UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Northern Natural Gas Company Docket No. RP06-437-001

ORDER DENYING REHEARING

(Issued April 20, 2007)

1. On December 15, 2006, the Northern Municipal Distributors Group (NMDG) and the Midwest Region Gas Task Force Association (MRGTF) (collectively, Distributors) filed a request for rehearing of the Commission's November 16, 2006 Order[1] in the captioned proceeding. The November 16 Order granted Northern Natural Gas Company's (Northern) petition for a declaratory order and authorized Northern to charge market-based rates to the initial shippers that submitted winning bids and signed precedent agreements for Firm Deferred Delivery (FDD) service that results from a planned expansion (2008 FDD Expansion) of Northern's aquifer storage field in Redfield, Iowa. In reaching its decision, the Commission found that Northern met the requirements established for market-based rates under section 4(f) of the Natural Gas Act (NGA)[2] and the implementing regulations, sections 284.501, 284.502 and 284.505 of the Commission's regulations.[3]

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[1] *Northern Natural Gas Company*, 117 FERC ¶ 61,191 (2006) (November 16 Order).

[2] 15 U.S.C. § 717c (f)(1)(A)-(B) (2007).

[3] 18 C.F.R. §§ 284.501, 284.502, and 284.505 (2006). *See* Rate Regulation of Certain Natural Gas Storage Facilities, Order No. 678, 71 Fed. Reg. 36,612 (June 27, 2006), FERC Stats. & Regs. [Regulations Preambles] ¶ 31,220 (June 19, 2006) (Order No. 678).

## I. Background

2. In its initial filing, Northern stated that it determined that market-based rates were necessary for the 2008 FDD Expansion after conducting an open season to determine customer interest. In order to support the required investment for the expansion, the open season indicated a maximum and minimum price, both of which were in excess of the existing maximum FDD rate. Besides the positive customer response to the open season, Northern cited other reasons to justify market-based rates. Northern argued that the risk associated with the development of an aquifer storage facility warrants a higher rate of return than traditional pipeline investment. Thus, by using market-based rates, Northern stated that it would be able to offer prospective customers rate certainty while taking on itself the significant risk that accompanies operation of the facility. In addition, Northern stated that it would also be better able to protect existing Rate Schedule FDD customers from the potential risk associated with the project.

3. In the November 16 Order, the Commission found that Northern's proposal met the following criteria, discussed in Order No. 678, necessary for underground natural gas storage providers to negotiate market-based rates: (1) the capacity must relate to any "specific facility" requiring certification placed in service after the date of the Energy Policy Act of 2005, be it a new storage cavern or a facility which expands capacity at an existing cavern or reservoir;[4] (2) the market-based rates must be in the public interest and necessary to encourage the construction of storage capacity in the area needing storage services;[5] and (3) customers must be adequately protected.[6]

## II. Request for Rehearing

4. On December 15, 2006, Distributors filed a request for rehearing of the Commission's November 16 Order. On rehearing, Distributors raise three main issues. First, Distributors claim that the Commission erred in concluding that the market-based rates proposed by Northern are in the public interest based on the fact that Northern stated it would not build but for the rates. Second, Distributors state that the Commission erred in concluding that Northern provided adequate protections to the shippers that bid on the storage capacity. Finally, Distributors claim that the Commission erred in concluding that Northern provided adequate protections to shippers not participating in

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[4] Order No. 678, FERC Stats. & Regs. [Regulations Preambles] ¶ 31,220 at P 115.

[5] *Id*. P 125-132.

[6] *Id*. P 153-159.

the storage project so as to prevent cross-subsidization of the market-based rates by tariff rates.

5. Distributors note that part of the Commission's rationale for concluding that market-based rates were in the public interest was based on Northern's statement that it would not proceed with the storage project absent market-based rates. Distributors claim this is incorrect because Northern has reserved the option in its precedent agreements to go forward with the project under an alternative rate structure. Distributors also argue that the open season process proves that market-based rates are not needed for the project because there was strong demand at a price-level above the floor imposed by Northern.[7] In other words, Distributors argue, traditional cost-based rates could have been used, and market-based rates were not necessary for the project.

6. Distributors' second main argument is that Northern failed to provide adequate protections to shippers that bid on the storage capacity. Distributors argue that because shippers are bound by the precedent agreements, but Northern has two "outs," Northern has not truly shouldered the risks as it stated it would in its initial filing. Distributors see this as an exercise of market power, and state that it is inconsistent with customer protection. Finally, Distributors believe that the provision in the precedent agreements requiring shippers to support Northern's filing is another abuse of market power.

7. Distributors' final argument is that the Commission erred in concluding that Northern has provided adequate protections to shippers not participating in the storage project. The Commission based its conclusions on the facts that rates would not change for existing shippers, and Northern would maintain separate records so that the Commission could ensure that existing shippers would not subsidize any of the costs of the storage project. Distributors argue that these reasons are insufficient, and the Commission should have required more detail as to how exactly Northern would allocate the costs of the project, and how exactly Northern would insulate existing customers from bearing any of the risks associated with the project.

[7] Distributors state that Northern must have designed the floor to be somewhere at or above Northern's estimate for its costs for the project.

## III. Discussion

8. For the reasons discussed below, the Commission denies rehearing on all issues.

### A. Northern's Market-Based Rates Are in the Public Interest

9. In its November 16 Order, the Commission found that Northern's market-based rates were in the public interest. Distributors argue that Northern's statement that it would not proceed with the storage project absent market-based rates conflicts with the fact that Northern reserved the option in its precedent agreements to go forward with the project under an alternative rate structure. The Commission disagrees with this argument.

10. Section 4(f) of the NGA states that in order to allow a company to charge market-based rates under this section, the Commission must determine that: "market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services."[8] In Order No. 678, the Commission determined that it would consider a variety of factors in determining whether market-based rates are in the public interest:

> In determining whether market-based rates for a particular project are in the public interest, the Commission will consider, among other things, the risk of the project, and the investment required to fund it. Generally, the Commission would expect that for market-based rates to be in the public interest for services proposed under section 4(f), market-based rates would be necessary for the project sponsor to secure financing and move forward with the project. In the Commission's view, it is unlikely that market-based rate authorization would be necessary, or in the public interest, to encourage relatively risk-free expansions of storage.[9]

11. The Commission here reviewed a number of factors which indicated that based on the representations by Northern, the risks of the project, and the types of contracts offered to the shippers that market-based rates in this instance met the standards established in Order No. 678. Northern stated that it would not proceed with the project without

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[8] 15 U.S.C. 717c (f)(1)(A) (2007).

[9] Order No. 678, FERC Stats. & Regs. [Regulations Preambles] ¶ 31,220, at P 126, 128.

market-based rates because of the risks of the project and the need for a potentially higher rate of return due to the risks. In reviewing the filing, the Commission found that there were in fact significant risks with this project. For example, gas treatment is needed to remove hydrogen sulfide, but the level of such expansion treatment costs, while likely to be significant, are unknown. Further, the Commission found that the amount of, and price of, Northern's requirement for base gas is uncertain and that every additional 0.5 Bcf of base gas could potentially cost $3.5 million (or $7.50 per dth) to $5.3 million (or $10.70 per dth). In addition, additional wells may be needed to maintain deliverability and the cost of such wells is approximately $2 million each to develop, and there also may be a need for additional treatment facilities to maintain pipeline quality specifications.[10]

12. In finding that market-based rates were in the public interest, the Commission also found that, under traditional cost-based rates, Northern's customers would potentially be subject to rate increases through NGA section 4 filings if Northern's cost projections were incorrect, whereas market-based rates would provide expansion shippers with rate security for the life of their contracts while the risk of rate increases falls upon Northern.[11]

13. In opposition to this evidence, Distributors cite only to the fact that in boilerplate language in the precedent agreements, Northern reserved the right to proceed under an alternative rate structure. The Commission does not find that such a reservation negates the evidence of risk presented by Northern. Northern's reservation of an option to pursue an alternative rate structure does not mean that Northern would have done so had the Commission not approved Northern's filing. Moreover, it is not clear that any alternative rate structure would have preserved cost certainty for the expansion customers that Northern's proposal did. While Northern may have reserved the right to cancel the project outright, under its market-based rate proposal, once it built the project, it could not change the expansion shippers' rates for the life of their contracts. Had Northern opted to proceed under traditional cost-based rates, Northern would not be obligated to provide customers with a fixed rate, because once the project was constructed, it could, under section 4 of the NGA, have reserved the right to increase rates to reflect cost increases.

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[10] *Northern Natural Gas Company*, 117 FERC ¶ 61,191 at P 14.

[11] *Id.*

14. Distributors also argue that since the bids received exceeded the floor set by Northern (which Distributors presume, without citing any evidence, is above Northern's estimate of a cost-based rate), that Northern could have recovered its costs through cost-based rates. Distributors maintain that under Order No. 678, market-based rates cannot be shown to be necessary unless the pipeline first offers its capacity at cost-based rates through an open season and is unable to obtain sufficient long-term commitments at those cost-based rates.

15. Under Order No. 678, speculation as to the reason Northern chose a price floor in the bidding is not determinative as to whether market-based rates are necessary. Under Order No. 678, the determination of whether market-based rates are needed or are in the public interest depends on an analysis of the risks of the project and the financing needs of the project. As discussed above, and in the initial order, Northern demonstrated amply that the project entailed cost risks with respect to removal of hydrogen sulfide, base gas costs, and the need for additional wells that are sufficient to meet the requirements of Order No. 678, as well as providing expansion shippers with rate certainty that is not required of cost-based rates.

16. Nor did Order No. 678 require that a pipeline pursue cost-based rates in an open season before being allowed to pursue market-based rates. In Order No. 678, the Commission recognized that such a showing might be one method of establishing that market-based rates were necessary, but specifically permitted making other showings with respect to the risk of the project.[12]

17. Here, the Commission finds that Northern satisfied the requirements of Order No. 678 because Northern demonstrated that the project entailed significant investment risk, and because the project offers fixed rates over the term of the service, it does not fit the traditional cost-based rate program.

### B. Northern Provided Adequate Protection to Both Shippers That Bid on the Storage Capacity and Its Existing Customers

18. In Order No. 678, the Commission required that storage applicants propose ways of protecting both the new customers for storage and existing customers. The Commission discussed various ways in which an applicant for market-based rates could provide adequate protection, such as: (1) a showing that the applicant conducted a fair

[12] Order No. 678, FERC Stats. & Regs. [Regulations Preambles] ¶ 31,220 at P 129.

and transparent open season, and complied with the nondiscriminatory access requirements of the Commission's regulations; (2) ensuring that existing customers are not subject to additional costs, risks or degradation of service resulting from new services provided under section 284.505;[13] (3) providing service under an open access tariff stating the terms and conditions of the service offered; (4) submitting a proposal that adequately prevents withholding; and (5) establishing some form of a reserve price for use in an open season.[14] In the November 16 Order, the Commission found that Northern adequately protected both its existing and expansion customers.

19. Distributors argue that the Commission failed to establish that Northern's proposal provided adequate protection to existing or expansion customers. At the outset, the Commission notes that Distributors do not claim they bid in the subject auction or that they desired to obtain the auctioned capacity, and are not expansion shippers. Therefore, Distributors lack standing to challenge the issue of customer protection for expansion shippers.[15] Distributors have not established an "injury in fact" to a protected interest that has been or will be injured by the Commission's decision with regard to protection for expansion customers. As current customers of Northern, Distributors' protected interests are only the interests of existing customers that are "within the zone of interests to be protected by FERC"[16] under Order No. 678. The Commission nonetheless will examine the arguments posed by Distributors with respect to protection for expansion customers.

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[13] 18 C.F.R. § 284.505 (2006).

[14] Rate Regulation of Certain Natural Gas Storage Facilities, 115 FERC ¶ 61,341, at P 154-67 (2006).

[15] *See Virginia State Corporation Commission v FERC, et al.*, 468 F.3d 845 (D.C. Cir. 2006) and *Mississippi Valley Gas Company v. FERC*, 68 F.3d 503 (D.C. Cir. 1995) (Section 19(b) of the NGA and the requirements of constitutional standing require that the petitioner] "establish 'injury in fact' to a protected interest", "one that is 'arguably within the zone of interests to be protected or regulated by FERC under' the applicable statute).

[16] *Mississippi Valley Gas Company v. FERC, et al.*, 68 F.3d 503, 507-8 (D.C. Cir. 1995) (quoting *Moreau v. FERC,* 299 U.S. App. D.C. 168, 982 F.2d 556, 564 (D.C. Cir. 1993)).

### 1. Existing Customers Are Protected

20. The Commission found in the November 16 Order that Northern's proposal adequately protected existing cost-based rate customers. The Commission stated that the rates of existing customers are unaffected by the instant proposal and, in accordance with section 284.504(a) of the Commission's regulations,[17] Northern will separately account for all costs and revenues associated with facilities used to provide the market-based services. Further, the Commission found that Northern's maintaining separate records will help enable the Commission to ensure in a future rate case that existing customers will not subsidize the costs of the expansion.[18]

21. Distributors argue that the Commission should have required more detail as to how exactly Northern would allocate the costs of the project and how exactly Northern would insulate existing customers from bearing any of the risks associated with the project before finding that existing customers were adequately protected. In Order No. 678, the Commission stated that "successful applicants [for market-based rates] will be required to separately account for the costs, services, and commitments provided pursuant to section 4(f) authorizations, and to retain these records for as long as they may be required under the Commission's existing practices for pipelines operating under the Uniform System of Accounts."[19]

22. A detailed description of the method for allocating costs or protecting existing customers from bearing any of the risks of the project is unnecessary at this juncture of the proceeding. Northern's rates to existing customers have not changed, and such rates can change only when Northern makes a rate filing under section 4 of the Natural Gas Act. As long as Northern separately accounts for the costs of the expansion project, any issues with respect to cost allocation and protection of existing customers can take place during the rate case once Northern makes a rate proposal. Until that time, there can be no harm to the existing customers.

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[17] 18 C.F.R. § 284.504(a) (2006).

[18] *Northern Natural Gas Company*, 117 FERC ¶ 61,191 at P 21.

[19] Order No. 678, FERC Stats. & Regs. [Regulations Preambles] ¶ 31,220 at P 157.

### 2. Expansion Shippers Are Protected

23. The Commission found in the November 16 Order that Northern's proposal adequately protected expansion shippers. In Order No. 678, the Commission recognized that a storage operator cannot exert market power as long as it does not withhold its capacity and offers a reasonable reserve price.[20] In the November 16 Order, the Commission stated that Northern held an open season in which it included all of the capacity that was estimated to be available in the storage project. Moreover, the Commission stated, in the event that capacity exceeds the projected amount, Northern committed to giving any additional capacity to the highest bidder that did not receive capacity under its open season auction.[21] The Commission found that Northern conducted a transparent auction where it awarded capacity to the shippers bidding the highest net present value, including rate and contract term. The Commission stated that rates resulting from such an auction reflected competitive prices, not the exercise of market power.[22] The Commission also noted that Northern provided further protection by establishing a maximum ceiling price of $1.50 per dth and a ceiling term of 20 years, such that any bids at or above the ceiling levels would be considered as if they were at the ceiling levels. In addition, the Commission stated, Northern met the other criteria established in Order No. 678 because it offered the proposed service pursuant to its General Terms and Conditions of service.[23]

24. Distributors argue that the expansion shippers that bid on the storage capacity were not adequately protected because (1) the expansion shippers are bound by the precedent agreements while Northern has reserved the right to terminate the project if final costs require higher rates or if the project has become uneconomic, and (2) the expansion shippers were required in the precedent agreements to support Northern's filing and its application for market-based rates. Distributors see both of these facts as an abuse of market power and say that they are inconsistent with customer protection.

25. Even if Distributors did have standing to contest the issue of customer protection for expansion shippers, the fact that Northern reserved the right under certain circumstances to cancel the project and that the shippers were required to support

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[20] *Id.* P 163.

[21] *Northern Natural Gas Company*, 117 FERC ¶ 61,191 at P 20.

[22] *Id.*

[23] *Id.*

Northern's filing does not negate the finding of adequate expansion customer protections in the November 16 Order. The Energy Policy Act itself permits the Commission to grant market-based rates to storage developers even if they possess market power as long as customers are "adequately protected."[24] Thus, even if these provisions established that Northern possessed market power, as Distributors allege, that would not prevent Northern from receiving market-based rates.

26. Further, the fact that the precedent agreement may bind shippers but leave the pipeline with the ability to terminate the project is part of the very nature of a precedent agreement.[25] Pipelines enter into precedent agreements with shippers so that they can be assured of customer interest before they undertake a costly project. If shippers were not bound by the precedent agreements, then there would be no assurance of customer interest, and it would likely be too risky for a pipeline to ever begin an expansion project. These precedent agreements are meant solely to gauge customer interest in a project, and therefore, the pipeline may need to reserve its right not to proceed with a project if certain circumstances exist.[26] Moreover, as discussed earlier, Northern's reservation of rights to

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[24] 15 U.S.C. § 717c (f)(1)(B) (2007).

[25] Precedent agreements even for cost-based rates routinely contain the types of reservations included by Northern. For example, Northern itself has included in cost based rate filings the right to terminate the project "if Northern determines, in its sole discretion, that the [project], or portion thereof, has become uneconomical for Northern to pursue." See Precedent Agreement filed in Docket No. CP05-410-000 on September 2, 2005.

[26] Distributors argue that the Commission should not find that adequate protection for the expansion customers existed because the expansion shippers were required by the precedent agreements to support Northern's filing and its application for market-based rates. The Commission has not made a determination whether the restriction on the right of expansion shippers to challenge the market-based rate application were just and reasonable. *See Columbia Gas Transmission Corp*., 111 FERC ¶ 61,338 (2005), *aff'd Columbia Gas Transmission Corp. v. FERC*, No. 05-1285 (D.C. Cir. 2007) (affirming the Commission's determination that certain provisions in an executed agreement were not just and reasonable), *see also Maritimes and Northeast Pipeline, LLC.*, 118 FERC ¶ 61,110 (2007). Making a determination on the validity of this contractual term is unnecessary since the Commission reviewed Northern's application on the merits and finds, as discussed in the initial order and below, that Northern provided adequate protection for the expansion shippers.

cancel the project still leaves it with significant business risks, such as the risk of significant cost overruns.[27]

27. More importantly, however, the Commission satisfied its statutory obligation by finding that the protections included by Northern were sufficient to protect expansion shippers against the possible exercise of market power. Pipelines can exercise market power only when they can withhold capacity to "create the artificial scarcity necessary to force shippers to bid" super-competitive prices.[28] A pipeline can exercise market power by physically refusing to build capacity or by building capacity that is smaller than the demand in order to elicit higher bids for scarce capacity. A pipeline also can exercise market power by economically withholding capacity by setting high prices.

28. As to physical withholding, the Commission examined Northern's application to determine whether Northern sought to strategically withhold available capacity to induce higher bids during the open season. The Commission was satisfied that, based on its application, Northern had not withheld capacity because it included in the open season the amount of capacity it estimated to be available. Northern's preliminary engineering studies showed that somewhere between 9 and 12 Bcf of capacity could be available.[29] While Northern indicated during the open season that 10 Bcf reasonably would be available, it, in fact, committed to awarding 13 Bcf of capacity, because it committed to

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[27] If overruns occur, Northern could terminate the project, but it would be at risk for all of the investments made to date, or it could complete the project and earn a lower rate of return. But, under the market-based rates utilized herein, Northern could not pass through the overrun costs to the expansion shippers, absent their express agreement, as it could if it were using traditional cost based rates. *See Northwest Pipeline Corp.,* 76 FERC ¶ 61,068, at 61,421-22 (1996) (allowing pipeline to pass on $61 million in overrun expansion costs under cost-based rates), *rehearing denied*, 78 FERC ¶ 61,289 (1997). Significant overrun costs can occur on storage projects. *See Hardy Storage Co., L.L.C.*, 118 FERC ¶ 61,200 (2007) ($43 million cost overrun).

[28] *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 836 (D.C. Cir. 2002) (*Process Gas*). *See American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005) (following *Process Gas*).

[29] See Northern Declaratory Order Petition, Exhibits A & F.

awarding additional capacity (should it become available) to the highest bidder that did not receive capacity under its open season auction at that bidder's bid price.[30] Distributors do not contend, and provide no evidence, that Northern strategically limited the scope of the project in order to obtain higher bid prices.[31]

29. As to economic withholding, the Commission finds that Northern's use of a fair and open auction procedure shows that it was not withholding capacity. As the court in *Process Gas* recognized, the use of an auction process to allocate capacity means that the pipeline is not exercising market power, but that the result of the auction reflects "rather competition for scarce capacity."[32] The Commission finds these protections sufficient to approve market-based rates particularly, since, as the court recently recognized in *Columbia Gas Transmission Corporation v. FERC,* a pipeline's market power during the subscription phase of a project is "relatively low." The court reasoned that,

> potential shippers will have either the alternative of continuing to use their then-current carriers, or, if they have no current carrier because they haven't yet constructed facilities to use the proposed service, of choosing to locate their facilities elsewhere if they decline the proposed new service.[33]

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[30] Northern actually awarded approximately 13 Bcf of capacity. *See* Northern Declaratory Order Petition, at 37.

[31] As the court found in *Process Gas*, under a cost-based regime, Commission regulation limits the ability of the pipeline to exercise market power by not constructing new facilities, because such regulation limits the pipeline's ability to profit from scarcity. Because this application involved a request for market-based rates, the Commission directly examined whether Northern limited capacity by looking at its engineering analysis to ensure that it included reasonably available capacity in the open season.

[32] *Id*. at 837.

[33] No. 05-1285, 2007 U.S. App. LEXIS 3265, 11 n.1 (D.C. Cir. February 13, 2007).

<u>The Commission orders</u>:

The Commission denies Distributors' request for rehearing, as discussed in the body of this order.

By the Commission. Commissioner Kelly dissenting with a separate statement attached.

( S E A L )

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company Docket No. RP06-437-001

(Issued April 20, 2007)

KELLY, Commissioner, *dissenting*:

As with the original order in this proceeding, I must dissent from this order on rehearing because I continue to believe that the applicant has failed to meet the requirements of Order No. 678 to: (1) prove that market-based rates are in the public interest (i.e. needed to permit the expansion) and (2) provide adequate customer protection.

My earlier dissent in this proceeding contains a detailed description of my reasoning and I see no reason to repeat that discussion here. I believe that reasoning still stands on its own merits. However, I will address new or expanded arguments made in this rehearing order.

The majority continues to argue that the risks of this expansion, such as the potential need for treatment facilities and the possible need for additional wells, in combination with Northern's offer of long-term fixed-rate contracts, prove that market-based rates are in the public interest here. However, all of these risks are common to most if not all storage projects, whether greenfield or expansion, and can be dealt with using cost-based rates. Indeed, they have been dealt with in cost-based rates for years, including by Northern itself.

To the extent the pipeline faces risk, we are required to set the Return on Equity in its cost-based rate at a level commensurate with that risk. This is a legal requirement for cost-based rates and market-based rates, therefore, are not needed to address a risk-appropriate return. Additionally, if a pipeline is truly concerned about the risk of cost overruns, then cost-based rates that can be adjusted through subsequent filings appear to be a better solution for the pipeline than long-term fixed market-based rates such as those allegedly proposed here. The only logical rationale, then, for market-based rates under these circumstances would be that customers will not accept the risk of later rate increases and would only sign fixed-rate precedent agreements where the seller has accepted the market risk.

The majority relies partially on the idea that market-based rates are in the public interest because they allow Northern to accept the risk of cost overruns, including market risks like increased base gas costs, and give its customers long-term fixed rate contracts. However, this leads to my next point: these rates are only fixed to the extent that

Northern remains satisfied with them. As I discussed in detail in my last dissent, Northern's draft precedent agreement states that "[i]f the final costs determined by Northern require higher rates than set forth in the precedent agreements, Northern will notify customers that it will not execute the precedent agreements *and will hold another open season*."(emphasis added) In other words, if Northern expects its costs to exceed projections, Northern retains the right to abandon these allegedly fixed rates and require these customers to re-bid at rates that will recover the higher costs. As the majority notes, this is a common provision in precedent agreements. However, such precedent agreements have largely, perhaps exclusively, included cost-based rates with no requirement that the pipeline shift market risk from its customers to itself. How then can we reconcile the claim that Northern has shielded its customers from market risk, with Northern's retention of the right to change these "fixed" rates, which are the only mechanism that would shield them from market risk?

This issue of which side accepts the market risk is of great importance. In cost-based rates the market risk is essentially on the buyer and regulated cost-based rates are the quid pro quo for that assignment of market risk. The situation is supposed to be reversed for market-based rates. In exchange for deregulated rates, the seller is supposed to accept the market risk.

Indeed, in another order on this agenda addressing an electric merchant transmission proposal in Docket No. ER07-543-000, the Commission discusses its ten criteria for evaluating proposals to charge negotiated rates for transmission rights over new electric transmission facilities. The very first criterion is that "the merchant transmission facility *must assume full market risk*."(emphasis added) I see no substantive difference between a merchant electric transmission line and a merchant gas storage service to justify different treatment. Yet I submit that, by retaining precedent agreement provisions more appropriate for a cost-based regime, Northern has not accepted "full market risk."

Finally, the majority again argues that Northern's open season protected customers, in part, because no physical withholding of capacity occurred. At the end of paragraph 27, the majority recognizes that economic withholding through the setting of high prices is also a concern. However, the majority essentially argues that economic withholding is never a concern as long as a fair and open auction procedure is used. In my earlier dissent I discussed other issues with the majority's reliance on this auction process, and that earlier discussion is still relevant. However, in this dissent I wish to focus more on the issue of economic withholding itself.

For purposes of economic withholding, as the majority itself recognizes, the question is whether Northern set a high price. I believe that the relevant Northern-set price in this auction process was the bidding floor, which received scant attention from the majority. Had the final auction price resulted only from fair competition among the bidders, then perhaps there would be more support for the majority's view. However, competition in this auction was tainted by the need to exceed the floor set by Northern. The existence of a floor below which no bid would be accepted, gives Northern the direct power to set a minimum price for the auction. As I explained in my prior dissent, there is every rational reason to believe that Northern would set this floor well above its projected costs. Therefore, almost by definition, Northern engaged in economic withholding by employing a floor price in what was represented to be a market-based auction.

In conclusion, I continue to find that this proposal fails to meet the two key requirements of Order No. 678 and NGA section 4(f). Therefore, I respectfully dissent from this order denying rehearing.

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Suedeen G. Kelly