the Commission can ensure that the prohibition against subsidization will not be violated.¹³

14. Northern States provided its own market study which it claims demonstrates that ANR Storage does have market power and the petition should therefore be denied. According to Northern States' market power study, the working gas market share of ANR Storage and its affiliates increases from 14.93 percent to 29.75 percent, with the HHI jumping from 951 to 1911, above the 1800 level established by the Commission as the threshold above which an applicant would not qualify for market-based rates.¹⁴ Northern States further argues that while the geographic market is concentrated, with ANR Storage and its affiliates as the dominant providers, Northern States' study shows two of the top five storage providers, DTE Energy and Spectra Energy control 18 percent and 9.47 percent respectively, and are market-based storage providers. Northern States argues that with market-based rate storage providers controlling such a significant percentage of the market, the potential exists for market-based rate providers to increase

¹² 18 C.F.R. § 385.213(a)(2) (2012).

¹³ BP Canada Protest at p. 13-14 and New Jersey Natural at p. 5.

¹⁴ Northern States Protest at p. 30.

prices, on their own or in tandem, by a significant amount for a significant period of time.¹⁵

15. BP Canada, CAPP, and Tenaska contend that if the petition for declaratory order is not denied, then the Commission should set the case for full evidentiary hearing and hold this proceeding in abeyance, pending the outcome of the section 5 investigation and hearing initiated in Docket No. RP12-123 concerning ANR Storage's cost-based rates. BP Canada contends that the extensive holdings of ANR Storage and its affiliates create significant potential for market power if the petition is granted. BP Canada alleges that if the Commission solely considers the Commission-regulated working gas capacity in Michigan and the 75 percent interest that ANR Storage/ANR Pipeline holds in Blue Lake, the total climbs to 82.33 percent of Commission-regulated storage and 80.34 percent of the Commission-regulated storage working gas capacity in Michigan.¹⁶ CAPP argues that there are unique factual circumstances which raise unresolved issues related to the market power analysis. CAPP also contends that the relevant market is geographically inconsistent with the claims that ANR Pipeline has made over the years, namely that ANR Storage facilities serve a function such that ANR Storage facilities cannot be equated with storage operations in different locations irrespective of whether they are accessible to ANR Pipeline's mainline system.¹⁷ CAPP further contends that the availability of storage at several of the alternative storage fields is unsubstantiated storage capacity as "available" and "good alternatives" renders the application deficient and inappropriate for market-based rate approval.¹⁸ Tenaska argues that because ANR Storage's facilities are fully depreciated, ANR Storage's attempt to change the rate methodology is an opportunistic switch with its aim to force ANR Storage customers to pay multiple times for the same facilities, and that to allow ANR Storage to over-recover in this manner would be unjust and unreasonable.¹⁹

Discussion

16. The Commission finds that this filing raises issues of material fact that warrant examination in a hearing to decide whether ANR Storage lacks significant market power

¹⁵ *Id.*

¹⁶ BP Canada Protest at p. 7-8

¹⁷ CAPP Protest at p. 18-19.

¹⁸ *Id.* at 20-22.

¹⁹ Tenaska Protest at p. 7.

to charge market-based storage rates. The Commission lacks a complete record to determine whether ANR Storage's proposal is just and reasonable. The issues to be addressed include, but are not limited to, whether ANR Storage possesses market power, the relevant geographic and product markets, whether ANR Storage's affiliates would be direct beneficiaries of the proposal, availability of competitive alternatives, and whether ANR Storage's Part 157 customers would be required to pay market-based rates.

The Commission orders:

(A) Pursuant to the authority of the Natural Gas Act, particularly sections 4, 5, 8, and 15 and the Commission's rules and regulations, a public hearing shall be held in Docket No. RP12-479-000 to determine whether ANR Storage lacks significant market power to charge market-based storage rates.

(B) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304, must convene a prehearing conference in this proceeding to be held within 20 days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. The prehearing conference is for the purpose of clarification of the positions of the participants and establishment by the presiding judge of any procedural dates necessary for the hearing. The presiding administrative law judge is authorized to conduct further proceedings in accordance with this order and the rules of practice and procedure.

By the Commission

(S E A L)

Kimberly D. Bose,
Secretary.