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BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

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IN THE MATTER OF: :  
CONSENT MARKETS, TARIFFS AND RATES - ELECTRIC :  
CONSENT MARKETS, TARIFFS AND RATES - GAS :  
CONSENT ENERGY PROJECTS - MISCELLANEOUS :  
CONSENT ENERGY PROJECTS - CERTIFICATES :  
DISCUSSION ITEMS :  
STRUCK ITEMS :  
- - - - -x

910TH COMMISSION MEETING  
OPEN MEETING

Commission Meeting Room  
Federal Energy Regulatory  
Commission  
888 First Street, N.E.  
Washington, D.C.

Thursday, November 16, 2006  
10:12 a.m.

1 APPEARANCES:

2 COMMISSIONERS PRESENT:

3 CHAIRMAN JOSEPH T. KELLIHER

4 COMMISSIONER SUEDEEN G. KELLY

5 COMMISSIONER MARC SPITZER

6 COMMISSIONER PHILIP MOELLER

7 COMMISSIONER JON WELLINGHOFF

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9 SECRETARY MAGALIE R. SALAS

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21 ALSO PRESENT:

22 JANE W. BEACH, Reporter

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## P R O C E E D I N G S

(10:12 a.m.)

CHAIRMAN KELLIHER: Good morning. This open meeting of the Federal Energy Regulatory Commission will come to order to consider the matters which have been duly posted in accordance with the Government in the Sunshine Act for this time and place.

Please join us in the Pledge of Allegiance.

(Pledge of Allegiance recited.)

CHAIRMAN KELLIHER: If we can close the door, that would be great.

This is an important meeting. We're following our efficient implementation of the Energy Policy Act of 2005. We've got a couple of EAct items on the agenda, mostly importantly, the transmission siting final rule, but also we have the Rehearing Orders for long-term financial transmission rights, as well as the Gas Storage Rule that we issued, in part, under our EAct authority.

So we have got some good business in front of us.

I'd like to note that since the October 19th meeting, the Commission has issued 90 Notational Orders, which is an average of more than four a day, every day since the last open meeting.

And my gratitude extends to all of the Commissioners for their assistance, because there's a green

1 blizzard that I can't say the Commissioners always see. We  
2 know it's swarming around us, but I think that level of  
3 production really helps us at the open meetings, and I'm  
4 very grateful for all the Commissioners' assistance, for all  
5 their hard work, not just over the past month but in recent  
6 months, in doing notational work.

7 So, with that, no colleague has expressed an  
8 interest in discussing any Notational Orders, so why don't  
9 we go to today's business. Madam Secretary, let's turn to  
10 the consent agenda.

11 SECRETARY SALAS: Good morning, Mr. Chairman and  
12 good morning, Commissioners. Since the issuance of the  
13 Sunshine Notice on November 9, M-1 has been struck from the  
14 agenda for this morning.

15 Your consent agenda for this morning is as  
16 follows: Electric Items - E-1, 2, 3, 4, 5, 6, 7, 9, 10, 11,  
17 12, 13, 14, 15, 17, and 19.

18 Hydro Items: H-1, 3, 4, and 5.

19 Certificates: C-3.

20 As required by law, Commissioner Moeller is not  
21 participating in Consent Item E-3, and, similarly,  
22 Commissioner Spitzer is not participating in E-13.

23 Other specific votes for these Consent Items are  
24 as follows: E-14, Commissioner Kelly dissenting, in part,  
25 with a separate statement; E-19, Commissioner Kelly

1       dissenting, in part, with a separate statement; and  
2       Commissioner Wellinghoff dissenting, in part, with a  
3       separate statement; H-1, Commissioner Kelly dissenting, in  
4       part, with a separate statement and Commissioner Wellinghoff  
5       concurring, with a separate statement.

6               Now, if we are ready, we can vote. Commissioner  
7       Wellinghoff?

8               COMMISSIONER WELLINGHOFF: I vote aye, with the  
9       notation of my partial dissent in E-19, and my concurrence  
10      in H-1.

11              SECRETARY SALAS: Commissioner Moeller?

12              COMMISSIONER MOELLER: Aye.

13              SECRETARY SALAS: Commissioner Spitzer?

14              COMMISSIONER SPITZER: Mr. Chairman, I vote aye,  
15      noting the recusal in E-13, and, if I may, I would like to  
16      thank Commissioner Wellinghoff for his concurring opinion in  
17      H-1, that reflects views that I had, and I thank him for his  
18      very thoughtful insights into that matter.

19              SECRETARY SALAS: Commissioner Kelly?

20              COMMISSIONER KELLY: Aye, with the exception of  
21      my dissents in E-14, E-19, H-1. I would note that this is  
22      the first Commission meeting that we've had since the  
23      election, and I want to set everyone's mind at ease, that  
24      the end of the honeymoon and the advent of my five dissents  
25      today, has nothing to do with the results of the election.

1 (Laughter.)

2 CHAIRMAN KELLIHER: I don't know how to follow  
3 that. I guess I'll just -- my one comment will be that  
4 with greater diversity of views, will sometimes come  
5 differences of views, so that's, I think, to be expected.

6 SECRETARY SALAS: And I need your vote, Mr.  
7 Chairman.

8 CHAIRMAN KELLIHER: My vote is a simple aye.

9 SECRETARY SALAS: Thank you.

10 CHAIRMAN KELLIHER: Why don't we move to the  
11 discussion agenda?

12 SECRETARY SALAS: The first item for discussion  
13 this morning, is C-2. This is regulations for filing  
14 applications for permits to site interstate electric  
15 transmission facilities, and it is a presentation by John  
16 Schnagl, Carolyn Van Der Jagt, Ed Abrams, and Mark  
17 Hershfield.

18 MR. SCHNAGL: Good morning, Mr. Chairman and  
19 Commissioners. I'm John Schnagl from the Office of Energy  
20 Projects. Joining me here at the table are Carolyn Van Der  
21 Jagt of the Office of the General Counsel, who is also the  
22 primary author of the Rule; Ed Abrams of the Office of  
23 Energy Projects; and Mark Hershfield from the Office of  
24 External Affairs.

25 The Energy Policy Act of 2005, or EPAct, requires

1 the Commission to issue regulations specifying the form of  
2 the application and the notice procedures for an interstate  
3 electric transmission construction permit.

4 C-1 -- excuse me, C-2, the Draft Rule before you  
5 today, fulfills that requirement. On June 16th, the  
6 Commission issued a Notice of Proposed Rulemaking in this  
7 proceeding, requesting comments on the requisite  
8 regulations.

9 Fifty-one comments were filed, including comments  
10 from various state commissions, government agencies, tribes,  
11 electric transmission and electric generation companies,  
12 nongovernmental organizations, and other interested  
13 individuals.

14 A major issue addressed in the comments, is how  
15 and when the Commission will determine it has jurisdiction  
16 under the Federal Power Act Section 216(b)(1) and when it  
17 will initiate its prefiling process.

18 Specifically, concern was expressed over Section  
19 216(b)(1)(c), which authorizes the Commission to issue a  
20 construction permit, if the state commission or other entity  
21 that has authority to approve siting of the facility, has:  
22 One, withheld approval for more than one year after the  
23 filing of an application seeking approval pursuant to  
24 applicable law, or one year after the designation of the  
25 relevant national interest electric transmission corridor,

1       whichever is later.

2               Or, two, conditioned its approval in such a  
3       manner that the proposed construction or modification will  
4       not significant reduced transmission congestion in  
5       interstate commerce, or is not economically feasible.

6               Many commenters made recommendations on how the  
7       one-year clock should be interpreted, and also requested  
8       clarification of the types of conditions that may trigger  
9       Commission jurisdiction.

10              Several states recommend that the Commission not  
11      commence its prefiling process until the state process is  
12      complete, or at least one year from the date an application  
13      was filed with the state.

14              Other comments request that the Commission begin  
15      the prefiling process while the state proceeding is ongoing.

16              The Draft Final Rule states that the Commission  
17      reads the statute to permit parallel Commission/state  
18      processes, however, the Final Rule adopts an approach that  
19      is more respectful of state jurisdiction and state process.

20              For cases where the Commission jurisdiction  
21      relies on Federal Power Act Section 216(b)(1)(c), the  
22      prefiling process will not commence until one year after the  
23      relevant state application has been filed.

24              On other matters, some commenters urged the  
25      Commission to use relevant materials from the state

1 proceedings to satisfy some application requirements.

2 The Draft Final Rule states that the Commission  
3 may adopt analyses prepared for state proceedings, where  
4 possible.

5 The Draft Final Rule also addresses many issues,  
6 providing clarification, yet the answer to many of the  
7 hypothetical questions raised by commenters, will depend on  
8 case-specific circumstances and will, by necessity, be  
9 addressed in the context of the facts of each case.

10 The Draft Final Rules requires a prefiling  
11 process which will help to ensure that a complete  
12 application is filed with the Commission.

13 During the prefiling process, the applicant would  
14 implement a public participation plan to inform and to  
15 include interested entities in the application process;  
16 gather information necessary to complete the application;  
17 and resolve issues at the local, state, and regional levels.

18 Staff would assist in the above, while it  
19 prepares to draft an Environmental Impact Statement in  
20 anticipation of an application.

21 Under the Draft Final Rule, after completion of  
22 the prefiling process, an application would be filed and the  
23 Commission would coordinate all federal authorizations for  
24 the proposed facilities; complete the Environmental Impact  
25 Statement; conduct a thorough evaluation; prepare an Order

1 on the merits, and act on the application within the one  
2 year required by EPAct.

3 The Draft Final Rule implements the best  
4 practices from the Commission's experience in processing  
5 applications for hydroelectric, natural gas pipelines, and  
6 LNG facilities.

7 We look forward to working with other federal  
8 agencies, states, tribes, the industry, property owners, and  
9 all other interested entities to help ensure a fair and open  
10 review of the applications for electric transmission  
11 construction permits.

12 That concludes the presentation, and we would be  
13 happy to answer any questions.

14 CHAIRMAN KELLIHER: Thank you. I want to thank  
15 you for that presentation. I also want to thank you for the  
16 quality of the Order.

17 We just initiated this process a few months ago,  
18 and one of our goals was to have final rules in place by the  
19 time the Department of Energy might be in a position to  
20 designate corridors, and we do that today with the Final  
21 Rule, but I want to thank the Staff for their efforts. I  
22 think it is a very good product.

23 I want to explain my reasoning at more length in  
24 this Order, because I think it's an important Order and  
25 there are definitely some complex issues.

1           If you look at the Energy Policy Act of 2005, one  
2 thing that Congress concluded in that law and is reflected  
3 in that law, is a view that under the status quo, the  
4 country was not developing a sufficiently robust  
5 transmission grid.

6           And Congress took a number of actions to develop  
7 a stronger grid. They, first of all, directed us to  
8 undertake a transmission incentives rulemaking, something  
9 that we did in July, when we acted unanimously in July to  
10 approve a Transmission Incentives Final Rule.

11           Another provision was that Congress gave FERC  
12 some limited authority to site transmission facilities, and  
13 we're acting on that today, taking final action today.

14           And I think that the Final Rule we're issuing, is  
15 faithful, clearly faithful to Congressional intent. The  
16 Rule recognizes that the siting authority that Congress  
17 entrusted to us, is limited in scope.

18           Congress took a very different approach with  
19 respect to siting of transmission facilities, than they took  
20 with respect to natural gas pipelines in 1947.

21           In 1947 -- before 1947, natural gas pipelines  
22 were sited by states, solely by states, not at the Federal  
23 Government level. In 1947, Congress concluded that that  
24 process was not working.

25           Congress established an exclusive and preemptive

1 federal role to site interstate pipelines, and completely  
2 preempted the states.

3 That's not what Congress did in this area last  
4 year with respect to transmission siting. So the federal  
5 transmission siting provisions of EPCAct are not exclusive,  
6 and they are designed to supplement state siting, not to  
7 supplant state siting, and I think our Rule is completely  
8 consistent with that approach.

9 Now, the Rule also recognizes that, as a  
10 practical reality, states will continue to site most  
11 transmission facilities. Federal jurisdiction to site  
12 transmission under EPCAct, is limited.

13 First, the Commission can only issue a  
14 construction permit for transmission projects located in a  
15 national-interest electric transmission corridor designated  
16 by the Department of Energy.

17 And it's -- there are many areas of the country  
18 that are not expected to be designated as national  
19 corridors, and so there would be no prospect of federal  
20 siting in those parts of the country.

21 But, second, even in the areas where there are  
22 national-interest transmission corridors designated, the  
23 Commission can only issue a construction permit where states  
24 do not have authority to site these facilities or consider  
25 the interstate benefits of the project, where the applicant

1 does not qualify for siting under state law, or where a  
2 state siting body has withheld approval for more than a  
3 year, or conditioned approval on a particular matter.

4 Now, in my view, the most significant change  
5 between the proposed rule and the Final Rule that we're  
6 acting on today, is with respect to the initiation of the  
7 prefiling process.

8 The Commission uses prefiling in both hydropower  
9 license proceedings, as well as natural gas pipeline  
10 certificate proceedings.

11 In our experience, prefiling is both an important  
12 and a necessary part of the construction permit proceedings.  
13 It's important, because it encourages early identification  
14 and resolution of issues; it engages all stakeholders in  
15 determining study needs; and it enhances the prospect of the  
16 various permitting agencies to act in unison.

17 Now, prefiling is also necessary, because, based  
18 on our experience, mandatory prefiling is needed for the  
19 Commission to meet the one-year statutory deadline for  
20 authorization of transmission projects under EPAct 2005.

21 So, for that reason, because prefiling we deem to  
22 be both necessary and important, we make it mandatory under  
23 the Final Rule.

24 Now, under the proposed rule, the Commission did  
25 bar formal applications for construction permits during the

1 first year of a state proceeding. However, we would have  
2 allowed prefiling to be initiated during that first year.

3 Now, in the wake of the proposed rule, states  
4 expressed serious concerns about the initiation of prefiling  
5 during the first year of a state proceeding.

6 They were concerned about prefiling occurring  
7 contemporaneously with state siting proceedings.

8 Some of the concerns were that ex parte rules,  
9 state ex parte rules would impede or bar their participation  
10 in a FERC prefiling process; that a contemporaneous FERC  
11 prefiling proceeding would be a burden on state resources;  
12 they wouldn't be able to both conduct their own siting  
13 process and participate in our prefiling process, even if  
14 our proceeding is informal.

15 They also were very concerned about the prospect  
16 of gaming by project developers. We took these concerns  
17 very seriously, and that's reflected in the Final Rule.

18 Now, prefiling has not been controversial in  
19 either the hydropower or the natural gas pipeline context.  
20 In fact, it's something that's been very popular, and is  
21 something that enjoys broad support from landowners, from  
22 environmental and recreation groups, from federal and state  
23 lands agencies and state siting bodies.

24 So it hasn't been controversial in those other  
25 contexts. But federal siting authority in these contexts is

1 both exclusive and preemptive, so there's no prospect in  
2 these other contexts, of prefiling competing with a  
3 contemporaneous state proceeding. That's really the  
4 important difference.

5 Now, allowing prefiling to occur  
6 contemporaneously with state siting proceedings, does create  
7 the potential for conflicts that do not exist in those  
8 other contexts of hydropower and natural gas.

9 Now, for that reason, we go further than the  
10 proposed rule, and we not only bar formal application for  
11 construction permits during the first year of a state  
12 proceeding, but we also bar initiation of prefiling during  
13 that period.

14 Doing so, gives the state siting agencies one  
15 clear year to site electric transmission facilities in  
16 designated transmission corridors, free from any burden or  
17 competition of a contemporaneous FERC proceeding.

18 Now, that will help state siting bodies make  
19 timely siting decisions during this period.

20 I do want to note that we actually could have  
21 gone much further than the position that we took in the  
22 proposed rule. Under a strict reading of the relevant  
23 statutory provisions, the Commission actually could have  
24 allowed contemporaneous formal filings with federal and  
25 state regulators, so that the Commission could have taken

1 final action and issued a construction permit, a year and a  
2 day after such contemporaneous filings. That's not what we  
3 did in the proposed rule, and that's certainly not what we  
4 do today.

5 We do something quite different: We bar  
6 prefiling during the first year of a state proceeding; we  
7 mandate prefiling, and we only allow the formal application  
8 at the end of prefiling.

9 So we give states one clear year to site proposed  
10 transmission projects in designated corridors.

11 Now, our action on prefiling shows our respect  
12 for the state siting process. We expect project developers  
13 to demonstrate the same level of respect.

14 One of the most serious state concerns was fear  
15 of gaming, a concern that transmission project developers  
16 would go through the motions at the state level, but that  
17 their real intent was to pursue federal siting.

18 And I just want to issue a word of warning to  
19 project developers, that we will not tolerate that kind of  
20 gaming.

21 We also show respect for the state process,  
22 because we will accept the state record, whatever record is  
23 produced by the state siting agency. We will accept it into  
24 our proceeding and we will give it appropriate weight, and,  
25 hopefully, that record will help reduce the time that it

1 might take for FERC to act on a construction permit.

2 Now, another decision we make, is that we provide  
3 greater regulatory clarity with respect to one of the key  
4 terms in the statute, namely, what does the term, "withhold  
5 approval," mean?

6 The Final Rule clarifies the meaning of that  
7 term. As I indicated earlier, one of the circumstances  
8 where FERC is authorized to issue a construction permit for  
9 a transmission project in a designated corridor, is where a  
10 state siting body has, quote, "withheld approval for a  
11 year."

12 Now, the question has arisen as to whether that  
13 term only means state failure to act, or means both state  
14 failure to act and state denial.

15 There seems to be, frankly, no merit in deferring  
16 this decision to a later day when we can interpret the term  
17 now and provide greater regulatory certainty to both our  
18 state colleagues, as well as project developers.

19 Now, at first glance, the term, "withhold  
20 approval," could mean either failure to act or both failure  
21 to act and denial.

22 But under application of the usual rules of  
23 statutory construction, the meaning becomes more clear and  
24 we conclude that the most reasonable interpretation is that  
25 the term includes both state failure to act and denial.

1           Now, under the rules of statutory construction,  
2 we must give meaning to the words chosen by Congress. We  
3 must assume that the choice of words by Congress is  
4 deliberate and done with care, and we must -- we cannot  
5 assume that the choices were inadvertent or somehow an  
6 accident.

7           Now, to the extent that there is ambiguity in  
8 what the term, "withhold approval," means, we can interpret  
9 it by reference to other words in the statute.

10           The view that "withhold approval" means only  
11 failure to act, I think ultimately fails, because Congress  
12 is familiar with the latter term, the term "failure to act,"  
13 and knows how to use it.

14           In fact, elsewhere in EPAct 2005, Congress used  
15 this term. In the new Section 203 provision, Congress  
16 directed the Commission to approve mergers, if, it quote,  
17 "does not act," close quote, within a certain period.

18           Elsewhere in this very same transmission siting  
19 section that we're interpreting, Congress used the very  
20 term, "failure to act," yet Congress did not use state  
21 failure to act with respect to when the Commission could  
22 authorize transmission.

23           Instead, it used, quote, "withhold approval," and  
24 I think that we must conclude that the decision to use -- to  
25 not use "failure to act," was deliberate, and that Congress

1           therefore meant something different than "failure to act."

2                         Now, we also can rely on the dictionary to  
3           interpret this term, "withhold approval." If you look at  
4           Webster's Third New International Dictionary, it defines  
5           "withhold" to mean, quote, "to refrain from granting,  
6           giving, or allowing."

7                         The same Dictionary defines "deny" as, quote, "to  
8           refuse to grant, withhold." And it also defines "denial" as  
9           "to refuse to grant, rejection of something requested,"  
10          nearly the mirror image of the definition of "withhold."

11                        So, "withhold" and "denial" are not different  
12          concepts, and, in fact, based on Roget's International  
13          Thesaurus, "deny" and "withhold" are synonyms, so they're  
14          not only not different concepts, they're recognized a  
15          synonyms.

16                        Because of that, I think we come to the view that  
17          the most reasonable interpretation of the term, "withhold  
18          approval," is that it means both state failure to act and  
19          denial.

20                        I also want to thank the Secretary of Energy for  
21          his delegation of authority to the Commission. That  
22          delegation was necessary for us to establish a smooth  
23          federal transmission siting process, and this delegation  
24          signals the smooth working relationship between the  
25          Department and the Commission, which will be necessary for

1 the federal transmission siting process to work effectively.

2 And I would like to wish Assistant Secretary  
3 Designate Kevin Kolevar, good luck at his nomination  
4 hearing, which I think is occurring contemporaneous with our  
5 meeting today. He will be in charge of the federal role in  
6 transmission siting, and I know I can work very closely with  
7 Kevin.

8 I also want to note that there were some comments  
9 in the proposed rule that urged the Commission to actually  
10 seek a broader delegation from the Department, but we reject  
11 those calls. We think that the delegation that we have  
12 received from the Department, is necessary and appropriate,  
13 and that no further delegation seems necessary.

14 With that, I just want to thank the Staff for  
15 their hard work on this Order. I think this process started  
16 just a few months ago, and I just want to commend you with  
17 the Staff's continuing ability to deal with very difficult  
18 matters and produce proposed rules and final rules in just a  
19 matter of months.

20 I think you did an excellent job in this area.  
21 With that, I'd like to recognize any of my colleagues who  
22 would like to speak. John?

23 COMMISSIONER WELLINGHOFF: Thank you, Joe.

24 I also want to commend the Staff on this, I  
25 think, very important Rule we're voting on here today. I

1 support this Final Rule, but I believe that two points  
2 should be made with respect to that Rule:

3 First, I hope and expect that transmission siting  
4 proceedings under this Final Rule, will be rare, and, as the  
5 Chairman stated, I expect that most of those projects will  
6 continue to be sited under state law.

7 The Final Rule reiterates that state proceedings  
8 are the most expeditious way to site facilities, and that is  
9 incumbent upon a project sponsor in affected states, to work  
10 together in an attempt to site facilities at the state  
11 level.

12 As the Chairman made clear, the Final Rule also  
13 indicates that we will not countenance attempts by project  
14 sponsors to abuse state siting processes, such as by  
15 submitting incomplete information to a state, in the hopes  
16 of frustrating the state's ability to act prior to the  
17 deadline set forth in EPOA 2005.

18 Second, the Final Rule makes clear that in  
19 reviewing a proposed project, the Commission will consider  
20 all relevant factors on a case-by-case basis. As part of  
21 that review, we'll look at alternatives, including, where  
22 appropriate, alternatives other than new transmission lines.

23 Such alternatives may include demand-side  
24 alternatives, as well as upgrades to existing facilities.  
25 And that review, if necessary, will promote, in my opinion,

1 efficiency and environmentally sound solutions. Thank you,  
2 Mr. Chairman.

3 CHAIRMAN KELLIHER: Thank you. Mark?

4 COMMISSIONER SPITZER: Thank you Mr. Chairman.

5 As my colleagues know, I had a different position  
6 earlier in the year. It gives me some perspective on this  
7 matter.

8 I would echo the comments of my colleagues  
9 regarding the respect that is due to the state siting  
10 process. I voted both to deny and to approve siting  
11 applications, and those actions and those actions of my  
12 colleagues on the Arizona Commission, were based on a full  
13 and fair evidentiary record.

14 We are deeply respectful of the state process,  
15 and I'm sure I'm speaking for all of us.

16 Recognize that the state process respects the due  
17 process rights of the applicants, intervenors, and  
18 landowners, and in this Rule, the incorporation of the  
19 record of the state proceeding, is an affirmation of the  
20 respect for the due process rights of those folks.

21 I'd also point out that in the siting process in  
22 the states, there are many opportunities for mediation  
23 during the process. I voted on consent stipulations where  
24 aggrieved landowners who had brought concerns to the Line  
25 Siting Committee, were incorporated into the certificate

1 that was ultimately issued, and that is true across the  
2 country.

3 So I would agree that the federal provision is  
4 one that must be respectful of the states, and it is also my  
5 hope that it be used sparingly.

6 At the same time, there is a requirement for this  
7 Commission to faithfully execute the wishes of the United  
8 States Congress, and that requires a delicate balancing of  
9 competing interests, and I believe that that balancing of  
10 competing interests is reflected in this Rule.

11 Let me say that the Arizona Commission had  
12 written three letters to Congress during prior iterations of  
13 this provision. I think the first was authored in 2003, and  
14 one of the concerns expressed by the Arizona Commission --  
15 and I was a signatory to all those letters -- was that there  
16 be certainty with regard to the process, which is why I  
17 commend the Staff and the Commission this morning, for  
18 adopting procedural rules.

19 You will recall that this is not a substantive  
20 measure, in my view; it is to govern the procedures. We are  
21 not siting any transmission, based on this Order this  
22 morning, but providing, again, a certain procedural  
23 framework that the state commissions can then rely on.

24 And that is very important, and that was, I  
25 think, at the crux of the concerns of the Arizona

1 Commission, that the rules be elucidated clearly, and that  
2 is certainly done here, in terms of the time clock  
3 provision.

4 I wholeheartedly support the concept that the  
5 prefiling not take place until the one year has lapsed.  
6 That is supportive of state interests and consistent with  
7 state interests.

8 Similarly, this interesting legal issue with  
9 regard to the definition of the term, "withheld approval," I  
10 think it's important for this Commission to articulate  
11 today, the nature of that definition, and fully put in  
12 concrete, the specific terms of the Rule, again, to give the  
13 states fair notice and opportunity of what the Rules are.

14 As you know, we have potential proceedings  
15 ongoing currently, and, again, it's important that all the  
16 parties -- the applicants, and, most importantly, in my  
17 view, the participants in these proceedings, know what the  
18 rules are.

19 And it was the clear interpretation reflected in  
20 the letters that I signed, that a withholding of approval,  
21 included within its, embraced within its definition, a  
22 denial of approval and not simply a failure to act, and that  
23 any other construction of that term, it seems to me, would  
24 abrogate the Congressional intent to provide this mechanism.

25 So, with that being said, I think the Rule and

1 the definition are correct. I would also admonish the  
2 applicants and potential developers to be respectful of the  
3 state proceedings, and it's my hope, going forward, that the  
4 states continue to exercise their discretion and judgment,  
5 which, by and large, has been very good in the case of  
6 siting, and that this provision of federal law be sort of  
7 analogous to the nuclear mutual assured destruction concept  
8 in the 1950s, where you possess a weapon with the intent  
9 that it not be used. Mr. Chairman, thank you.

10 CHAIRMAN KELLIHER: Thank you. Commissioner  
11 Moeller?

12 COMMISSIONER MOELLER: Thank you, Mr. Chairman.  
13 I was not here for the development of the proposed Rule, but  
14 I'm happy to be able to be here to be able to vote on what I  
15 think is a good, fair, and balanced Rule. Thanks to the  
16 Staff for putting it together.

17 It's my firm belief that this country is in  
18 catch-up mode for transmission. There may be a few areas  
19 that don't need a lot more transmission, but they are few  
20 and far between.

21 We had, arguably, a good ten to 12 years of  
22 uncertainty as to where this transmission system was  
23 heading. Congress solved those uncertainties with the 2005  
24 EPAct, and now it's time for us to get more constructed,  
25 because, to me, it is the key to making wholesale markets

1 work.

2 And that, in turn, I believe, will allow more  
3 creative and more expansive demand-response programs that  
4 will work, and it will be key to getting the renewables onto  
5 the grid, that apparently the voters of many states in this  
6 nation have said that they want more of.

7 So, in that sense, I firmly believe we need a lot  
8 more transmission, and yet I hope we don't have to use the  
9 authority given to us in this Rule. As alluded to earlier,  
10 it is backstop authority, but if it is necessary, I think  
11 this Rule is a good balance that allows stakeholders,  
12 particularly the states, to have their authority respected,  
13 the ability to exercise it.

14 We may be called on, but as a last resort, and I  
15 look forward to voting for the Rule.

16 COMMISSIONER KELLY: This past June when we  
17 issued a NOPR in this proceeding, I noted my support for the  
18 proposed Rule and emphasized that only certain limited  
19 circumstances would give rise to our backstop authority.

20 I added that in considering a permit application,  
21 the Commission would ensure that all stakeholders, including  
22 affected states, will have an opportunity to provide input  
23 into our process.

24 I emphasized opportunities for, quote/unquote  
25 affected states, because, as I have said on a number of

1 occasions, this Rule should be respectful of state  
2 jurisdiction.

3 Unfortunately, in one critical area, it is not.  
4 In particular, the Final Rule states that the Commission's  
5 permitting authority is triggered when, among other things,  
6 a state lawfully denies a permit application.

7 I could not disagree more with this  
8 interpretation. It flies in the face of well-established  
9 principles of statutory construction, not to mention a  
10 common-sense reading of the provision at issue.

11 Most significantly, it preempts the state  
12 permitting process. States have always had exclusive  
13 plenary jurisdiction over transmission siting.

14 In 2005, Congress passed EPAct, which, for the  
15 first time, carefully carved out a limited role for the  
16 Federal Government in the area of transmission siting.

17 EPAct amended the Federal Power Act to give the  
18 Commission the authority to site electric transmission  
19 facilities in five specific situations. The majority's  
20 interpretation of Section 216 of the FPA, will add a sixth  
21 situation.

22 The Commission will have jurisdiction, we say, to  
23 approve the siting of a transmission line, pursuant to  
24 federal law, that a state has lawfully denied, pursuant to  
25 state law.

1           Lawfully denying a permit is critically important  
2 to the states for ensuring that the interests of their  
3 communities and their citizens be protected.

4           What the Commission does today, is make a  
5 significant inroad into traditional state transmission  
6 siting authority. It gives states two options: Either  
7 issue a permit or we'll do it for them.

8           Obviously, this is no choice; this is preemption.  
9 As the U.S. Supreme Court has stated, it is presumed that  
10 Congress does not cavalierly preempt state law, and that  
11 Congress should be unmistakably clear, if it intends to do  
12 so.

13           In my view, there is no evidence to show that it  
14 is Congress's intent to preempt the state permitting  
15 process. Indeed, the evidence is quite to the contrary.

16           First, let's look at the plain meaning of the  
17 statute. The statutory provision at issues says that the  
18 Commission may issue a permit for the construction of  
19 electric transmission lines, if the state having the  
20 authority to site the line, has, quote, "withheld approval  
21 for more than one year after the filing of an application  
22 seeking approval, pursuant to applicable law, or one year  
23 after the designation of the relevant national-interest  
24 electric transmission corridor, whichever is later."

25           This is the language that the majority says also

1 means that the Commission can issue a permit for the  
2 construction of an electric transmission line, if the state  
3 has denied the permit application.

4 The majority says that the words at issue are  
5 "withheld approval." Those are not the words at issue.

6 The words at issue are "withheld approval for  
7 more than one year after the filing of an application  
8 seeking approval." The interpretation that the majority  
9 gives "withheld approval," must be taken into context under  
10 laws of statutory interpretation.

11 Taking the majority's interpretation into  
12 context, where the majority says if the state has the  
13 authority to site the line, but has denied approval for more  
14 than one year after the filing of an application seeking  
15 approval, that's nonsensical.

16 I find it inconceivable that Congress would have  
17 specified in painstaking detail in Section 216(b)(1), five  
18 circumstances that will trigger Commission jurisdiction, yet  
19 fail to have specified state denial of a permit as a sixth  
20 one.

21 If Congress had intended to take away the states'  
22 authority to lawfully deny a permit, surely it would have  
23 said so in unmistakable terms.

24 Like me, I suspect that many today will be  
25 surprised by the Commission's decision. We have received 51

1 letters commenting on the proposed Rule, including many that  
2 delved into minute details of our Rule, yet not one has  
3 opined, let alone argued that the Commission has  
4 jurisdiction if the state denies a permit. That's our idea.

5 Indeed, there is evidence beyond the plain  
6 meaning of the statute, that Congress did not intend to give  
7 the Commission the authority to override a state's denial of  
8 a permit application.

9 In Section 216(b)(1)(a)(ii), Congress told the  
10 states that they cannot retain jurisdiction to site a  
11 transmission line, unless they have the authority to, quote,  
12 "consider the interstate benefits expected to be achieved by  
13 the proposed construction of the transmission facilities in  
14 the state."

15 It makes little sense that Congress would have  
16 said, on the one hand, you have authority to review a permit  
17 application, if you take these factors into account, but, on  
18 the other, it doesn't really matter if you take these  
19 factors into account, because if you don't approve the  
20 application, you lose jurisdiction to FERC.

21 I realize that the majority is concerned that the  
22 goal of Section 216 to encourage transmission-building, will  
23 be frustrated if our backstop authority does not somehow  
24 extend to state denials of permits.

25 However, I believe that states, as well as

1 applicants, will act in good faith in processing requests  
2 for permits. Moreover, as I mentioned, Congress included a  
3 requirement that states must consider the interstate  
4 benefits of applicants' proposals.

5 Accordingly, states will be required to look  
6 beyond their borders in considering whether to approve or  
7 deny permit applications. If the state does not adequately  
8 or lawfully take these interstate benefits into account and  
9 inappropriately and unlawfully denies the siting request,  
10 applicants will have a remedy in court.

11 Having said that, in all other respects, I do  
12 support this rule. It provides extensive opportunities for  
13 stakeholder involvement and requires careful consideration  
14 of the public interest.

15 It also makes clear that the Commission's mere  
16 consideration of an application, does not mean we are making  
17 a jurisdictional call, much less that we will approve a  
18 proposed project.

19 In fact, once an application is before us, any  
20 one can raise issues over our jurisdiction, as well as the  
21 merits of the proposal itself.

22 Of course, it is my expectation and belief that  
23 states, applicants, and stakeholders, will work  
24 collaboratively in the state permitting process, so that the  
25 Commission will rarely have to make jurisdictional calls in

1 the first place.

2 However, it should provide a level of comfort to  
3 the states to know that, if and when an application is  
4 before us, they can weigh in on our jurisdictional  
5 determinations.

6 Thanks for Staff's hard work. The Final Rule  
7 sets forth with great clarity, a process that will ensure  
8 that reasonable siting requests are considered and that  
9 critical transmission lines are built, thus enhancing system  
10 reliability.

11 For these reasons, Mr. Chairman, I am pleased to  
12 vote out the rule, however, to the extent that under this  
13 Rule, state denial of a permit gives rise to Commission  
14 jurisdiction, I respectfully dissent.

15 CHAIRMAN KELLIHER: Let's vote.

16 SECRETARY SALAS: Now we need to vote for the  
17 record. Commissioner Wellinghoff?

18 COMMISSIONER WELLINGHOFF: I vote aye.

19 SECRETARY SALAS: Commissioner Moeller?

20 COMMISSIONER MOELLER: Votes aye.

21 SECRETARY SALAS: Commissioner Spitzer?

22 COMMISSIONER SPITZER: Aye.

23 SECRETARY SALAS: Commissioner Kelly?

24 COMMISSIONER KELLY: Aye, noting my dissent.

25 SECRETARY SALAS: Chairman Kelliher?

1                   CHAIRMAN KELLIHER: Aye.

2                   SECRETARY SALAS: The final item for discussion  
3 this morning, is a joint presentation of G-1, Northern  
4 Natural Gas Company, and C-1, Rate Regulation of Certain  
5 Natural Gas Storage Facilities. It's a presentation by  
6 Alicia Cobb, Michael Goldenberg, Michael McGehee, Michael  
7 Lacey, Sandy Delude and Ed Murrell.

8                   MS. DELUDE: Good morning, Mr. Chairman and  
9 Commissioners. I am Sandy Delude from the Office of the  
10 General Counsel. With me at the table today is Ed Murrell,  
11 from the Office of Energy Markets and Reliability.

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1           I will present C-1, the draft order on rehearing  
2 of Order No. 678, and then Alicia Cobb from the Office of  
3 General Counsel will present G-1, a draft declaratory order  
4 authorizing Northern Natural to charge market-based storage  
5 rates.

6           The draft order in C-1 denies the requests for  
7 rehearing, and grants clarification in part of Order No. 678  
8 which adopted reforms of the Commission's storage pricing  
9 policies.

10           In Order No. 678 the Commission modified its  
11 market power analysis to permit the consideration of close  
12 substitutes to storage in defining the relevant product  
13 market.

14           The Commission also adopted regulations  
15 implementing Section 312 of the Energy Policy Act of 2005.  
16 Section 312 permits the Commission to authorize market-based  
17 rates for storage and storage-related services related to a  
18 specific facility placed in service after August 8, 2005, if  
19 the Commission determines that two conditions have been met:

20           First, that market-based rates are in the public  
21 interest and necessary to encourage the construction of the  
22 storage capacity in the area needing storage services; and

23           Second, that customers are adequately protected.

24           The draft order before you denies requests for  
25 rehearing of the final rule. Petitioners asked the

1 Commission to limit the expansion of the product market  
2 definition to consideration of market-based rates for new  
3 storage capacity.

4 They also sought to require all storage providers  
5 with market-based rates that have a ten percent or greater  
6 market share to file updated market power analyses every  
7 five years.

8 Regarding the implementation of Section 312 of  
9 the Energy Policy Act of 2005, the draft order denies  
10 requests to interpret eligible facilities to apply only to  
11 new storage caverns, reservoirs, or aquifers and not to  
12 expansions of existing facilities.

13 The draft order finds that continuing to use the  
14 Commission's long-standing definition of the word "facility"  
15 is more consistent with Congressional intent and better  
16 serves to further the goal of both Congress and the  
17 Commission to facilitate the development of new natural gas  
18 storage capacity.

19 Finally, the draft order denies requests to  
20 require applicants to report at least every five years on  
21 the adequacy of the customer protections put into place as a  
22 condition of market-based rate authority.

23 That concludes my presentation.

24 MS. COBB: Good morning, Mr. Chairman and  
25 Commissioners. I am Alicia Cobb from the Office of General

1 Counsel. Joining met at the table are Michael Goldenberg  
2 from the Office of General Counsel, Michael McGehee from the  
3 Office of Energy Projects, and Michael Lacy from the Office  
4 of Energy Markets and Reliability. The team working on this  
5 order includes Robert McLean and Jacqueline Holmes from the  
6 Office of General Counsel; Michael McLaughlin, John Carlson,  
7 Pamela Seeley, and Penny Murrell from the Office of Energy  
8 Markets and Reliability; and Cyrus Zerby and Berne Mosley  
9 from the Office of Energy Projects.

10 G-1, the draft declaratory order before you  
11 today, authorizes Northern Natural to charge market-based  
12 rates to the initial shippers that submitted winning bids in  
13 an auction and signed precedent agreements for Firm Deferred  
14 Delivery service that results from a planned expansion of  
15 its aquifer storage field in Redfield, Iowa. the draft  
16 order finds that Northern's petition meets each of the  
17 criteria specified in Order 678.

18 First, the draft order finds that Northern's  
19 facility will be placed in service after August 8, 2005.

20 Second, the draft order finds that Northern's  
21 petition establishes that market-based rates are in the  
22 public interest and necessary to encourage the construction  
23 of storage capacity in the area needing storage service.

24 More specifically, the draft order finds that the  
25 project meets the public interest test because additional

1 storage is clearly necessary in the area; Northern Natural  
2 identified significant investment risks with proceeding with  
3 the project; and the filing does not fit traditional cost-  
4 based rate applications since Northern Natural assumed all  
5 the risks of subsequent cost increases.

6 Finally, the draft order finds that Northern's  
7 proposal protects the expansion customers because Northern  
8 did not withhold capacity and used a transparent auction  
9 process during the open season to allocate the storage  
10 capacity.

11 The draft order finds that Northern protected  
12 existing customers by continuing their existing rates and  
13 separately accounting for all costs and revenues associated  
14 with facilities used to provide market-based services.

15 This concludes my presentation, and both teams  
16 would be pleased to answer any questions that you all may  
17 have.

18 CHAIRMAN KELLIHER: I want to thank both teams  
19 for their presentation, and also for the quality of the  
20 orders. Good work.

21 I will just make some general comments about the  
22 rehearing order, and brief comments on Northern Natural.

23 Over the past year we have witnessed significant  
24 volatility in natural gas prices. A year ago we were  
25 struggling with record gas prices in the wake of the

1 hurricanes, and although prices have fallen very  
2 significantly since then, volatility has been present  
3 throughout the year.

4 Now FERC has taken a number of steps to reduce  
5 price volatility in natural gas markets and provide greater  
6 assurance that we can meet peak demand.

7 We have acted to strengthen our natural gas  
8 infrastructure. We have improved access to domestic natural  
9 gas supplies. And we have increased our liquified natural  
10 gas import capability.

11 We have also encouraged greater efficiency. We  
12 have encourage hedging which can reduce exposure to price  
13 volatility, and we are also currently considering exercising  
14 our price transparency authority.

15 Another way, though, to reduce natural gas price  
16 volatility is to expand natural gas storage capacity, and we  
17 have done that. We have pursued doing that by reforming our  
18 natural gas storage pricing policies both in the market-  
19 based area and the cost-based area.

20 Now there is clearly a need to expand gas storage  
21 capacity. There is no question that we have not reached our  
22 physical limits. Yet, even though we are nowhere near our  
23 physical limits, gas storage capacity has increased by a  
24 total of 1.4 percent since 1988.

25 Now pricing reforms can help develop the untapped

1 potential for gas storage capacity to the benefit of  
2 consumers and to the markets themselves.

3 Now Congress sent a clear signal in the Energy  
4 Policy Act of 2005 that it wanted FERC to be more flexible  
5 with respect to market-based rates for new storage capacity.  
6 The final rule responded to Congress's recognition of the  
7 need for more gas storage capacity by reforming our  
8 traditional market power analysis, as well as implementing  
9 the new 4(f) authority in the Energy Policy Act of 2005.

10 Now the final rule took two approaches:

11 First, it modified the product definition in our  
12 traditional test to recognize that gas storage does compete  
13 with other forms of gas such as available pipeline capacity,  
14 local gas production, and liquified natural gas imports.  
15 Essentially the final rule held that storage is not a  
16 discrete product but competes with other natural gas.

17 Now second, the final rule also implemented our  
18 new authority under the Energy Policy Act to approve market-  
19 based rates, notwithstanding market power, if necessary and  
20 in the public interest and if FERC assures adequate consumer  
21 protection.

22 Now in Northern Natural we actually apply our new  
23 4(f) authority in the first instance. We conclude that the  
24 company met the requirements of the final rule. We hold  
25 that the project is in the public interest; that market-

1 based rates are needed; and that consumers are adequately  
2 protected.

3 Now perhaps most significant, at least from my  
4 point of view, was the fact that under the open season the  
5 storage capacity was fully subscribed which eliminates any  
6 ability to engage in withholding, and that most of the  
7 capacity is actually subscribed for a 20-year period.

8 So I support both orders, and again I commend the  
9 staff.

10 Colleagues? Jon.

11 COMMISSIONER WELLINGHOFF: Joe, thank you. I  
12 commend the staff, and also do support both orders. I look  
13 at the order on rehearing with respect to our regulations  
14 establishing these criteria for market-based rates much like  
15 incentives that we have provided for transmission  
16 construction. It's incentivizing construction, and I  
17 believe that the Commission's determination that it should  
18 be applied to the expansion of existing facilities as well  
19 as new facilities is an appropriate one and fits within the  
20 context of my philosophy that we need to optimize  
21 efficiency.

22 It is much more efficient to ultimately expand an  
23 existing facility that has existing infrastructure, and in  
24 doing so I think it is an appropriate place to look at this  
25 market-based rate authority. And it is something that I

1 would encourage.

2 With respect to the Northern Natural case,  
3 because in fact they are using an existing facility and  
4 expanding it, again I think they are doing what in part is  
5 necessary for efficient use of that infrastructure. But I  
6 would also encourage Northern Natural to look at any other  
7 aspects of efficiency in constructing that particular  
8 facility to ensure that they can optimize efficiency overall  
9 and minimize use of any resources in utilizing that storage  
10 facility.

11 Thank you.

12 CHAIRMAN KELLIHER: Thank you. Colleagues?  
13 Marc?

14 COMMISSIONER SPITZER: Thank you, Mr. Chairman.  
15 If my colleagues will pardon a brief digression, the global  
16 issue of natural gas supply is of grave importance to the  
17 ratepayers of this country. I don't think it goes back just  
18 to the hurricanes; it goes back to 2000, 2001 where the  
19 volatility and price spikes in natural gas had demonstrable  
20 negative impacts on customers, and a number of these  
21 negative impacts flowed from inadequate facilities.

22 We live in an era of extreme commodity risk, and  
23 the increase in the commodity costs for natural gas has  
24 destroyed tens of thousands, if not millions, of American  
25 jobs in various industries heavily dependent on natural gas

1 that are permanently lost to foreign countries, as well as  
2 the very graphic impact on retail ratepayers.

3 I had to travel up to northern Arizona in the  
4 dead of winter to have public comment on surcharge  
5 applications, including the town where we were married, and  
6 it was attributable to these commodity costs. Ultimately we  
7 explained to the ratepayers the reason for the surcharge  
8 proposed by the distribution company, but the customers  
9 rightfully asked our state commission, and they're asking  
10 state commissions across the country, what they are doing to  
11 try and remedy this problem.

12 Congress ultimately did act and provide some  
13 remedies. You know, I had a great attorney who mentored me  
14 over the years, and he had an uncanny instinct for  
15 identifying what the case was about. He would always ask  
16 me: Spitzer, what is this case about?

17 I was rereading the Red Lake Order and the  
18 rehearing on Red Lake, and it became very graphic and  
19 demonstrable to me that what was being litigated in the Red  
20 Lake case was not what the case was about. And that is in  
21 fact what new Natural Gas Act Section 4(f) is designed to  
22 fix. So it was a problem that needed to be fixed; Congress  
23 fixed it; and I think our rulemaking faithfully implements  
24 that fix.

25 Red Lake was chasing squirrels to try and prove

1 that there was an absence of market power, when in fact what  
2 the case was about was the applicant, the distribution  
3 companies, the customers, the Commission in Arizona, the  
4 elected officials, were all in total support of a new  
5 facility at market-based rates. Yet, the interests of those  
6 affected parties were effectively ignored by the legal  
7 requirements that the applicant established that there was  
8 an absence of market power.

9 There was no gas storage in Arizona. That  
10 imposed huge burdens on the folks in northern Arizona, and  
11 really throughout the state, and yet the issue before the  
12 customers was not being articulated.

13 I've always somewhat resented the Dickens'  
14 statement, or observation, that "the law is an ass."

15 (Laughter.)

16 COMMISSIONER SPITZER: But I think that was  
17 established in Red Lake and has been pointed out in the  
18 various opinions that that was an issue that needed to be  
19 changed. And so we now have an opportunity where there is a  
20 public interest in storage for the real issue to be  
21 addressed, which is the protection of the interests of the  
22 customers. That is what the case is about.

23 Red Lake did not have the opportunity to address  
24 that. This rulemaking does address the interests of the  
25 customers. The Northern Natural case does address the

1 interests of the customers.

2 I would associate my views with those of the  
3 Chairman with respect to the 20-year contracts. State  
4 Commissions and others have been hectoring the distribution  
5 companies to enter into long-term contracts with the view to  
6 eliminating the volatility that has plagued the retail  
7 customers.

8 And it seems to me odd that a denial of the  
9 Northern Natural application would have the effect of being  
10 punitive to an entity that conducted an open season and  
11 negotiated in good faith with customers, both large and  
12 small, for long-term contracts. That is a result that I  
13 don't think we can countenance, and the Order today does  
14 approve that application. And in my view, both the  
15 rulemaking and the Order do adequately protect customer  
16 interests and in fact the finding that natural gas storage  
17 is in the public interest. It is certainly not in all  
18 cases--you know, I believe that there should be a case-by-  
19 case analysis; there's no substitute for the specific facts;  
20 but we have in this rulemaking established the law, and in  
21 my view the law ceases to be an ass, Mr. Chairman.

22 (Laughter.)

23 CHAIRMAN KELLIHER: That's good to hear.

24 (Laughter.)

25 CHAIRMAN KELLIHER: Colleagues? Bill.

1                   COMMISSIONER MOELLER: Thank you, Mr. Chairman.  
2 I will associate myself with most of Commissioner Spitzer's  
3 remarks.

4                   (Laughter.)

5                   COMMISSIONER MOELLER: Storage is a good thing.  
6 It moderates prices. If you doubt that, take a look at some  
7 of the numbers of nations that proportionately have less  
8 storage than we do, and how their price has spiked over the  
9 last few years.

10                  So we want to encourage storage. To the extent  
11 that these actions do that, I support them. And yet I think  
12 consumer protections are still there.

13                  CHAIRMAN KELLIHER: Thank you. Commissioner  
14 Kelly.

15                  COMMISSIONER KELLY: I fully support the final  
16 rule on rehearing the market-based rates rule for storage on  
17 rehearing. In the Northern Natural case, I am dissenting.

18                  When we grant an applicant market-based rates we  
19 are really just removing regulatory controls on their  
20 ability to set their own rates.

21                  If there is adequate competition, then any  
22 attempt to set a rate too high will risk losing customers to  
23 competitors who charge less. However in the absence of  
24 adequate competition, the risk remains that the applicant,  
25 the owner of the storage, can set a rate too high.

1           Accordingly, market-based rates are normally only  
2           in the public interest when adequate competition exists.  
3           For us to take the extraordinary step of giving a monopolist  
4           the ability to charge what it wishes, Congress has said we  
5           can do that but we need to assure ourselves of two things:

6                         First, that market-based rates are absolutely  
7           needed to get this storage built; and

8                         That the consumer will be adequately protected  
9           from market power.

10                        I don't believe that either of those criteria  
11           were met in this case. Northern Natural has argued that  
12           market-based rates are needed for its expansion project, and  
13           I will note that its existing project is at cost-based  
14           rates, but that market-based rates are needed for this  
15           expansion project because of certain unavoidable risks such  
16           as the potential need for treatment facilities and the  
17           possible need for additional wells.

18                        It also argues that the price of base gas will be  
19           difficult to predict at this early stage. Of course all of  
20           these "risks," quote/unquote, can be dealt with using cost-  
21           based rates and have been dealt with using cost-based rates  
22           for years, including by Northern itself.

23                        To the extent a pipeline or a storage provider  
24           faces risks, we are required and we do set the return on  
25           equity in the cost-based rates at a level commensurate with

1 that risk. If it's a high risk, it will be a high return on  
2 equity.

3 Additionally, when prudently incurred costs  
4 increase, a pipeline or a storage provider may file for a  
5 rate increase to match. Indeed, if a pipeline is truly  
6 concerned about risks, then adjustable cost-based rates  
7 appear to be a better solution than fixed market-based rates  
8 such as those proposed here.

9 As I note in detail in my dissenting statement,  
10 there is question in my mind whether these rates are truly  
11 even fixed from Northern Natural's perspective.

12 While there is no similar provision for the  
13 customer, paragraph 7(b) of the precedent agreement states  
14 that: Northern shall have the right, quote, "at any time to  
15 terminate this precedent agreement and any resulting firm  
16 deferred delivery agreement".

17 Northern can do so if it, quotes, "determines in  
18 its sole discretion that the firm deferred delivery  
19 expansion or portion thereof has become uneconomical for  
20 Northern to pursue".

21 Northern also reserves the right to hold another  
22 open season with a higher floor if it determines that the  
23 current rates are uneconomical.

24 Because Northern will not even present a firm  
25 deferred delivery agreement to its customers until after its

1 cost studies are complete and it has signed the precedent  
2 agreements, this lets Northern cancel the expansion or hold  
3 another open season after it has committed to it and after  
4 we have given Northern carte blanc to charge whatever it  
5 wants.

6 When one side can extract a much better deal for  
7 itself than the other side is able to get, that constitutes  
8 a textbook example of exercising market power and is not  
9 consistent with consumer protection.

10 Additionally, in this case the precedent  
11 agreement that the shipper signed obligates them not to  
12 object to the Commission filing asking for market-based  
13 rates. Likely one reason there was no objection.

14 This open season was fully subscribed. It was  
15 oversubscribed. That also is evidence that market-based  
16 rates are not needed. From the get-go, Northern will be  
17 able to fully recover its costs and fully fund its storage  
18 expansion.

19 I would like to talk about Red Lake.  
20 Commissioner Spitzer has raised it, and I agree with him  
21 that there's lots of concern about the Red Lake decision and  
22 how it was decided.

23 The situation in Red Lake I think actually  
24 presents a good situation for getting market-based rates  
25 under our new authority.

1           But the Red Lake case is not like this case. Red  
2 Lake argued that there was inadequate customer interest at  
3 cost-based rates, to justify construction of the project.

4           Specifically, Red Lake noted that its open season  
5 resulted in highly contingent precedent agreements covering  
6 only 61 percent of its proposed capacity, unlike the  
7 situation here, where more than 100 percent of Northern's  
8 proposed expansion capacity is spoken for under precedent  
9 agreements that provide no real contingencies for the  
10 customers.

11           Clearly, Northern had -- Red Lake had a problem  
12 that we have actually stated in our Market-Based Rate  
13 Storage Rule, can justify market-based rates; that is,  
14 inadequate need or demand for the project when it begins.

15           That's not the situation here. Red Lake also  
16 stated that it based a currently, quote/unquote soft market,  
17 where it would be forced to discount below-cost-based rates  
18 to make sales without the possibility of making this loss up  
19 during tight markets. Again, that is a valid reason to  
20 consider market-based rate authority.

21           That's not the situation here. Clearly, there is  
22 more than enough current customer interest in Northern's  
23 proposed expansion, and this abundant interest demonstrates  
24 a tight market, rather than a soft one in Northern's area.

25           Accordingly, a situation like that in Red Lake,

1 is better suited to application of the new NGA Section 4(f)  
2 than the situation here.

3           Indeed, in addressing the requirement for an  
4 applicant to show why market-based rates are necessary to  
5 encourage the construction of storage capacity, our Order  
6 Number 678 specifically stated that one way that the  
7 applicant could make such a showing, is to present evidence  
8 that it offered its capacity at cost-based rates through an  
9 open season and was unable to obtain sufficient long-term  
10 commitments at those cost-based rates.

11           Turning to the Order's rationale for why  
12 consumers are protected, I disagree that Northern's open  
13 season provides the needed protection. The Order cites to  
14 certain cases that we have decided for the proposition that  
15 rates resulting from an auction, quote, "with the  
16 characteristics of the one that Northern held, reflect  
17 competitive prices, rather than the exercise of market  
18 power."

19           However, while those cases cited in the Order,  
20 involved auctions with some of the characteristics of the  
21 Northern open season, the deciding auction characteristic,  
22 that is, the auction characteristic on which our decision to  
23 find that competitive prices existed, is not present here.

24           Those cases reviewed the Commission's decision to  
25 eliminate a cap on term length, when the customers were

1       protected by the existence of a cost-based maximum rate.

2               That's not the case here. The ultimate decision  
3       of the Court to affirm the Commission's contract term  
4       findings, specifically turned on the existence of  
5       Commission-regulated cost-based recourse rates.

6               Here, there is no cost-base recourse rate to  
7       protect customers.

8               While the proposal does contain term caps of 20  
9       years, those term caps are long enough that in the absence  
10      of a cost-based rate, they would still trigger the concerns  
11      that were raised by the Court in an earlier phase of that  
12      proceeding.

13              These court cases thus do not speak to the  
14      relevant issue of market-based rates in an auction and do  
15      not support the Draft Order's contention that Northern's  
16      auction process protects customers, either from a rate or  
17      term length perspective; either from a rate increase in the  
18      future or a change in term.

19              I would also like to note that under our  
20      negotiated rate policy with cost-based recourse rates, the  
21      same arrangement that Northern seeks in this case, can be  
22      accommodated. We allow storage providers to go out on an  
23      open season and enter into long-term contracts with fixed  
24      prices higher than cost, if the subscriber wants to pay it.

25              If a subscriber to storage wants a long-term, 20-

1 year contract at a fixed rate higher than the recourse cost-  
2 based rate, they can do so. So, establishing that Northern  
3 must provide a cost-based recourse rate, does not prevent  
4 Northern from doing what it is doing here, yet that simple  
5 action would protect consumers.

6 In my opinion, the applicant has failed to prove  
7 that market-based rates are in the public interest, that is,  
8 needed to permit the expansion, and has failed to provide  
9 adequate customer protection to the customers who will feel  
10 the brunt of their market power.

11 Having determined that this proposal fails to  
12 meet two key requirements of Order Number 678 and NGA  
13 Section 4(f), I respectfully dissent from this Order  
14 authorizing the proposal.

15 CHAIRMAN KELLIHER: Any other comments?

16 (No response.)

17 CHAIRMAN KELLIHER: Let's vote.

18 SECRETARY SALAS: Let's vote for the record, and  
19 we will be voting on both items at the same time.  
20 Commissioner Wellinghoff?

21 COMMISSIONER WELLINGHOFF: I vote aye on G-1 and  
22 C-1.

23 SECRETARY SALAS: Commissioner Moeller?

24 COMMISSIONER MOELLER: I vote aye on G-1 and C-1.

25 SECRETARY SALAS: Commissioner Spitzer?

1                   COMMISSIONER SPITZER: Madam Secretary, I vote  
2                   aye on both items.

3                   SECRETARY SALAS: Commissioner Kelly?

4                   COMMISSIONER KELLY: Aye on C-2 and nay on G-1.

5                   SECRETARY SALAS: Chairman Kelliher?

6                   CHAIRMAN KELLIHER: Aye on both. With that, we  
7                   are adjourned. Thank you.

8                   (Whereupon, at 11:20 a.m., the Open Meeting was  
9                   concluded.)

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