

153 FERC ¶ 61,052  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

ANR Storage Company

Docket No. RP12-479-000

OPINION NO. 538

ORDER ON INITIAL DECISION

(Issued October 15, 2015)

1. This order addresses an Initial Decision issued on January 29, 2014, by the Presiding Administrative Law Judge related to ANR Storage Company's (ANRS) request for a declaratory order granting authorization to charge market-based rates for natural gas storage service. As discussed herein, this order affirms in part, and reverses in part, the Initial Decision. This is the first fully-litigated proceeding where a gas storage provider has sought market-based rate authority. This case therefore presents an opportunity for the Commission to set forth in detail its policies and procedures for market-based rate applications from gas storage providers, and allows the Commission to make clear how gas storage providers may meet the evidentiary burden they possess to demonstrate they lack significant market power.

2. Upon filing an application for market-based rate authority, the filing company has the burden of proof to demonstrate it lacks significant market power. Companies must define the relevant product and geographic markets, compile a list of competitive alternatives, calculate market share and market concentration numbers, and identify any additional factors that could impact a market power application. ANRS filed its request, which the Commission set for an evidentiary hearing. The Initial Decision denied ANRS' application, and the Commission reviewed.

3. In summary, the Commission finds that ANRS failed to meet its evidentiary burden to show that it lacked significant market power. The Commission first sets forth the proper procedures through which ANRS was afforded a means to meet this burden, including the presentation of an initial case-in-chief as well as rebuttal testimony and an evidentiary hearing. The Commission reverses the Initial Decision's finding that ANRS was required to meet its evidentiary burden solely through its direct testimony. The Commission then examines ANRS' market power analysis in detail. While the Initial Decision limited the product market to firm, interstate storage and local production, the

Commission determined that the proper product market for ANRS consisted of firm service and local production as well as intra-state storage. While interruptible service could potentially also be in the product market of a gas storage provider, ANRS' arguments in support of this were contradictory, and therefore ANRS did not meet its evidentiary burden. The Initial Decision had limited the geographic market to the area where competitive alternatives were located. The Commission determined the applicable geographic market was the Central Great Lakes market, consisting of Michigan, Illinois, Indiana, Ohio, and western Ontario, which comprise the area in which ANRS provided service. The Commission finds that identifying the geographic market is a distinct, separate step that is not determined solely by the location of competitive alternatives.

4. The Commission then, within the applicable product and geographic markets, determined the list of competitive alternatives that could potentially discipline an attempt by ANRS to exercise market power. The Commission analyzed the potential competitive alternatives in terms of price, availability and quality. The Commission does not require a specific price test, nor does the requirement that an alternative be available eliminate subscribed alternatives that may become available through, for example, capacity release. The Initial Decision had incorrectly excluded alternatives that were either fully subscribed or did not possess the proper certification for providing interstate service.

5. Upon determining the list of competitive alternatives, the Commission derived market share and market concentration calculations. While finding that these market metrics were within range of similar entities that were granted market-based rate authority, the Commission ultimately agreed with the ruling of the Initial Decision and determined that the likelihood that a significant number of alternatives would make themselves available in response to an anti-competitive price increase by ANRS was too speculative, and therefore ANRS failed to meet its evidentiary burden that it lacked significant market power. No additional factors outweighed the determination, and ANRS' request is denied.

## **I. General Background**

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

Michigan. ANR Pipeline provides 134.50 Bcf of working gas storage capacity, and Blue Lake provides 47.09 Bcf of working gas storage capacity.<sup>1</sup>

7. On November 17, 2011, pursuant to section 5 of the NGA,<sup>2</sup> the Commission initiated action against ANRS to determine whether ANRS's rates were just and reasonable, and set the case for hearing. The Commission found in setting the case for hearing that based on ANRS's Form No. 2 data ANRS received an estimated return on equity of 130.38 percent in 2009 and 153.71 percent in 2010.<sup>3</sup>

8. After the case was set for hearing before an Administrative Law Judge, ANRS, its customers, and Commission Trial Staff agreed to a Settlement filed on June 8, 2012, that ended the investigation by lowering ANRS' rates.<sup>4</sup> The rate reductions were phased-in for firm and interruptible storage customers, with Phase 1 rate reductions beginning on July 1, 2012 and Phase 2 rate reductions commencing on June 1, 2013. Under Phase 1, ANRS' firm rates were reduced from \$2.39997 per Dth for monthly deliverability and \$0.02449 per Dth for monthly capacity to \$1.91998 per Dth for monthly deliverability and \$0.01959 per Dth for monthly capacity, representing a reduction of 20 percent and 41 percent, respectively. The Phase 2 rates reduced ANRS' rates to \$1.09240 per Dth for monthly deliverability and \$0.01325 per Dth for monthly capacity representing a 55 percent and 51 percent decrease, respectively, from the rates in effect prior to the Settlement. Further, the Settlement required at Article IV that ANRS file a new NGA Section 4 general rate case to be effective no later than July 1, 2016.

9. On March 6, 2012, in Docket No. RP12-479-000, ANRS had filed a petition for a declaratory order requesting that the Commission grant ANRS authorization to charge market-based rates for natural gas storage services, and seeking certain waivers of the Commission's cost-based regulations. The subsequent Settlement at Articles I and V provided that parties in the instant declaratory order proceeding were free to make whatever arguments they could make in the absence of the Settlement, finding that the declaratory order proceeding could be handled separately by the Commission.

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<sup>1</sup> See *Jurisdictional Storage Fields in the United States by Owner* (updated May 6, 2014), <http://www.ferc.gov/industries/gas/indus-act/storage/fields-by-owner.pdf>.

<sup>2</sup> *ANR Storage Co.*, 137 FERC ¶ 61,136 (2011).

<sup>3</sup> *Id.* PP 6-7.

<sup>4</sup> *ANR Storage Co.*, 140 FERC ¶ 61,007 (2012), *order on contested settlement*, 140 FERC ¶ 61,134 (2012).

10. On November 5, 2012, after several parties filed motions to intervene, and finding the filing raised issues of material fact that warranted examination in a hearing, the Commission set for hearing the question of whether ANRS lacked significant market power to merit charging its customers market-based storage rates.<sup>5</sup> The Presiding Judge held a prehearing conference on November 29, 2012. The hearing commenced on August 29, 2013, and concluded on September 5, 2013.

11. On January 29, 2014, the Presiding Judge issued the Initial Decision. Briefs on exception to the Initial Decision were filed by DTE Energy, Commission Trial Staff (Trial Staff), ANRS, and the Joint Intervenor Group (JIG).<sup>6</sup> Briefs opposing exceptions were also filed by all the parties except DTE Energy. As discussed below, the briefs on exception and briefs opposing exception raise issues related to: (1) burden of proof; (2) product market; (3) geographic market; (4) competitive alternatives (5) market metrics; and (6) other relevant factors.

## **II. Burden of Proof**

### **Initial Decision**

12. The Initial Decision held that ANRS's burden of proof had to be met entirely through arguments presented in its pre-filed direct testimony, and therefore gave no weight to ANRS' significant rebuttal testimony.<sup>7</sup> The Initial Decision also found that ANRS inappropriately attempted to shift the burden of proof to Intervenor on whether certain facilities were good alternatives.<sup>8</sup>

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<sup>5</sup> *ANR Storage Co.*, 141 FERC ¶ 61,099 (2012), *order on petition for declaratory order and declaring a hearing*.

<sup>6</sup> BP Canada Energy Marketing Corp. (BP Canada), Canadian Association of Petroleum Producers (CAPP), Northern States Power Company-Minnesota, and Northern States Power Company-Wisconsin (NSP), and Tenaska Gas Storage, LLC (Tenaska).

<sup>7</sup> Initial Decision at P 435.

<sup>8</sup> *Id.* P 436.

### **Briefs On Exceptions**

13. ANRS states that the Initial Decision erred by finding that ANRS failed to meet its burden of proof through its pre-filed direct testimony, and in using that finding to accord no weight to most of ANRS' rebuttal testimony. ANRS argues that the Initial Decision conflated or misunderstood what constitutes a direct case, the burden of proof, the burden of production and the burden of persuasion, and the proper scope of rebuttal testimony in an administrative hearing. Specifically, ANRS asserts that the Initial Decision misinterpreted *Southern California Edison* as disallowing rebuttal testimony in considering whether an applicant has met its burden of proof.<sup>9</sup> Accordingly, ANRS argues that the Initial Decision, by impermissibly limiting the scope of rebuttal testimony, failed to determine whether the burden of proof had been satisfied by the preponderance of record evidence.

14. ANRS also states that the Commission's regulations, at 18 C.F.R. §§ 284.501-505, refer to an "application," not a market power study, as does the Policy Statement.<sup>10</sup> ANRS states that its *prima facie* case was more than adequate to show that it lacked market power because the Commission set ANRS' application for rehearing rather than denying it. ANRS argues that it follows that, after the Commission's November 5, 2012 Hearing Order, the burden of going forward shifted to the Intervenors to submit evidence in response to ANRS' affirmative case.<sup>11</sup>

15. Furthermore, ANRS asserts that all of its rebuttal testimony was proper because it either responded to arguments raised, or demonstrated the intrinsic faults of the evidence offered by Intervenors. ANRS cites evidence from its pre-hearing filings to show that its *prima facie* case discussed the impact of Marcellus production, natural gas trading and storage markets, and intrastate storage, and that accordingly, its rebuttal testimony on these topics was proper.<sup>12</sup> ANRS points out that JIG criticized its inclusion of state-regulated storage as good alternatives in response to ANRS' direct testimony, and that

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<sup>9</sup> ANRS Brief on Exceptions at 22-23 (citing *S. Cal. Edison Co.*, 50 FERC ¶ 63,012, at 65,056 (1990)).

<sup>10</sup> ANRS Brief on Exceptions at 23 (citing *Alternatives to Traditional Cost-of-Serv. Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,236 (1996) (Policy Statement)).

<sup>11</sup> *Id.* 24.

<sup>12</sup> *Id.* 25-26.

ANRS' rebuttal testimony on this topic was therefore proper because it responded to specific criticisms raised by the Intervenors.<sup>13</sup>

16. ANRS also argues that ANRS was not in possession of some relevant evidence, listed in ANRS' Appendix C, until after discovery was conducted and after Intervenors filed their answering testimony.<sup>14</sup> ANRS also asserts that the Initial Decision's July 19, 2013 Order Denying Motion to Compel kept information about state-regulated state facilities away from ANRS because other evidence was sufficient. ANRS thus contends that, if its burden of proof has not been met, then the Initial Decision's decision to keep out that evidence is reversible error.<sup>15</sup>

17. ANRS asserts that the Initial Decision's claim that ANRS' rebuttal testimony constituted an improper submission of evidence is undermined because Intervenors never timely filed any motions to strike the rebuttal testimony, nor was any qualification or condition (aside from protected status) placed upon the admission of this evidence at the hearing, and consequently, the rebuttal evidence is a part of the record.<sup>16</sup>

18. The final argument ANRS makes to show it met the burden of proof concern the policy reasons behind the burden of proof rule. Citing the Initial Decision's concern that an important policy reason for the imposition of the burden of proof is that of providing notice, ANRS contends that all of the participants had notice of all the information and arguments the Initial Decision implied or concluded were not advanced until rebuttal. Specifically, this information was either (1) produced by Intervenors in discovery and therefore within their possession and knowledge; (2) in pleadings that Intervenors had made in other state and federal proceedings; or (3) included in ANRS' materials filed before Intervenors filed their testimony.<sup>17</sup>

19. ANRS also argues that acceptance of the Initial Decision's reasoning would fail to accord ANRS due process. ANRS states that the Initial Decision applied different

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<sup>13</sup> *Id.* 27.

<sup>14</sup> *Id.* 28.

<sup>15</sup> *Id.* 29.

<sup>16</sup> ANRS Brief on Exceptions at 29.

<sup>17</sup> *Id.* 30.

standards than those applied in the applicable case law<sup>18</sup> and failed to provide a cognizable standard to ANRS, and that this departure is inappropriate because (1) there was no adequate explanation for the marked departure from prior Commission precedent;<sup>19</sup> (2) the lack of notice to ANRS of the departure from established Commission precedent creates a moving target; and (3) the Initial Decision was internally inconsistent in its characterization of the standard.

20. ANRS cites three examples to show how the Initial Decision failed to articulate a cognizable standard for demonstrating a lack of market power. First, the Initial Decision stated that the Commission's process for determining the relevant geographic market is less clear, and then discussed a one-pipeline test, a two-pipeline test, and a price test, and concluded there to be no definitive answer. Second, the Initial Decision created a new standard by saying that only intrastate storage with authorization to move gas into the interstate market could be a good alternative. Third, the Initial Decision stated that while the Policy Statement requires a price test, the Commission has sought comparability with a price test when applicants have not submitted price data with their applications, and the Initial Decision then concluded that perhaps price tests were not required only where applications were unopposed or applicants very small. Therefore, ANRS contends, the Initial Decision's failure to articulate a cognizable standard that it purports to hold ANRS to should result in a rejection of the Initial Decision.

21. ANRS also contends that the Initial Decision held ANRS to a different standard than any other applicant for market-based storage rates. ANRS holds out as an example Chestnut Ridge Storage LLC's application, which sought market-based rate authority for considerably more services than ANRS but provided far less information on the product or geographic market definitions than ANRS. ANRS further asserts that its application was more robust than that of any other applicant who ultimately received market-based rate authority under Part 284.501, *et seq.*<sup>20</sup>

22. Trial Staff was the only other participant to offer arguments on the burden of proof question in the Briefs on Exceptions. Trial Staff asserted that the Initial Decision erred by finding that ANRS failed to meet its burden of proof and also erred by finding that ANRS and Trial Staff improperly attempted to shift a portion of the burden of proof to

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<sup>18</sup> *Id.* 32 (citing *Mobil Pipe Line Co. v. FERC*, 676 F.2d 1098, 1104-05 (D.C. Cir. 2012)).

<sup>19</sup> *Id.* 31 (citing *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989)).

<sup>20</sup> *Id.* 33-34.

the Intervenor.<sup>21</sup> With regard to the question of whether ANRS failed to meet its burden of proof, Trial Staff argued that the Initial Decision misapplied the burden of proof standard by asking whether ANRS had filed sufficient evidence in its pre-filed direct testimony to carry its burden that it lacks market power and therefore is eligible to receive market-based rates. Trial Staff states that if ANRS had filed more evidence, the Commission might have issued a declaratory order by means of a paper hearing, and that if ANRS had plainly failed to file sufficient evidence, the Commission might have summarily dismissed ANRS' application.<sup>22</sup> Trial Staff also asserts that it is plainly the totality of all evidence – the direct evidence, the answering evidence, the cross answering evidence, and the rebuttal evidence – which ultimately determines who prevails.<sup>23</sup>

23. With regard to the burden shifting issue, Trial Staff puts forward several examples to show that neither Trial Staff nor ANRS engaged in improper burden shifting. First, ANRS Storage pointed out in rebuttal evidence, after Tenaska witness Litjen testified that several potentially good alternatives had operational impediments that precluded them from being of service to Tenaska, that Mr. Litjen failed to present any documentary evidence to support his assertions. Trial Staff points out that, similarly, Trial Staff asserted that Intervenor's answering and cross answering testimony challenging the lists of good alternatives separately advanced by ANRS and Trial Staff was limited to a paper study of each potential storage provider's tariff and/or certificate terms as well as Mr. Litjen's undocumented operational analysis. Trial Staff contends that neither of these contentions by ANRS and Trial Staff amount to burden shifting.

24. Second, Trial Staff explains how ANRS first put forward a list of good alternatives, Trial Staff sought to narrow the list somewhat, and Intervenor then sought to narrow the list further. In rebuttal testimony, ANRS and Trial Staff challenged a number of the conclusions advanced by Intervenor. This comprised, Trial Staff asserts, an orderly exchange of the burden of going forward, not shifting the burden of proof to Intervenor.<sup>24</sup>

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<sup>21</sup> Trial Staff Brief on Exceptions at 24-25.

<sup>22</sup> *Id.* 25.

<sup>23</sup> *Id.* 25 (citing *Nw. Pipeline Corp.*, 61 FERC ¶ 63,016, at 65,103 (1992) (Initial Decision)).

<sup>24</sup> Trial Staff Brief on Exceptions at 27.

25. Third, Trial Staff contends that the Initial Decision asserted that Trial Staff attempted to shift the burden of proof to Intervenors when, Trial Staff stated that JIG's witness should have examined "realistic alternatives to potential market-based rates" and that this was tantamount to asserting that JIG had a duty to perform a price analysis. Trial Staff asserts this quote had nothing to do with a price test, but rather referred to the failure of JIG's witness to even ask his clients what they consider to be their realistic alternatives should market-based rates be charged by ANRS.<sup>25</sup> Trial Staff allows that it did point out in testimony (Exhibit S-10 at 12) that JIG had not conducted a price test, but asserts that this was merely a response to JIG's assertion that sufficient data was available to perform a price test and that a price test is analytically simple, and that Trial Staff did not provide valid reasons for not performing a price test. Thus, rather than shifting the burden of proof, Trial Staff argues that its statement merely challenged JIG's claim that a price test is easy to conduct.<sup>26</sup>

26. With regard to the burden shifting issue, Trial Staff also states that the Initial Decision does not appreciate the difference between a market-based rate case and a standard natural gas rate increase application, where the applicant pipeline possessed virtually all of the underlying data to support its application. For instance, Trial Staff points out that under the Initial Decision's approach, shippers are placed under no obligation to even identify their receipt and delivery points, even though the proximity of those points to the facilities of identified storage providers would lead to highly relevant information and ultimately to an informed determination as to whether certain storage providers were good alternatives to ANRS. Trial Staff points out that the Presiding Judge accepted JIG witness Wilson's view that knowing receipt and delivery points was unnecessary, and that it faulted Trial Staff for suggesting that JIG witness Wilson had a responsibility to even ask his four shipper clients the basic question of what realistic alternatives to ANRS they would likely consider.<sup>27</sup>

### **Briefs Opposing Exceptions**

27. JIG, in its Brief Opposing Exceptions, opposes ANRS' argument in its Brief on Exceptions that the Initial Decision's handling of the burden of proof issue was flawed. JIG states that the Initial Decision's rulings were the product of reasoned decision

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<sup>25</sup> *Id.* 27-28.

<sup>26</sup> *Id.* 29.

<sup>27</sup> *Id.* 30.

making and were completely consistent with the Policy Statement, Order No. 678, Commission precedent, and principles of basic procedural fairness.

28. JIG cites the Policy Statement at several places to show that applicants must support their choice of the relevant product and alternatives with detailed evidence.<sup>28</sup> JIG also cites Order No. 678, which JIG asserts forcefully reiterated the applicant's burden of proof.<sup>29</sup> JIG also cites prior Commission decisions for the proposition that substitutes an applicant has not shown to be good alternatives must be cast aside.<sup>30</sup> Given this precedent, JIG asserts that the Initial Decision justifiably held that the first burden of proof question was "[H]as ANRS filed sufficient evidence in its pre-filed direct testimony to carry its burden that it must prove that it lacks market power, and therefore is eligible to receive market-based rates?"

29. JIG also asserts that the rebuttal testimony of ANRS Witnesses Sullivan and Kirk on intrastate storage was properly discounted by the Initial Decision because their theory – that all intrastate storage within the relevant geographic market necessarily qualified as a good alternative – was initially advanced and developed only in its rebuttal case. JIG contends that ANRS advanced this theory to avoid making the necessary showing required by the Policy Statement and Order No. 678. Therefore, JIG argues the Initial Decision took the only reasonable course of disregarding the rebuttal testimony supported by this untimely new theory.<sup>31</sup>

30. JIG states that, in contrast to ANRS' claim, the Initial Decision did not mischaracterize ANRS' position on the intrastate storage issue. JIG states that ANRS, on page 58 of its Reply Brief, was demanding that the Presiding Judge find all LDC storage within its geographic market to be a good alternative.<sup>32</sup>

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<sup>28</sup> JIG Brief Opposing Exceptions at 11 (citing the Policy Statement, 74 FERC ¶ 61,076, at 61,231 & 61,236).

<sup>29</sup> *Id.* 12 (citing *Rate Regulation of Certain Natural Gas Storage Facilities*, 115 FERC ¶ 61,343, at PP 27, 29 & 47-48 (2006) (Order No. 678)).

<sup>30</sup> *Id.* 13 (citing *Gas Transmission Nw. Corp.*, 119 FERC ¶ 61,288 (2007); *Miss. River Transmission Corp.*, 95 FERC ¶ 61,141, at 61,452 (2001)).

<sup>31</sup> JIG Brief Opposing Exceptions at 14.

<sup>32</sup> *Id.* 14-15.

31. JIG also argues that the Initial Decision's rejection of Mr. Bennett's rebuttal testimony is also on firm footing. JIG states that Mr. Bennett's testimony was offered in relation to the Market Power Study for the sole purpose of showing that the Market Power Study was conservative, not as independent evidence of non-storage "good alternatives" to be factored into the market metrics. At best, JIG argues, Mr. Bennett's direct testimony fell into the category of "other factors," one of which was that the Market Power Study was conservative. Yet on rebuttal, JIG argues that ANRS shifted gears, discussing how alternatives mentioned in Mr. Bennett's direct testimony were good alternatives for purposes of market metrics calculations.<sup>33</sup> Thus, JIG concludes, the Initial Decision properly held that endorsing ANRS' approach would relegate the Market Power Study to a meaningless sideshow and not meet the rigorous, detailed evidentiary showing and metrics contemplated by the Policy Statement and Order No. 678.<sup>34</sup>

32. JIG asserts that the Initial Decision's decision to discount Mr. Bennett's rebuttal testimony is also consistent with the basic considerations of procedural fairness as explained in *Southern California Edison Co.*, 50 FERC ¶ 63,012 (1990) (*SCE*) and *KN Interstate Gas Transmission Co.*, aff'd 86 FERC ¶ 61,220 (1999) (*KNI*). JIG concludes that ANRS alleges two unwarranted flaws in the Initial Decision's reliance on *SCE*: that the Initial Decision incorrectly identified *SCE* as a Commission decision, and that the Initial Decision did not acknowledge that the Presiding Judge in *SCE* allowed as rebuttal evidence a study that also could have been presented on direct. JIG states that the alleged flaws are, respectively, a quibble that does not undermine the logic and relevance of the decision, and ANRS' depiction of the case is incomplete. In regard to the incompleteness of the depiction, JIG explains that the only reason the Presiding Judge in *SCE* allowed a study that could have been presented on direct was because the opposing side had presented its own study, and thus the applicants' were merely filing a responsive study. JIG asserts that ANRS by contrast, responded to no such study, but merely sought to fill the cavernous gaps in its own direct case.<sup>35</sup>

33. JIG discusses two other holdings made by the Presiding Judge in *SCE*, which support the Initial Decision's discounting of ANRS' rebuttal evidence. First, the Presiding Judge struck studies that applicants offered on rebuttal because those studies addressed issues on which the applicants had an affirmative burden of proof. Second, he struck other portions of the applicants' rebuttal evidence involving an analysis of vertical

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<sup>33</sup> *Id.* 16-17.

<sup>34</sup> *Id.* 18.

<sup>35</sup> *Id.* 19.

merger impacts because those analyses were only developed on rebuttal after what had merely been an aside in the applicants' direct case.<sup>36</sup>

34. JIG also describes the evidentiary rulings in the *KNI* case as follows: KNI filed a general rate case in which it proposed to recover project costs on a rolled-in basis. But final project costs significantly exceeded the projected costs and the Commission held in its suspension and hearing order that KNI thereby lost the benefit of a rolled-in rate presumption. Rather than attempt to update its application, KNI opted to go forward with its direct case unchanged. As a result, the Presiding Judge granted a motion for partial summary disposition, on the grounds that KNI's originally filed evidence failed to make a *prima facie* case in favor of rolled in rates, and the Presiding Judge also rejected KNI's attempt to offer supplemental testimony. The Commission affirmed the Initial Decision, including the holdings that the pipeline had reason and opportunity to supplement its direct case as a result of the hearing order, and thus, the pipeline should bear the consequence for failing to timely update its case.<sup>37</sup>

35. JIG contends that another factor that should have put ANRS on notice that it needed to supplement its case and seek leave to supplement its petition was the fact that the Commission, for the first time ever, set a market-based storage rate application for hearing. JIG contends that as ANRS did not seek leave to supplement its Petition, the Presiding Judge rightfully found that ANRS took the risk attendant to holding back what, in substance, was direct evidence until rebuttal.<sup>38</sup>

36. Responding to ANRS' contention that excluding evidence that allegedly came into ANRS' possession only after it filed its Petition, JIG states that the correct inquiry is not whether ANRS' rebuttal case contained information that was not available to ANRS at the time it filed its petition, but whether it contained information available at the time of the Commission's hearing order. The answer to that question, JIG states, is a resounding yes. JIG argues that therefore ANRS stands in the same position as the pipeline in *KNI*. Therefore, the Initial Decision's conclusion that ANRS should be held to the consequences of that choice was not error.<sup>39</sup>

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<sup>36</sup> *Id.* 20.

<sup>37</sup> JIG Brief Opposing Exceptions at 20-21.

<sup>38</sup> *Id.* 22.

<sup>39</sup> *Id.* 23.

37. JIG also responds to ANRS' claim that the Presiding Judge improperly dismissed rebuttal testimony in regard to three subjects because he incorrectly found that ANRS had not mentioned them in its direct case. With regard to Marcellus Shale production, JIG states that while it is true that ANRS mentioned Marcellus shale in its petition and market power study, it was in the context of other factors, this type of evidence is too speculative to be accepted in a market power determination. This incorrect portrayal of ANRS' direct case is thus harmless error at best.<sup>40</sup> With regard to gas trading and storage markets, JIG states that the Initial Decision was correct in finding that ANRS' direct case did not discuss gas trading and storage market as other factors and intrastate storage, but only mentioned it as an "other factor" in its Initial Brief. With regard to intrastate storage, JIG states that the Presiding Judge was correct that intrastate storage was not discussed in its direct case. Rather, JIG states that while several intrastate storage facilities were included in its market study, ANRS presented no analysis of how these facilities met the tripartite standard required for a good alternative.<sup>41</sup>

38. JIG also responds to ANRS' claim that its evidence was, in fact, proper rebuttal testimony. JIG states that it would not be proper rebuttal evidence for an applicant, as ANRS suggests, to fill in the gaps for why individual intrastate providers are good alternatives after an opposing party has claimed that they are not. Rather, proper rebuttal in that instance would be for ANRS to explain why the omitted evidence was not relevant or necessary to its direct case.<sup>42</sup> Moreover, JIG asserts that ANRS' appendix purporting to tie ANRS' rebuttal testimony, line for line, to JIG's testimony does not provide an escape from the evidentiary box that ANRS created for itself and that these "connections" are in most cases no more than tenuous threads.

39. JIG also disputes ANRS' claim that the Presiding Judge's denial of its motion to compel data from BP Canada is proof that he "reviewed this case from the wrong end of the evidentiary telescope." JIG states that, firstly, ANRS is too late in making its claim for reversible error at the brief on exceptions stage. Regarding the substance of the argument, JIG states that the Presiding Judge justifiably found that the information BP Canada would provide would only be tangentially relevant at best because he explained that responses from BP Canada would not have resulted in relevant data, that the data would have been duplicative, and that the search for information requested would have been unduly burdensome, so that, on balance, the burden imposed on BP Canada

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<sup>40</sup> *Id.* 24.

<sup>41</sup> *Id.* 26.

<sup>42</sup> *Id.*

outweighed the potential that the requested information will lead to the production of relevant information or that production will lead to a more fully developed record.<sup>43</sup>

40. JIG addresses ANRS' claim that the Initial Decision violated ANRS' due process rights. JIG states that ANRS failed to remember that every market-based rate application is approached by the Commission on a case-by-case basis, and that it failed to appreciate the uniqueness of its own case. JIG asserts ANRS should have been aware of these unique or unusual factors: The Commission had not previously considered a market-based rate application where the applicant's facilities could only be accessed via affiliated pipelines; although ANRS' consultants had previously used a "two-pipeline" test that test had never formally been adopted by the Commission as a substitute for the price test; ANRS' application of the "two pipeline" test required that ANR Pipeline and Great Lakes be considered a single entity, an issue the Commission had not previously addressed; the Commission had previously rejected the very geographic market ANRS was proposing and its proposal could face greater scrutiny as a result; and its application, unlike the majority of prior market-based rate applications, likely would be vigorously protested by its shippers, given their recent participation in ANRS' Section 5 rate case.<sup>44</sup> JIG also states that perhaps ANRS was lulled into a false sense of security by the Commission's fairly regular approval of market-based rate applications for applicants intending to build new facilities, applicants with small market shares, applicants located in markets the Commission already has determined to be competitive, in proceedings where the application was unopposed, or where the applicants were not relying on broad claims of non-storage alternatives.<sup>45</sup>

41. Finally, JIG maintains that it is incorrect for ANRS to claim that the Presiding Judge dispensed with the Commission's established analysis for reviewing market-based rate applications because the Presiding Judge did the following: identified the product market, identified the geographic market, calculated the market share and concentration metrics and excluded alternatives for good reasons, and reviewed "other factors" and concluded they were insufficient to overcome the metrics.<sup>46</sup>

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<sup>43</sup> JIG Brief Opposing Exceptions at 29.

<sup>44</sup> *Id.* 30-31.

<sup>45</sup> *Id.* 30.

<sup>46</sup> *Id.* 32-33.

### **Commission Determination**

42. In the Initial Decision, the Presiding ALJ found that ANRS had the burden of proof in this proceeding, and was required to demonstrate it lacked market power solely through its pre-filed direct testimony.<sup>47</sup> The Presiding ALJ gave no weight to any subsequent filings of ANRS, including rebuttal testimony. The Initial Decision also sharply criticized ANRS for attempting to shift the burden of proof onto the Intervenors.

43. While it is uncontested that ANRS had the burden to prove it lacks market power,<sup>48</sup> the Commission overturns the Initial Decision's holding that ANRS was required to meet its burden of proof solely through its pre-filed testimony. The Commission ruled in the Hearing Order that ANRS had presented a *prima facie* case, and that a hearing was necessary to further develop the record.<sup>49</sup>

44. The Commission's regulations set forth what an application for market-based rates must contain. Applicants must file proposed testimony in support of the application, and this testimony will serve as the applicant's case-in-chief, if the Commission sets the application for hearing.<sup>50</sup> In the policy statement, the Commission found that an application should be sufficient to establish on its own, without further inquiry or support, that the proposed service or services meet the criteria for market-based rates.<sup>51</sup>

45. Upon receiving an application for market-based rate authority, the Commission has the choice of conducting a paper hearing "based upon the initial filing and responses thereto, or set[ting] the matter for a formal evidentiary hearing before an administrative law judge."<sup>52</sup> Such a formal hearing would therefore involve more than the initial filing and responses. In the Hearing Order, the Commission stated that the matter was being set for hearing to ensure an adequate factual basis to determine whether ANRS lacked

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<sup>47</sup> *ANR Storage Co.*, 146 FERC ¶ 63,007, at P 435 (2014) (Initial Decision).

<sup>48</sup> *Koch Gateway Pipeline Co.*, 85 FERC ¶ 61,013, at 61,041 (1998).

<sup>49</sup> *ANR Storage Co.*, 141 FERC ¶ 61,099, at P 16 (2012) (Hearing Order).

<sup>50</sup> 18 C.F.R. § 284.503 (2014).

<sup>51</sup> Policy Statement, 74 FERC ¶ 61,076 at 61,236.

<sup>52</sup> *Id.* 61,236.

significant market power.<sup>53</sup> The Commission explicitly found that it lacked a complete record to determine whether ANRS' proposal was just and reasonable.<sup>54</sup> However, by setting the matter for hearing the Commission acknowledged that ANRS had met the filing requirements and the application should not be rejected. The Commission has rejected applications for failing to provide the relevant information necessary to make a market power determination,<sup>55</sup> but did not do so in this proceeding. The test for *prima facie* evidence is whether there are facts in evidence which if unanswered would justify the Commission in affirming ANRS' request.<sup>56</sup> By meeting the *prima facie* test, ANRS demonstrated that it met the initial burden on going forward with its application.<sup>57</sup>

46. In setting the matter for hearing, the Commission was clear that ANRS had not yet met its overall burden of demonstrating that it lacked market power. ANRS states that upon issuance of the Hearing Order, the burden shifted to the Intervenors to submit evidence in response to ANRS' affirmative case.<sup>58</sup> This is not correct. The party with the burden of proof, in this case ANRS, bears the burden of production, or the need to provide sufficient evidence to establish a *prima facie* case.<sup>59</sup> The information filed by ANRS in its application met the requirements of section 284.503, enough that the Commission did not dismiss the case outright. Once ANRS' initial burden was met, the burden of going forward shifted to the opposing party, although the ultimate burden of

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<sup>53</sup> Hearing Order, 141 FERC ¶ 61,099 at P 1.

<sup>54</sup> *Id.* P 16.

<sup>55</sup> *Miss. River Trans. Corp.*, 95 FERC ¶ 61,141 (2001).

<sup>56</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 149 FERC ¶ 61,116, at P 46 (2014) (citing *Nantahala Power & Light Co. Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 19 FERC ¶ 61,152, at 61,276 (1982)).

<sup>57</sup> *Nantahala Power & Light Co. Town of Highlands, NC v. Nantahala Power & Light Co.*, 19 FERC ¶ 61,152, at 61,276 (1982).

<sup>58</sup> ANRS Brief on Exceptions at 24.

<sup>59</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 149 FERC ¶ 61,116, at P 45 (2014) (citing *Dir. OWCP v. Greenwich Collieries*, 512 U.S. 267, 276 (1994)).

persuasion remains with the proponent.<sup>60</sup> Intervenors filed protests that questioned the validity of ANRS' arguments. After reviewing both sides' arguments, the Commission ruled that not enough information was present to make a determination on ANRS' market power. At this stage, through the various protests, the Intervenors met their burden of casting doubt on ANRS' *prima facie* case.<sup>61</sup> The Intervenors need not have proven the existence of market power, but only have produced some evidence to cast sufficient doubt on ANRS' arguments in the application.<sup>62</sup> Once this was accomplished in the various protests, the burden shifted back to ANRS to prove that it lacks market power.

47. The burden of proof, in the sense of the ultimate burden that rests upon a party to establish the truth of a given proposition, never shifts during the course of the trial, but remains from the first to the last with the party on whom the law cast it at the beginning of the trial.<sup>63</sup> It remained ANRS' burden to affirmatively demonstrate that it lacked significant market power. The Intervenors were under no obligation to file anything after the original protests. Just as ANRS chose not to request the opportunity to file supplemental direct testimony, the Intervenors could have foregone filing answering testimony. If no party had filed any evidence following the Hearing Order, ANRS' burden would have remained unmet.

48. As ANRS did not meet its ultimate burden of proof with its application and supporting evidence, and the Commission determined that it required an evidentiary hearing to further develop the record, the Initial Decision's ruling that ANRS was required to meet its burden solely with its pre-filed market study was in error. Strangely, the ID states that ANRS should have presented evidence on good alternatives "once the Intervenors" put (ANRS) on notice through objections raised in answering testimony that not all of its alternative storage facilities were unassailably "good".<sup>64</sup> Doing so, which would have occurred in rebuttal testimony, is exactly what the Initial Decision finds fault with in ANRS' rebuttal. The Initial Decision also states, in a critique of ANRS, that

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<sup>60</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 149 FERC ¶ 61,116, at P 45 (2014) (citing *Dir. OWCP v. Greenwich Collieries*, 512 U.S. 267, 273, 279-80 (1994)).

<sup>61</sup> *Windsor Gas Corp.*, 23 FERC ¶ 62,373, at 63,574 (1983).

<sup>62</sup> *See Penzoil Co. v. FERC*, 645 F.2d 360, 392 (5<sup>th</sup> Cir. 1981).

<sup>63</sup> *Windsor Gas Corp.*, 23 FERC ¶ 62,373, at 63,574 (1983).

<sup>64</sup> Initial Decision at P 437.

“ANRS had ample opportunity to rebut (Intervenor’s) assertions.”<sup>65</sup> This seems not to be the case, as the Initial Decision ultimately ruled that ANRS’ rebuttal testimony was irrelevant and should be ignored.

49. Once the matter was set for hearing, the question became what were the appropriate procedures for ANRS, as well as the Intervenor and Trial Staff, to develop the record. It is unquestioned that ANRS did not request an opportunity to update or otherwise further develop its pre-filed direct testimony. On December 3, 2012, the ALJ issued an Order Establishing Procedural Schedule. This procedural schedule did not provide for an opportunity for ANRS to file any additional direct or answering testimony, and this procedural schedule was not challenged by ANRS. Presumably the company never sought to file any additional direct testimony. ANRS only sought, and was therefore only provided, the opportunity to file rebuttal testimony and exhibits prior to the hearing.

50. The Commission’s regulations state that the testimony associated with an application for market-based rate authority will serve as the applicant’s case-in-chief, if the Commission sets the application for hearing.<sup>66</sup> The term “case-in-chief” would indicate that only the information contained in the initial application would constitute the applicant’s entire evidentiary presentation.<sup>67</sup> Such a narrow definition of case-in-chief, however, would have rendered the entire hearing unnecessary. As discussed, in setting the matter for hearing the Commission ruled that (a) ANRS had not met its ultimate burden of proof, and (b) that more evidence was necessary. If ANRS was prevented from supplementing the evidentiary record at all, it would have no further opportunity to meet its burden. The Commission would not have initiated a hearing for the sole purpose of casting more doubt on a case that had not been made.

51. The requirement in the Commission’s regulations that pre-filed testimony serve as an applicant’s case-in-chief is not an absolute bar on the applicant from filing additional evidence. The language of section 284.503 is identical to that of section 348.1 concerning applications for market-based rate authority from oil pipelines. Section 348.1(9) states that prepared testimony included in an oil pipeline’s market-based

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<sup>65</sup> *Id.* P 495.

<sup>66</sup> 18 C.F.R. § 284.503 (2014).

<sup>67</sup> Black’s Law Dictionary defines case-in-chief as the part of a trial in which a party presents evidence to support the claim or defense. BLACK’S LAW DICTIONARY (9<sup>th</sup> ed. 2009).

rate application “will serve as the carrier’s case-in-chief, if the Commission sets the application for hearing.”<sup>68</sup> Despite this, in oil pipeline market-based rate proceedings, applicants have been allowed to file additional direct testimony.<sup>69</sup> The Commission recognizes that this proceeding is the first gas storage market-based rate application set for hearing, and there is no direct precedent on the procedures participants should follow. The Commission finds that, just as in oil pipeline proceedings, there are circumstances where additional direct testimony may be offered to supplement an applicant’s case-in-chief.<sup>70</sup>

52. Foregoing the opportunity to file additional direct testimony, ANRS’ sole pre-hearing submission was its rebuttal testimony. The Initial Decision gave no weight to ANRS’ rebuttal, ruling that it was prejudicial and denied Intervenors an appropriate opportunity to contest allegations.<sup>71</sup> The Initial Decision made two separate rulings on ANRS’ rebuttal, that ANRS was prevented from using rebuttal to meet its burden, and that the rebuttal was improper rebuttal beyond the scope of being a response to the Intervenors answering testimony.<sup>72</sup>

53. As discussed above, the Hearing Order called for ANRS to file additional evidence to meet its burden of proof. Any evidence properly filed by ANRS and accepted into the record may be used to determine if ANRS met its ultimate burden. The Initial Decision erred in not weighing ANRS’ rebuttal based on a belief that ANRS was prevented from introducing any evidence beyond its pre-filed testimony. The Initial Decision also erred in ignoring rebuttal testimony that was not stricken from the evidentiary record.

54. The Initial Decision’s critique of ANRS is that its rebuttal testimony should have been included in its pre-filed testimony, and therefore was not proper rebuttal.

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<sup>68</sup> 18 C.F.R. § 348.1(9) (2014).

<sup>69</sup> See generally *Magellan Pipeline Co., L.P.*, Docket No. OR10-6-000, Order Establishing Procedural Schedule, (August 5, 2010).

<sup>70</sup> In future proceedings, applicants seeking to file additional direct testimony under 18 C.F.R. § 284.503 should file a motion requesting to do so with the presiding judge.

<sup>71</sup> Initial Decision at P 434.

<sup>72</sup> *Id.* P 435

Concerning the proper scope of rebuttal, if an applicant foregoes the opportunity to file supplemental direct testimony, as ANRS did, applicants are not at liberty to hold back affirmative evidence for the rebuttal stage.<sup>73</sup> Evidence which properly belongs in a pipeline's case-in-chief but is first introduced in rebuttal may be rejected, so as to avoid prejudice to opposing parties.<sup>74</sup> Rebuttal evidence may be used to challenge the evidence or theory of the opposing party, but not to establish a case-in-chief.<sup>75</sup> Rebuttal is not to be used as a continuation of a case-in-chief.<sup>76</sup>

55. It is not enough, however, that testimony could have been included in ANRS' application for it to be improper rebuttal. Even if testimony would have been more appropriate in an applicant's case-in-chief, it does not preclude the admission of the testimony if it was also proper rebuttal.<sup>77</sup> Generally, where evidence rebuts new evidence or theories proffered in answering testimony, that the evidence may have been offered in the pipeline's case in chief does not preclude its admission in rebuttal.<sup>78</sup>

56. Rebuttal testimony is evidence that explains, repels, counteracts or disproves facts asserted by the adverse party.<sup>79</sup> Rebuttal testimony is intended to refute testimony submitted by other parties, not to advance a new theory of the case.<sup>80</sup> It is permissible rebuttal to counteract the testimony of opposing expert witnesses.<sup>81</sup> Evidence that is proper rebuttal in response to protestors' answering testimony does not constitute a new

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<sup>73</sup> *KN Interstate Gas Transmission Co.*, 85 FERC ¶ 63,004, at 65,089-90 (1998).

<sup>74</sup> *See Emerick v. U.S. Suzuki Motor Corp.*, 750 F.2d 19, 22 (3<sup>rd</sup> Cir. 1984).

<sup>75</sup> *Marmo v. Tyson Fresh Meat*, 457 F.3d 748, 759 (8<sup>th</sup> Cir. 2006).

<sup>76</sup> *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 685 (5<sup>th</sup> Cir. 1991).

<sup>77</sup> *Everett v. S.H. Parks and Assoc., Inc.*, 697 F.2d, 250, 252 (8<sup>th</sup> Cir. 1983).

<sup>78</sup> *Bell v. AT&T*, 946 F.2d 1507, 1512 (10<sup>th</sup> Cir. 1991).

<sup>79</sup> *Golden Spear Elec. Coop., Inc.*, 113 FERC ¶ 63,033, at P 4 (2005).

<sup>80</sup> *Jack J. Grynberg v. Rocky Mountain Nat. Gas Co.*, 90 FERC ¶ 61,247, at 61,821 (2000).

<sup>81</sup> *See, e.g., Benedict v. U.S.*, 822 F.2d 1426, 1429 (6<sup>th</sup> Cir. 1987).

case-in-chief or “moving target.”<sup>82</sup> The Initial Decision’s criticisms of ANRS’ rebuttal are insufficient to bar consideration by the Commission of the rebuttal evidence.

57. Ultimately, the issue of whether ANRS’ rebuttal is in fact proper rebuttal is not before the Commission. The Commission concurs with the view of federal courts that trial judges have the discretion to admit or exclude evidence, including rebuttal testimony.<sup>83</sup> As ANRS states, however, no motions to strike the rebuttal testimony were received, and the ALJ accepted the rebuttal testimony into the evidentiary record. Further, while the rebuttal testimony was filed July 16, Intervenors had until August 9 to seek discovery on this testimony, and were accorded the opportunity to cross examine witnesses at hearing. The Commission sees no procedural unfairness given that Intervenors could have sought discovery, could cross-examine witnesses, failed to seek striking the rebuttal testimony, and failed to request the opportunity to file surrebuttal testimony. The Commission will therefore not ignore ANRS’ rebuttal testimony. The Commission will review the entire evidentiary record in determining whether ANRS lacks significant market power.

### **III. Product Market**

58. The Commission’s analysis of whether a pipeline has the ability to exercise market power includes three major steps: (1) define the relevant markets; (2) measure a firm’s market share and market concentration; and (3) evaluate other relevant factors.<sup>84</sup> The first step in this analysis requires defining the geographic market and product markets. The applicant’s service, together with other services that are good alternatives, constitute the relevant product market.<sup>85</sup>

59. The parameters of a product market are established by reasonable interchangeability, which results in a product market including the applicant’s product, products that will increase in demand given a price increase by the applicant (cross-elasticity of demand), and the extent to which suppliers will switch to the applicant’s service (supply substitutability). Products need not be identical to be in the same product

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<sup>82</sup> *Ohio Edison Co.*, 56 F.P.C. 1166 (1976).

<sup>83</sup> 18 C.F.R. § 385.504 (2014); *see Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1181 n.7 (11<sup>th</sup> Cir. 2002).

<sup>84</sup> Policy Statement, 74 FERC ¶ 61,076, at 61,231 (1996).

<sup>85</sup> *Id.*

market.<sup>86</sup> Products need only be reasonably interchangeable to be in the same relevant product market.<sup>87</sup> The ultimate question in defining a relevant product market is whether the market may be limited to sales of the applicant's product or whether substitutes may also be included, thereby reducing the applicant's market share.<sup>88</sup>

60. The Commission measures reasonable interchangeability of services in the same manner as it determines good alternatives. The Commission requires the applicant to define the product market fully and specifically. The applicant must demonstrate how each proposed substitute service is an adequate substitute to the applicant's service in terms of quality, price and availability.<sup>89</sup>

61. It is important to note that determining whether a *service* is a good alternative is a separate step in the market power analysis from determining that a specific alternative supplier is a good alternative. Defining the product market involves examining the product of the applicant as well as those services to which a consumer will switch as a result of a price increase above the competitive level by the applicant. Product markets are defined by the services included within the market, not the individual service providers.<sup>90</sup>

#### A. Interruptible Service

62. The Policy Statement explains that applicants wishing to make interruptible service a good alternative must demonstrate that an adequate amount of capacity is unsubscribed during peak periods so that the quality of the interruptible service is comparable to the applicant's firm service.<sup>91</sup> Yet, when applicants have sought authorization to charge market-based rates for both firm and interruptible service in association with unprotested market-based rate applications, the Commission has

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<sup>86</sup> See *F.T.C. v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 35 (D.D.C. 2007), *rev'd on other grounds*, 533 F.3d 869 (D.C. Cir. 2008).

<sup>87</sup> *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216 (2d Cir. 1999).

<sup>88</sup> *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

<sup>89</sup> Policy Statement, 74 FERC ¶ 61,076 at 61,231.

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* 61,232.

routinely accepted product market definitions that include firm as well as interruptible gas storage service, without explicitly addressing whether interruptible storage is an adequate substitute for firm storage.<sup>92</sup> When applicants have sought to provide firm and interruptible storage, and the applications were unprotested, the common practice has been to accept both interruptible and firm storage capacity in the product market analysis without discussion of comparability between the two.

63. ANRS argued in its application that “the relevant product market includes firm and interruptible storage services and some local production.”<sup>93</sup> Trial Staff supported this assertion. JIG defined the relevant product market as natural gas storage providing firm service, and local production.<sup>94</sup> However, JIG noted that if one were to include local production, pipeline capacity should also be included in the relevant product market.<sup>95</sup>

64. In its rebuttal testimony, ANRS moved away from its initial product market definition and instead argued that the relevant product market was firm storage plus some local production.<sup>96</sup> ANRS testified that interruptible service alone may not be a good

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<sup>92</sup> See, e.g., *UGI Storage Co.*, 133 FERC ¶ 61,073, at P 97 (2010) (the Commission accepted a product market defined as firm and interruptible storage service in its primary market power analysis where the applicant sought market-based rates for firm storage service, no-notice storage service, and interruptible storage service); *Petal Gas Storage, L.L.C.*, 142 FERC ¶ 61,119, at P 64 (2013) (the Commission accepted a product market that defined firm and interruptible storage services where the applicant sought market-based rates for firm and interruptible storage services); *Chestnut Ridge Storage*, 128 FERC ¶ 61,210, at P 32 (2009) (the Commission accepted a product market including firm and interruptible storage where applicant proposed new facilities in West Virginia and Pennsylvania for providing firm and interruptible gas storage and wheeling services); *East Cheyenne Gas Storage, LLC*, 132 FERC ¶ 61,097, at P 34 (2010) (the Commission accepted a product market definition which included firm and interruptible natural gas storage where the applicant proposed to construct new facilities in Colorado to provide firm and interruptible gas storage services and wheeling services).

<sup>93</sup> Ex. ANR-2 at 4.

<sup>94</sup> JIG-1 at 12.

<sup>95</sup> Ex. JIG-1 at 18.

<sup>96</sup> Ex. ANR-153 at 18.

alternative to firm service, unless it was combined with flowing supplies.<sup>97</sup> ANRS stated that while it was seeking to charge market-based rates for interruptible storage, it did not analyze the interruptible product market.<sup>98</sup> However, while arguing that interruptible was not in the relevant product market, ANRS did state that interruptible storage service “can be a part of the universe of good alternatives to firm storage service.”<sup>99</sup> JIG stated in its answering testimony that the Commission has found that an applicant lacking market power with regard to firm service will also lack market power over interruptible service.

### **2014 Initial Decision**

65. The Initial Decision agreed with JIG’s position and found that the relevant product market consists of firm storage service and Michigan local production, and not interruptible storage. It concurred with JIG’s position that interruptible storage service is inferior to firm because interruptible may very likely not be available for winter deliverability, which is highly valued by many storage customers.<sup>100</sup> It further acknowledged that Trial Staff witness Mills stated that “in general firm service is better than interruptible,” and that he had “not determined as a general matter whether interruptible storage service is a good alternative to firm storage service.”<sup>101</sup> The Initial Decision also interpreted ANRS Witness Bennett’s statements as “an acknowledgement that firm [service] and interruptible service constitute two separate and distinct services,” and cited Bennett’s statement that “[i]nterruptible storage alone may not be a good alternative for storage on a peak day.”<sup>102</sup> The Initial Decision also found that ANRS and Staff failed to demonstrate the Policy Statement requirement that an adequate amount of capacity is unsubscribed during peak periods, so that interruptible and firm service may be deemed comparable. The Initial Decision noted that JIG and NSP removed interruptible volumes totaling 105 Bcf (Integrlys, 42 Bcf; Nicor, 5Bcf; and Dominion, 58 Bcf), and agreed with their determination.<sup>103</sup> Making a final observation on this issue,

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<sup>97</sup> Ex. ANR-185 at 54.

<sup>98</sup> Ex. ANR-153 at 18-19

<sup>99</sup> *Id.* 19-20.

<sup>100</sup> Initial Decision at P 443.

<sup>101</sup> *Id.* P 443 (citing Ex. JIG-26 at 1).

<sup>102</sup> *Id.* P 450 (citing Ex. ANR-185 at 53-54).

<sup>103</sup> *Id.* PP 442-443 (citing Ex. JIG-33).

the Initial Decision reasoned that “if firm storage alone is a valuable product, and if interruptible storage is equal in value only with the addition of firm flowing supplies, then interruptible storage standing alone cannot be of equal value to firm storage.”<sup>104</sup>

66. The Initial Decision pointed out that ANRS explained that it did “not analyze interruptible storage service as a separate relevant product because a showing that ANRS lacks market power in a provision of firm storage service is sufficient to show that ANRS also lacks market power in the provision of interruptible service,” but the Initial Decision stated that, to be consistent with this explanation that ANRS should have removed the interruptible storage volumes from its list of storage fields that it considers to be good alternatives.<sup>105</sup>

### **Briefs on Exceptions**

67. ANRS argues that the Initial Decision erred by excluding the storage capacity of facilities owned by Integrys, Nicor, and Dominion as good alternatives to ANRS’ storage service, a decision which ANRS states is attributed to the provision of interruptible service by those companies. According to ANRS, not “since Order No. 678 did the Commission raise the issue of quality regarding the alternative storage facilities that were suggested as good alternatives.”<sup>106</sup> ANRS indicates that this omission is appropriate because facilities that offer interruptible service can offer firm service in a timely manner when incentivized by the market as described by ANRS witness Sullivan.<sup>107</sup> ANRS further states that the Initial Decision’s argument “that interruptible service is not of the same quality as firm storage *in general* and *as a stand-alone product* are irrelevant and a strawman.”<sup>108</sup> ANRS avers that uncontested evidence shows that ostensibly interruptible service has been proven to be available during peak periods, and that the Initial Decision failed to address this showing.

68. Furthermore, ANRS indicates that interruptible storage is a good alternative because it is an integral part of marketers’ portfolios and provision of service. It argues

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<sup>104</sup> *Id.* P 450.

<sup>105</sup> *Id.* P 448 (citing Ex. JIG-33).

<sup>106</sup> ANRS Brief on Exceptions at 34.

<sup>107</sup> *Id.* (citing Tr. 455:7-457:22 (Sullivan); Ex. ANR-153 at 38:9-16).

<sup>108</sup> *Id.* 35 (citing Initial Decision at 443 & 450) (emphasis in the original).

that firm flowing supplies may work in tandem with interruptible storage as a substitute for firm storage, and that if interruptible storage is not available, excess firm supplies could be leveraged to offset the need to access the spot market, which would otherwise be necessary. ANRS cites an example of how interruptible storage may increase firm storage flexibility by using the service available within a portfolio.<sup>109</sup> It claims that the portfolio argument for interruptible storage is bolstered by the fact that natural gas is fungible and is, therefore, nearly impossible to track.<sup>110</sup>

69. Trial Staff agrees with JIG that the only relevant products to be considered were other storage alternatives and local Michigan production. However, Trial Staff opposes the Initial Decision's summary removal of all interruptible storage services from consideration as good alternatives. Trial Staff argues against the Initial Decision's interpretation that the Policy Statement requires the applicant to demonstrate that adequate capacity is available during peak periods so that interruptible service is comparable with firm service. Trial Staff avers that the requirement deals with circumstances in which an applicant for market-based rates proposes another interstate pipeline or an intrastate pipeline as a reasonable alternative, rather than the capacity of a storage provider.<sup>111</sup> Trial Staff consequently insists that some interruptible storage service should be identified as a good alternative.

70. To further buttress this argument, Trial Staff recounts several arguments. First, Trial Staff mentions ANRS' use of the *Steckman Ridge* decision to argue that the quality requirement for good alternatives was not an issue when the proposed substitute products were other storage facilities or local production.<sup>112</sup> Second, Trial Staff contrasts JIG Witness Wilson's testimony in the current proceeding that shippers cannot replicate ANRS' flexibility with interruptible service with Mr. Wilson's proposal to include certain interruptible storage services as good alternatives to firm storage service in the *Red Lake* case.<sup>113</sup> Third, Trial Staff claims that storage operators' ease of switching between firm

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<sup>109</sup> *Id.* 36 (citing Tr. 131:2-13).

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

<sup>111</sup> Trial Staff Brief on Exception at 31.

<sup>112</sup> *Id.* 32 (citing *Steckman Ridge*, 123 FERC ¶ 61,248 (2008)).

<sup>113</sup> *Id.* 34 (citing *Red Lake Storage, L.P.*, 102 FERC ¶ 61,077, *order on reh'g*, 103 FERC ¶ 61,277 (2003)).

and interruptible sales, as described by Intervenors, shows that the two services should not be considered in isolation from one another.<sup>114</sup>

### **Briefs Opposing Exceptions**

71. In contrast, JIG supports the Initial Decision's decision that the proposed interruptible storage service did not meet the Commission's quality criteria. JIG restates its opposition to ANRS's claim that if it lacks market power over firm services, then it necessarily lacks market power over interruptible services. JIG states that the ANRS Market Power Study included as good alternatives interruptible storage capacity, though such capacity is not of comparable quality and cannot be considered a close substitute for firm storage service. Thus, JIG claims that interruptible storage services should be excluded from the study unless ANRS shows that such services are good alternatives to ANRS firm storage services.<sup>115</sup> JIG supports the Initial Decision's conclusion that neither ANRS nor Trial Staff were able to show such comparability.

72. Specifically, JIG supports the Initial Decision's application of a peak period availability standard to determine comparability between interruptible and firm services.<sup>116</sup> JIG states that even if ANRS may be able to show comparability of quality by other means aside from the peak period availability standard outlined in the Policy Statement, that ANRS' evidence that Tenaska had not been interrupted under a priority interruptible contract held with Nicor in 2012-2013 was not sufficient, as ANRS offered no further evidence to show that the remaining interruptible capacity is unlikely to be interrupted during peak periods.<sup>117</sup>

73. JIG also states that ANRS' defense of inclusion of interruptible services in its Market Power Study based on its "marketer portfolio theory" focused only on marketer customers, excluding LDCs such as NSP that lack a portfolio of services adequate to substitute interruptible storage for firm storage service. JIG contests that marketer portfolios consist of different services because each service has its own role to play, not

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<sup>114</sup> *Id.* 34.

<sup>115</sup> JIG Brief Opposing Exceptions at 38.

<sup>116</sup> *Id.* 39.

<sup>117</sup> JIG Brief Opposing Exceptions at 40.

because the services play interchangeable roles.<sup>118</sup> JIG argues that Trial Staff witness Mills' testimony that, based on the telephone survey of companies in ANRS' Market Power Study, certain companies had interruptible service available to the market, is not relevant to the inquiry of the reliability of interruptible services.<sup>119</sup> JIG also disputes ANRS' analogy to Mr. Wilson's testimony supporting interruptible service as a good alternative in *Red Lake*, asserting the two cases are not comparable.<sup>120</sup>

### **Commission Determination**

74. The Initial Decision states that firm and interruptible service constitute two separate and distinct services.<sup>121</sup> To support this, the ALJ states that "interruptible storage standing alone cannot be of equal value to firm storage."<sup>122</sup> However, a service need not be of equal value to be included in the relevant product market, so long as the price reflects the valuation of each service individually and there is reasonable interchangeability between the two services. Interchangeability of products is largely gauged by whether consumers will purchase the competing product or products for similar uses considering the price, characteristics and adaptability of the competing product.<sup>123</sup>

75. To demonstrate that interruptible service should be included in the relevant product market, it must be determined whether the two services can be used for the same purpose, and if so, whether and to what extent consumers are willing to substitute one for the other.<sup>124</sup> A group of services are close substitutes, and belong in the same relevant product market, if an increase in the price of one will significantly or noticeably affect the quantity purchased on the other. The services need not be exactly the same, so long as

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<sup>118</sup> *Id.* 41 (citing Tr. 132:8 (Bennett) (Testifying it would be "foolish" to use an interruptible service as a substitute for a firm delivery obligation)).

<sup>119</sup> JIG Brief Opposing Exceptions at 42.

<sup>120</sup> *Id.* 42-43.

<sup>121</sup> Initial Decision at P 450.

<sup>122</sup> *Id.* P 450.

<sup>123</sup> *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 380-381 (1956).

<sup>124</sup> *See Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962).

enough customers would switch to the alternative service in response to an anti-competitive price increase by the applicant to make such an increase unprofitable.<sup>125</sup>

76. The Initial Decision erred by excluding interruptible service from the relevant product market because it was not of “equal value” to firm service.<sup>126</sup> Excluding a product from the relevant product market based solely on differences in quality is not always realistic.<sup>127</sup> The test is not solely whether a service is of equal value as the applicant’s service, but whether customers will be able to substitute one for the other given an attempt to raise prices by the applicant. However, the Commission affirms the holding of the Initial Decision that interruptible service is not part of the relevant product market on other grounds.

77. In this proceeding, ANRS failed to meet its burden by demonstrating that interruptible service should be included in the relevant product market. This failure is rooted in ANRS’ changing and at times contradictory statements throughout its presentation concerning the relevant product market. In its application, ANRS witness Dr. Gallick testified that “the relevant product market includes firm and interruptible storage and some local production.”<sup>128</sup> ANRS stated that there was no need to analyze interruptible storage as a separate product market “because a showing that ANR Storage lacks market power in the provision of firm storage service is sufficient to show that ANR Storage also lacks market power in the provision of interruptible storage service.”<sup>129</sup> In rebuttal, however, ANRS testified that the relevant product market only included firm storage service plus some local production.<sup>130</sup> Despite excluding interruptible service from its new definition of the relevant product market, ANRS argued that interruptible service could serve as a good alternative to firm storage service.<sup>131</sup> Finally, in its Brief

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<sup>125</sup> *Id.*

<sup>126</sup> Initial Decision at P 450.

<sup>127</sup> *Brown Shoe Co.*, 370 U.S. at 326.

<sup>128</sup> Ex. ANR-2 at 4.

<sup>129</sup> ANR-1 at 19.

<sup>130</sup> ANR-153 at 18.

<sup>131</sup> *Id.* 19-20.

on Exceptions, ANRS broadly argued that interruptible service should be included in the product market because “such facilities can provide firm service in a timely manner.”<sup>132</sup>

78. While some individual arguments by ANRS concerning interruptible service may have merit as isolated statements, the entirety of ANRS’s argument on this issue is contradictory and confusing. ANRS fails to explain how a product could be excluded from the relevant product market, yet still serve as a good alternative. If interruptible service can serve as a good alternative in terms of price, availability and quality, there is no justification for excluding it from the product market. ANRS’ mid-hearing shift in its product market definition, along with the contradictory and unsupportable argument concerning interruptible service as a good alternative, leads necessarily to the Commission’s finding that ANRS failed to demonstrate persuasively that interruptible service should be included in the product market here. This failure leaves ANRS’ firm and interruptible service as two separate products.<sup>133</sup> Insofar as interruptible service was not adequately supported for inclusion in the relevant product market, it follows that interruptible storage service providers cannot be considered as potential good alternatives to ANRS.

### **B. Intrastate Storage**

79. The parties contest whether non-FERC jurisdictional intrastate—or state-regulated—storage capacity without a Part 284 authorization, should be considered good alternatives. The Policy Statement addresses transportation services in saying that “applicants may wish to demonstrate that intrastate pipelines offer comparable transportation service” to interstate pipelines, and “to the extent that intrastate pipelines offer firm transportation service, the Commission believes that such services could be offered under terms and conditions that are substantially comparable to the firm services offered by open access interstate pipelines.” However, the comparability between intrastate and interstate is limited to terms and conditions and the argument does not directly address intrastate storage service.

### **2014 Initial Decision**

80. The Initial Decision found that only storage facilities that are authorized to natural gas into the interstate market, presumably pursuant to Part 284 authorization, may be a good alternative to ANRS’ storage. It noted that ANRS included some intrastate storage

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<sup>132</sup> ANRS Brief on Exceptions at 34.

<sup>133</sup> *Koch Gateway Pipeline Co.*, 85 FERC ¶ 61,013 (1998).

capacity in its market power study during direct testimony though it did not directly defend the decision. The Initial Decision also noted that two ANRS witnesses offered rebuttal testimony arguing that intrastate storage capacity could compete with interstate storage on behalf of ANRS.<sup>134</sup> The Initial Decision noted that ANRS did not engage in the argument over whether intrastate storage could sell gas interstate without either a Part 284 or Section 311 certificate but instead relied on the theory that marketers provide the competitive link between such intrastate storage providers and ANRS, and that this theory could not support a conclusion that intrastate storage providers without authorization could compete with ANRS.<sup>135</sup>

81. The Initial Decision rejected capacity associated with Ameren, CMS Energy, NGO Transmission, Robinson Engineering, and Vectren Corp. because those facilities did not hold a Part 284 certificate. The Initial Decision rejected Robinson Engineering because it operates a facility owned by Egyptian Gas Storage Company, and because neither Robinson nor Egyptian hold Part 284.224 certificates or have reported Section 311 transactions to the Commission and because the facilities are outside of the Great Lakes Market. The Initial Decision rejected NGO Transmission, Inc. because the entirety of its capacity is under contract on a no-notice basis, though ANRS has not shown that its fully-subscribed capacity is available to the interstate market, and because the facilities are located in Ohio, which the Initial Decision considered outside of the Great Lakes Market.

82. The Initial Decision found that testimony claiming that intrastate storage can be released, sublet, assigned or otherwise used to serve a different entity does not actually indicate that such capacity serves some other entity beyond the borders of the state in which the storage exists. It found further that intrastate storage capacity would only affect the demand for services provided by ANRS if the end-user were in the same state as the intrastate storage facility.

83. The Initial Decision was unconvinced by ANRS' assertion that the Commission has allowed inclusion of intrastate storage facilities in approving market-based rate applications in *Bluewater*, *MichCon*, *WPS-ESI*, and *Orbit*.<sup>136</sup> The Initial Decision argued

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<sup>134</sup> Initial Decision at P 451 (citing Ex. ANR-65 at 33-41 & Ex. ANR-185 at 61).

<sup>135</sup> *Id.* P 461.

<sup>136</sup> Initial Decision at P 453 (citing *Bluewater Gas Storage, LLC*, 117 FERC ¶ 61,122, at P 24 (2006); *MichCon*, Docket No. PR09-10-000 (2009); *WPS-ESI Gas Storage, LLC*, 108 FERC ¶ 61,061, at P 15 (2004); and *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61095, at P 20 (2009)).

that in *Bluewater*, “the Commission excluded intrastate storage facilities for which Bluewater provided no evidence of the amount of storage capacity that intrastate storage facilities made available to the interstate market that could be available as an alternative to Bluewater’s storage capacity,” and that “MichCon was a Hinshaw pipeline that received a Part 284 certificate.”<sup>137</sup> The Initial Decision stated that the Commission found that in *WPS-ESI*, the company was a small player in its market, and was granted both a Part 284 certificate and market-based rates without discussing intrastate storage facilities.<sup>138</sup> The Initial Decision differentiated the *Orbit* case by noting that company did not argue intrastate storage facilities competed with Orbit in the interstate market, but rather, that it assumed all volumes of LDC storage in its geographic market would be available to compete with Orbit’s storage.<sup>139</sup> The Initial Decision also rebutted ANRS’ interpretations of *Gulf South* and *Koch Gateway*, stating that “neither the applicants nor the Commission attempted to determine what volumes of storage capacity owned by intrastate storage facilities, if any, were available to the interstate market,” and indicated that such a decision would have been more significant in the current proceeding.<sup>140</sup>

84. The Initial Decision also rejected ANRS’ argument that intrastate and interstate storage compete because the natural gas market is integrated. The Initial Decision stated that, in spite of LDCs and marketers using portfolios of interstate and intrastate services to provide end-use customers with gas, most sales configurations still require a Part 284 or Section 311 certificate. According to the Initial Decision, ANRS did not argue this point in its rebuttal testimony after JIG’s testimony posed its concern for a lack of gas transferability between intrastate and interstate storage in the absence of authorization. The Initial Decision indicated that ANRS side-stepped the issue and “relied instead on the theory that marketers and aggregators can move such gas into the interstate market by comingling intrastate and interstate gas supplies.” While the Initial Decision acknowledged the concept of a physical link of fungible, source-agnostic gas supplies, he found that “ANRS’s reliance on a marketing technique that results in gas held in non-FERC certificated storage being sold into the interstate market is contrary to the Commission’s regulations, and therefore cannot be used to support a conclusion that

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<sup>137</sup> *Id.* 453.

<sup>138</sup> *Id.* P 454.

<sup>139</sup> *Id.* P 455.

<sup>140</sup> *Id.* P 456 (citing *Gulf South Pipeline Company, LP*, 101 FERC ¶ 61,204 (2002); and *Koch Gateway Pipeline Company*, 66 FERC ¶ 61,385 (1994)).

intrastate storage providers without the required FERC certificates can compete with ANRS storage.”<sup>141</sup>

85. Accordingly, the Initial Decision rejected capacity associated with Ameren, CMS Energy Corp., DTE’s MichCon facilities, Enbridge, Inc., NGO Transmission, Nicor, Inc., Robinson Engineering, SEMCO Energy, Inc., and Vectren Corp.<sup>142</sup>

### **Briefs on Exceptions**

86. ANRS claims that the Initial Decision improperly disqualified state-regulated intrastate storage capacity. According to ANRS, the Initial Decision recognizes ANRS’ argument that “LDC storage capacity should be accounted for given its interconnectivity and impact upon the interstate markets through: (1) displacement and exchanges; (2) retail choice programs; (3) import/export transactions; (4) conversion to federally-regulated capacity; and (5) displacement of interstate storage service.”<sup>143</sup> ANRS contends that, despite these arguments, and in an apparent contradiction, the Initial Decision stated that ANRS failed to provide any explanation or support whatsoever for its assertion that state-regulated storage meets the Commission criteria for good alternatives to ANRS storage. ANRS posits that the decision may be linked to the Initial Decision’s decision to (1) omit rebuttal testimony by ANRS supporting LDC storage within the suggested geographic boundaries qualifying as good alternatives and (2) direct testimony on ANRS interconnections with LDC and intrastate providers and the access and acquisition of storage services.

87. ANRS makes several arguments to support the inclusion of intrastate services in the product market. First, ANRS states that its intrastate facilities in Michigan are highly interconnected and allow for gas to be moved from one side of the state to another without the need for interstate transportation. The company reasons that a MichCon storage facility or a facility behind Consumers Energy could be utilized to facilitate the load behind MGU. ANRS concludes that, because of various interconnects in Michigan, both MichCon and Consumers Energy directly compete with ANRS, that Consumers

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<sup>141</sup> *Id.* P 462.

<sup>142</sup> *Id.* P 460 n.482.

<sup>143</sup> ANRS Brief on Exceptions at 56 (oddly, in its Brief on Exceptions ANRS’ paraphrase of the Commission’s direct quote of ANRS’ own Reply Brief is not wholly accurate; for instance, the Initial Decision’s direct quote did not use the word “exchanges”).

Energy competes with ANRS and Panhandle, and that similar interconnectivity is present in Illinois and Ohio. ANRS further claims that this broad interconnectivity shows how interstate transportation-fed intrastate storage capacity can be directed into non-FERC jurisdictional facilities, thereby demonstrating that LDC-owned storage capacity is capable of competing with ANRS storage even without a Part 284 certificate.<sup>144</sup>

88. Second, ANRS cites Intervenors' engagement in intrastate transactions within the Central Great Lakes Market as an indicator that intrastate storage can crowd out demand otherwise satisfied by ANRS and is a good alternative to its company's storage. ANRS details the Intervenors' trading activities through the interconnections previously described and claims that the Initial Decision failed to acknowledge that activity in rejecting the intrastate services of Nicor, Ameren, and MichCon as good alternatives, based on claims of unavailability to the interstate market. ANRS asserts that, in fact, LDC-owned storage dedicated to serving an LDC's own customers affects the price of and/or demand for interstate storage and states that the Initial Decision further erred in limiting DTE Energy and MichCon capacity to the portion Intervenors asserted is available to the interstate market.<sup>145</sup>

89. Third, ANRS argues that the Initial Decision failed to account for the impact of NGA Section 3, which addresses the export and import of natural gas. ANRS argues that gas imports and exports via NGA Section 3 authorization provide an alternative means by which Michigan intrastate storage could leave Michigan to serve Ontario, and accordingly, the Initial Decision erred in reducing the working gas and daily deliverability metrics of those service providers that possess, could readily obtain, or benefit from Section 3 authority. To illustrate, ANRS references the Section 3 authorization issued in *Bluewater*, which provided for transportation of the company's stored natural gas either as redelivery within Michigan or through the authorized border crossing facilities. ANRS also presents several examples of ANRS customers or their affiliates that hold Section 3 authority, such as SEMCO Energy, Inc., DTE Gas Co., and DTE Energy Trading, Inc. Further, ANRS claims that the ID ignored the interconnected nature of utilities like MGU, MichCon, and Consumers Energy in connection with their ability to export supplies to Canada.<sup>146</sup>

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<sup>144</sup> ANRS Brief Opposing Exceptions at 56-58.

<sup>145</sup> *Id.* 58-60.

<sup>146</sup> ANRS Brief on Exceptions at 61-64.

90. Fourth, ANRS claims that by rejecting intrastate storage within the parameters of the two-pipeline test, the Initial Decision contradicted precedent set by *Koch Gateway* and other ensuing decisions.<sup>147</sup> ANRS also states that the Initial Decision failed to recognize that in *Bluewater*, the Commission excluded only state-regulated capacity located outside of the established geographic market, specifically, state-regulated intrastate capacity in northern Ohio, and that in this case, substantial evidence demonstrates that Ohio storage capacity is a good alternative.<sup>148</sup> ANRS states that the Initial Decision contradicted its treatment of *Bluewater* in relying on the case to set the geographic market, though distinguishing it for its inclusion of intrastate storage capacity. ANRS also states that *Bluewater*, *MichCon*, *WPS-ESI*, and *Orbit* included intrastate storage capacity as good alternatives within a geographic market roughly equivalent to the Central Great Lakes Market. ANRS claims that the Initial Decision's differentiation between these cases and the current proceedings failed to refute that each case included such intrastate storage capacity as good alternatives or to void the two-pipeline test on which these cases relied, and implies that the decisions are parallel to the current case.<sup>149</sup>

91. ANRS further states that the applicant in *Bluewater* and the Commission in that case included state-regulated storage in Indiana, Illinois, and Michigan.<sup>150</sup> Similarly, ANRS states that the Commission found the *Orbit* market study properly identified certain intrastate storage facilities as good alternatives. ANRS claims that the method applied in the Initial Decision would, however, eliminate 69 percent of the capacity in the study. According to ANRS, the applicant's list of good alternatives identified 90 storage fields, most of which were operated by intrastate pipelines, intrastate LDCs, or other non-Part 284 firm storage entities.<sup>151</sup> ANRS also cites the Commission's decision to include both interstate and intrastate storage facilities in the product market of the *Gulf South* case. ANRS avers that neither the Commission nor the applicants in either the *Gulf South*

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<sup>147</sup> *Id.* 64 (citing *Koch Gateway*, 66 FERC ¶ 61,385 (1994)).

<sup>148</sup> *Id.* (citing *Koch Gateway*, 66 FERC ¶ 61,385 at 62,299).

<sup>149</sup> *Id.* 65.

<sup>150</sup> *Id.* 66.

<sup>151</sup> *Id.* 68.

or *Koch Gateway* cases even attempted to determine whether any of the state-regulated capacity was, in fact, available.<sup>152</sup>

92. Fifth, ANRS argues that the Initial Decision eliminated state-regulated capacity based on facially inadequate assertions by Tenaska. ANRS challenges the use of Tenaska's testimony that many of the proposed good alternatives would not be suitable for Tenaska, on the ground that the argument is limited to Tenaska's individual needs, though not necessarily those of the broader market. ANRS maintains that a good alternative does not need to be available to every consumer in the market to be deemed a part of the product market definition, but rather that it "should be defined to include all products or services which are in realistic rivalry for all or some part of the commerce at issue."<sup>153</sup> ANRS references Tenaska's admission that its review of good alternatives to ANRS's service is limited to those which are available and suitable for Tenaska. For example, ANRS asserts that Tenaska proposes to exclude capacity from Dominion because it does not meet the company's needs, but states that the record reflects multiple points of interconnection between Dominion facilities and ANR Pipeline. ANRS concludes that Tenaska's unique needs do not speak to the circumstances of any other customer.<sup>154</sup>

93. ANRS also contests Tenaska's witness testimony that DEO's storage service is available only to customers behind the East Ohio citygate. However, ANRS states that filings with the Commission show that DTI will use capacity leased from DEO to provide service to interstate customers. ANRS contends that this is a "flawed and facially incomplete analysis" because if these two statements were factual, then this particular storage behind the citygate also serves interstate customers and is thus competitive with interstate storage capacity. ANRS further attempts to discredit Tenaska by citing an affiliate of the company's inclusion of intrastate storage facilities without any demonstration that the facilities were good alternatives or if any were subject to Part 284 authorization.<sup>155</sup>

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<sup>152</sup> ANRS Brief on Exceptions at 68 (citing *Gulf South*, 101 FERC ¶ 61,204, at P 41).

<sup>153</sup> *Id.* 70 (citing *Smithkline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978), and *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 397-400 (1956)).

<sup>154</sup> *Id.* 72.

<sup>155</sup> *Id.* 73.

94. Sixth, ANRS cites the fungibility of natural gas, and the Commission's recognition that from an end-use customer's perspective natural gas is fungible,<sup>156</sup> and that flows on non-interstate pipeline impact demand considerations in the interstate market.<sup>157</sup> ANRS also points to Tenaska's acknowledgment of the fungibility of natural gas supplies.<sup>158</sup> ANRS then points to Intervenor's admission that the storage capacity offered by state-regulated facilities, despite attempts to exclude them from the market, could nevertheless influence the demand for services provided by ANRS.<sup>159</sup> As evidence of its argument, ANRS cites material that it claims show its marketer customers satisfy the majority of their peak winter sales in the Central Great Lakes Market from alternatives other than ANRS.<sup>160</sup> ANRS also presents evidence it claims attests to the interchangeability of intrastate and interstate storage from sources such as testimony before the Illinois Commerce Commission by Ameren Illinois, a statement by Integrys in Ex. ANR-20 at 3 stating that its regulated natural gas utilities contract with LDCs and interstate pipelines, and the Electric Power Supply Association's critique of a Midwest Independent System Operator study concerning pipeline coordination with power plants which failed to adequately consider the impact of intrastate pipelines and their associated natural gas storage facilities.<sup>161</sup>

95. Seventh, ANRS argues that increased unbundling of state retail markets is heightening competition between intrastate and interstate storage. ANRS contends the programs permit marketers "to market within the state and thus displace demand for storage [that] their affiliates would otherwise need from interstate storage providers."<sup>162</sup> ANRS states that retail choice programs are offered in Ohio, Illinois, Michigan, and Ontario. ANRS states that numerous energy marketers, including ANRS' customer Shell

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<sup>156</sup> Order No. 678, FERC Stats. & Regs. ¶ 31,220, at P 26 (2006).

<sup>157</sup> ANRS Brief on Exceptions at 73 (citing *Pipeline Posting Requirements under Section 23 of the Natural Gas Act*, FERC Stats. & Regs. ¶ 31,302, at P 44 (2010) (Order No. 720-A)).

<sup>158</sup> *Id.* 74.

<sup>159</sup> *Id.* 76.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* 78.

<sup>162</sup> *Id.* (citing Ex. ANR-65 at 40:17-41:10).

Energy North America, can sell natural gas to in-franchise customers located in each LDC's service territory and utilize the LDCs' in-franchise storage facilities.<sup>163</sup> ANRS notes that retail natural gas unbundling has also been encouraged by federal policy through the asset management agreements permitted by Order No. 712.<sup>164</sup> ANRS states that the Initial Decision did not evaluate whether these developments would affect the analysis of intrastate capacity as a good substitute.

96. The eighth and final reason ANRS supplies for why intrastate storage capacity should be included in the product market is the concept, recognized in *Koch Gateway*, that good alternatives can include new entrants.<sup>165</sup> ANRS discusses several instances in which state-regulated storage capacity has been transferred to federal regulation within less than one year,<sup>166</sup> all of which, ANRS asserts, demonstrate supply substitutability. ANRS underlines the theory of supply substitutability by referencing several United States district court, circuit court, and Supreme Court cases.<sup>167</sup>

97. DTE requests the Commission reverse the Initial Decision insofar as it excludes from consideration all capacity from intrastate storage providers. At a minimum, DTE requests that even if the Commission affirms the Initial Decision's conclusion that ANRS failed to meet its evidentiary burden, that it confirm that LDC storage providers that do not have FERC authorization to sell interstate services are not *per se* excluded from consideration as good alternatives to interstate storage.<sup>168</sup> Specifically, DTE argues that, on a policy basis, the Initial Decision's *per se* exclusion of intrastate storage providers that do not have FERC authorization to sell interstate storage services imperils the

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<sup>163</sup> ANRS Brief on Exceptions at 79-80 (citing Ex. ANR-65 at 50:6-11).

<sup>164</sup> *Id.* 80 (citing *Promotion of a More Efficient Capacity Release Market*, 123 FERC ¶ 61,286, at PP 109-110 (2008)).

<sup>165</sup> *Id.* 81 (citing *Koch Gateway*, 66 FERC ¶ 61,385, at 62,302 (1994)).

<sup>166</sup> *Id.* 81-82.

<sup>167</sup> *Id.* 82-84.

<sup>168</sup> *Id.* 1 & 14.

Commission's policy, articulated in Order No. 678, of considering potential substitutes in the context of individual applications for market-based rates.<sup>169</sup>

98. Moreover, DTE argues that the Initial Decision ignored Commission precedent finding that intrastate storage providers without FERC authorization to sell interstate storage services in the Great Lakes Market provide good alternatives to interstate gas storage services. DTE states that, notably, ANRS Witness Kirk noted that much of the storage capacity excluded by the Initial Decision was included in *Bluewater*, where the Commission adopted the same geographic market as that adopted in the Initial Decision.<sup>170</sup> DTE asserts that the Initial Decision also erroneously dismissed the Commission's decisions in *WPS-ESI* and *Orbit*. DTE states that the Initial Decision did this based on the logic that the Commission had not adequately examined whether the intrastate volumes used in those cases were good alternatives, but that the better conclusion is that intrastate storage in those cases were judged to be good alternatives, even where such storage providers did not have FERC authorization to sell interstate services.<sup>171</sup> DTE also asserts that the Initial Decision did not succeed in distinguishing those Commission decisions in which the Initial Decision states neither the applicants nor the Commission endeavored to determine what volumes of intrastate capacity were available to the interstate market.<sup>172</sup> To the contrary, DTE states that in decisions like *Koch Gateway*, and *Gulf South* the Commission clearly and rigorously considered whether the proposed intrastate alternatives constituted good alternatives.<sup>173</sup>

### **Briefs Opposing Exceptions**

99. JIG disputes that the Initial Decision's exclusion of intrastate storage "short circuited the Commission's geographic market analysis."<sup>174</sup> JIG argues the Initial

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<sup>169</sup> DTE Brief on Exceptions at 6 (citing Order No. 678, FERC Stats. & Regs. ¶ 31,220 at P 6).

<sup>170</sup> *Id.* 8 (citing Ex. ANR-65 at 37:2-38:1 & Table 4).

<sup>171</sup> *Id.* 10-11 (citing *WPS-ESI Gas Storage, LLC*, 108 FERC ¶ 61,061 (2004) & *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095 (2009)).

<sup>172</sup> *Id.* 12 (citing Initial Decision at P 456).

<sup>173</sup> *Id.* (citing *Koch*, 66 FERC at 62,303, and *Gulf South*, 101 FERC ¶ 61,204 at P 41).

<sup>174</sup> JIG Brief Opposing Exceptions at 43 (citing ANRS Brief on Exceptions at 19).

Decision justifiably excluded intrastate storage service because ANRS did not explain how one would tease out intrastate versus interstate storage services a part of the geographic analysis. JIG asserts that according to ANRS, the geographic market portion of the analysis is intended to identify the sellers of the relevant product.<sup>175</sup> JIG then notes that several of the storage sellers provide both service under Part 284.224 certificates as well to retail loads, and that ANRS never explained how to choose which of these providers to include in the geographic market, and which to exclude, given that these entities sold services in and out of the market.<sup>176</sup>

100. JIG opposes all of the exceptions noted by ANRS and by Trial Staff, including those regarding whether to include intrastate storage capacity in the market power analysis. Rather, JIG asserts that the Initial Decision properly defined the product market as firm interstate storage service, thus excluding intrastate storage service because it did not meet the availability criteria of a good alternative.<sup>177</sup> JIG argues that the Initial Decision was also correct in rejecting the ANRS theory that if intrastate storage capacity existed within the relevant geographic market, it is necessarily a good alternative to a market-based rate applicant's services. JIG agrees with the Initial Decision's interpretation that ANRS's direct testimony did not include any explanation of how the proposed intrastate storage providers met the Commission's three part analysis of good alternatives, and therefore should not be included in the record. JIG states that as early as its Reply Brief, ANRS asserts that all LDC storage within its geographic market is necessarily a good alternative without employing the relevant analysis. JIG further states that ANRS used this line of reasoning to avoid making showings of a good alternative as directed in the *Policy Statement* and Order No. 678.

101. JIG also supports the Initial Decision's rejection of ANRS' arguments that even without a Part 284.224 certificate, intrastate connectivity to the proposed services are good alternatives to ANRS firm storage service. JIG states that, while the Initial Decision agreed that such interconnectivity may enable gas to be transported to various locations, the Initial Decision correctly asserted that it does not permit gas withdrawn from an intrastate facility to be delivered to locations in other states. JIG agrees with the ID that this makes intrastate storage an inadequate substitute. JIG also states that the Initial Decision correctly asserted that the Commission excluded intrastate storage as a good alternative in *Bluewater* due to a lack of evidence regarding its availability to the

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<sup>175</sup> *Id.* 44 (citing ANRS Brief on Exceptions at 17).

<sup>176</sup> *Id.* 44.

<sup>177</sup> *Id.* 32.

interstate market.<sup>178</sup> JIG furthermore argues that ANRS has not provided a basis to question these findings, but has only suggested that gas withdrawn from intrastate storage can be transported to other locations using “back door” channels that avoid interstate pipeline facilities and that JIG members engage in various transactions to use intrastate facilities. JIG responds that while gas may be withdrawn from intrastate facilities and transported via back door channels, such channels do not necessarily lead to interstate markets, and the idea that JIG members may engage in various transactions to make use of intrastate storage facilities does not mean they use those facilities as substitutes for interstate storage services.<sup>179</sup>

102. JIG also points out that DTE’s request that the Commission confirm that intrastate storage should not be *per se* excluded from being considered a good alternative is an about-face from the position DTE took in the proceedings that resulted in Order No. 678, where DTE urged the Commission to exclude storage capacity and deliverability associated with storage fields owned by LDCs and used to meet state-mandated service obligations to captive customers from market share and Herfindahl-Hirschman Index calculations.<sup>180</sup>

103. JIG disputes ANRS’ and Trials Staff’s position that the Initial Decision erred by relying on the testimony of Tenaska Witness Litjen regarding the viability of certain storage facilities.<sup>181</sup> JIG provides three reasons. First, JIG states that Presiding Judges are to be afforded great deference when weighing the credibility of witnesses, and in this instance the Presiding Judge found Mr. Litjen’s general knowledge and personal contacts in his role as Director of Marketing for Tenaska and Tenaska Marketing Ventures made his testimony more credible, rather than less. Second, JIG states the alleged consistency ANRS identified is nothing of the sort, and that owing to the pending construction of certain compression facilities, the testimony Mr. Litjen provided regarding the

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<sup>178</sup> *Id.* 48 (citing *Manchester Pipeline Corp.*, 76 FERC ¶ 61,007, at 61,022 (1996)) (rejecting the applicant’s reliance on certain intrastate facilities because the applicant “did not demonstrate that these facilities would be available for interstate section 311 service”).

<sup>179</sup> JIG Brief Opposing Exceptions at 49.

<sup>180</sup> *Id.* 49 & n.122.

<sup>181</sup> *Id.* 50 (citing ANRS Brief on Exceptions at 70-73, Trial Staff Brief on Exceptions at 26).

availability of DEO storage was accurate.<sup>182</sup> Third, JIG notes that the Initial Decision relied primarily on a portion of Mr. Litjen's testimony dealing with the operational limits that prevent natural gas from physically flowing from DEO and NiSource storage facilities in Ohio into ANR Pipeline, and neither ANRS nor Trial Staff have argued otherwise.<sup>183</sup>

104. JIG also agrees with the Initial Decision's decision to reject ANRS' argument that the integrated nature of the natural gas market means that intrastate storage is a good alternative to interstate storage services. Specifically, JIG recounts that ANRS argued that the Presiding Judge failed to consider the evidence provided by ANRS Witness Bennett. JIG counters that first, to suggest that the Presiding Judge failed to consider the evidence is simply wrong because the Initial Decision includes a substantial discussion of the marketer portfolio theory and specifically did not agree with ANRS' theory that marketers provide a "competitive link" that enables intrastate providers without FERC authorization to compete in the interstate market with ANRS interstate storage services.<sup>184</sup> Second, JIG points out that while ANRS' assertion that Mr. Bennett was the only witness with real world marketing experience to offer substantive live testimony is technically correct, Mr. Litjen also provided substantial testimony based on real world marketing experience, and the fact that it was not live testimony is only because ANRS and Trial Staff did not cross examine Mr. Litjen at hearing. Then, responding substantively to ANRS' argument that marketer services or exchanges provide a competitive link that enables intrastate storage to compete with interstate storage, JIG asserts that the nature of marketing services and exchanges, particularly in the context of retail choice programs, means that replication of storage services might be possible in some cases but not all cases, and therefore the details of individual transactions must be evaluated to determine their viability.<sup>185</sup>

105. JIG also addresses ANRS' assertion that, in rejecting intrastate storage as a good alternative, the Initial Decision failed to consider the potential for intrastate storage to be converted to interstate service.<sup>186</sup> JIG responds that the Commission requires that the

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<sup>182</sup> *Id.* 51.

<sup>183</sup> *Id.* 51-52 (citing Initial Decision at PP 143, 145-146).

<sup>184</sup> *Id.* 52-53.

<sup>185</sup> JIG Brief Opposing Exceptions at 54-55.

<sup>186</sup> *Id.* 55 (citing ANRS Brief on Exceptions at 78-80).

actual parameters of assertedly competitive alternatives be known and demonstrated contemporaneous with the time period of the market power analysis,<sup>187</sup> and that ANRS presented no such evidence, but merely offered a generic observation that intrastate storage can potentially be converted to provide interstate service and that if conversion is pursued, the timeline can be relatively short. JIG also points out that ANRS failed to consider that the reverse is also possible and has occurred in the Great Lakes Market, including with a facility currently owned by Consumers Power Company.<sup>188</sup>

### **Commission Determination**

106. The Commission reverses the Initial Decision. It is not necessary that an intra-state storage provider currently possess the authority to provide interstate service in order for intra-state storage service to be included in the relevant product market. The appropriate question is whether intrastate storage providers, in response to an anti-competitive price increase by ANRS, could prompt intrastate storage providers to enter the interstate market.

107. Defining the relevant product market solely on the basis of demand consideration, or what customers will do in response to a price increase, is erroneous. A reasonable product market definition must also be based on the reaction of suppliers to the same increase in price.<sup>189</sup> Facilities that can shift easily and economically to sell into the relevant product market within a short period of time should be included in the market. Facilities providing intrastate storage service need only alter their regulatory status in order to provide interstate storage service. This type of supply substitutability can serve

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<sup>187</sup> *Id.* 56 (citing *Miss. River Transmission Corp.*, 95 FERC ¶ 61,141 (2001) & *Mobil Pipe Line Co.*, 128 FERC ¶ 63,008, at PP 62 & 136 (2009), *order affirming initial decision*, 133 FERC ¶ 61,192 (2010), *vacated on other grounds*, *Mobil Pipeline Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012)).

<sup>188</sup> *Id.* 57 (citing Ex. NSP-6 at 6) (citing also *Michigan Consolidated Gas Co.*, 55 FERC ¶ 61,001 (1991); *Michigan Consolidated Gas Co.*, 59 FERC ¶ 61,341 (1992); *Michigan Gas Storage Co.*, 98 FERC ¶ 61,223 (2002)).

<sup>189</sup> *AD/SAT, Div. of Skylight, Inc. v. Assoc. Press*, 181 F.3d 216 (2d Cir. 1999), *see also* Dept. of Justice 1992 Merger Guidelines, §§ 2.21, 3.3.

to constrain an anti-competitive price increase, and therefore such facilities should be included in the market power analysis.<sup>190</sup>

108. Not only can intrastate storage providers quickly enter the interstate market upon a price increase, but use of existing intrastate storage reduces the overall demand for interstate storage and can serve to discipline an anti-competitive price increase in the interstate storage market. When a customer can turn to internal sources, such as an LDC turning to its own storage facilities, those facilities should be included in the relevant product market because they reduce demand for the product offered in the interstate market.<sup>191</sup> Both the intrastate and interstate markets are inter-related. As the Commission has held, while distinctions between intrastate and interstate natural gas markets may be meaningful from a legal perspective, they are not meaningful from the perspective of market price formation.<sup>192</sup> Purchasers of natural gas in interstate commerce draw on the same sources of supply as users and purchasers of intrastate natural gas.<sup>193</sup> The Commission finds that intrastate storage should be included in the relevant product market.

### C. Local Production

109. In its initial application, ANRS included local production in each of its multiple scenarios. The Commission has found that “[f]rom an end-use customer’s perspective, gas is fungible, whether it comes from storage, local production or more distant supplies

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<sup>190</sup> Dept. of Justice 1992 Merger Guidelines, §§ 2.21, 3.3. It is not relevant whether these facilities are included at the market definition stage or when calculating market shares and market concentration. However, where facilities can shift supply quickly and at minimal cost, the original service should be included in the relevant product market. *Id.*

<sup>191</sup> *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (C.C.A. 2d Cir. 1945).

<sup>192</sup> Pipeline Posting Requirements Under Section 23 of the Natural Gas Act, Order No. 720, FERC Stats. & Regs. ¶ 31,283, at P 8 (2008).

<sup>193</sup> *Id.* P 45.

transported by pipelines.”<sup>194</sup> The ID stated that “[a]ll participants in this case agree that local production is a good alternative to ANRS storage.”<sup>195</sup>

### **Commission Determination**

110. The Commission affirms the Initial Decision. The relevant product market in this proceeding includes local production.

### **IV. Geographic Market**

111. The Commission’s analysis of an applicant’s petition to charge market-based rates is confined to the geographic area in which the applicant effectively competes.<sup>196</sup> Defining the geographic market requires a careful identification of the area in which the applicant operates and to which the customer can practicably turn for service.<sup>197</sup>

112. ANRS operates four storage fields located in Kalkaska County in northern Michigan, providing 55.67 Bcf of working gas storage capacity. The ANR storage fields at issue directly connect to both Great Lakes Gas Transmission Pipeline (GLGT) and to a non-contiguous portion of ANR Pipeline (ANR) via a thirty six inch storage header that is jointly-owned with ANR Pipeline and which connects all of the ANRS storage facilities to GLGT at the Deward interconnect in Northern Michigan. ANR holds firm capacity on GLGT and offers transportation thereon as a means of delivering and redelivering gas volumes to and from ANRS storage.

113. ANRS identifies the relevant geographic market for determining whether it will have the ability to exercise market power as the Central Great Lakes Market. The storage facilities located in ANRS’ Central Great Lakes Market reside in Michigan, Illinois, Indiana, Ohio, and western Ontario.<sup>198</sup> In its application, ANRS defined the Commission’s methodology for determining the geographic market as including (1) areas

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<sup>194</sup> Order No. 678, FERC Stats. & Regs. ¶ 31,220, at P 26 (2006).

<sup>195</sup> Initial Decision at 149.

<sup>196</sup> *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

<sup>197</sup> *Id.*

<sup>198</sup> ANRS also provides three other cases that are derivatives of the Central Great Lakes Market to further demonstrate that ANRS lacks market power.

with alternative storage facilities that directly connect to intrastate or interstate pipelines that access the applicant's storage facilities, and (2) areas with alternative storage facilities that directly connect to intrastate or interstate pipelines that interconnect with the pipelines that access the applicant's storage facilities.<sup>199</sup> ANRS argues that the geographic market can be defined either through this "two-pipeline" approach, which ANRS adopts, or through an application of the Commission's price test.<sup>200</sup>

114. Trial Staff supported ANRS's position to use the Central Great Lakes Market. JIG's position is that the relevant geographic market area should be the same as the one that the Commission approved in *Bluewater*.<sup>201</sup> The Bluewater geographic market, better known as the Great Lakes Market area, includes Michigan, northern Illinois, northern Indiana, and western Ontario.<sup>202</sup>

### **2014 Initial Decision**

115. The Initial Decision stated that the Commission has articulated a one-pipeline test, a two-pipeline test, and the *Policy Statement* price test, but an examination of Commission action on market-based rate applications yields no definitive answer as to which test the Commission favors. The Initial Decision stated that in *Koch Gateway*,<sup>203</sup> the Commission accepted "storage facilities as price comparable to an applicant's storage service if [the facilities] are located in the same geographic market as the applicant and are connected to the same pipeline as the applicant or to a pipeline that is connected to the same pipeline as is the applicant." The Initial Decision referred to this as the "two-pipeline test."

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<sup>199</sup> Application at 20 (citing *Leader One Energy, LLC*, 136 FERC ¶ 61,113, at PP 25, 32 (2011); *East Cheyenne Storage Co., LLC*, 132 FERC ¶ 61,097, at PP 34, 43-44 (2010); *Blue Sky Gas Storage, LLC*, 129 FERC ¶ 61,210, at PP 23, 32 (2009); *Windy Hill Gas storage, LLC*, 119 FERC ¶ 61,291, at PP 91-92, 98 (2007)).

<sup>200</sup> Initial Decision at 45 (citing Ex. ANR-153).

<sup>201</sup> See *Bluewater Gas Storage*, 117 FERC ¶ 61,122 (2006).

<sup>202</sup> The Bluewater gas storage facility is located in Michigan, a few hundred miles from the ANRS storage facilities.

<sup>203</sup> Initial Decision at 464 (citing *Koch Gateway*, 66 FERC ¶ 61,385 (1994)).

116. The Initial Decision stated that in *Texas Gas Transmission, LLC*,<sup>204</sup> the applicant applied the two-pipeline test. The Initial Decision further stated that the Commission took exception with the two-pipeline test in *Texas Gas*, since Texas Gas, with its storage fields in Kentucky, included storage fields in the states of Pennsylvania, Maryland and Michigan as part of its geographic market. The Commission observed that Texas Gas had not shown that the availability and cost (including transportation rates) of alternative storage services across its proposed geographic market provided viable substitutes for its proposed expansion project service.<sup>205</sup> The Initial Decision claimed that the Commission applied a one-pipeline test and determined that the Texas Gas geographic market should only include facilities directly connected to Texas Gas' pipeline. The Initial Decision stated that the Commission acknowledged in *Texas Gas* the uncertainty of third party transportation capacity and the added transportation costs of accessing those storage fields. The Initial Decision asserted that the Commission in *Texas Gas* viewed the one-pipeline test as being substantially equivalent to the showing of availability and price comparability that the *Policy Statement* requires. The Initial Decision concluded that the *Texas Gas* decision conceivably renders the two-pipeline test valueless unless an applicant relying on it can show that firm capacity is available on the second pipeline at competitive prices.

117. The Initial Decision noted that in *Texas Gas* the Commission considered that the geographic market for storage providers includes only those states in close proximity to the applicant's facilities.<sup>206</sup> Therein the Commission decided the appropriate geographic market for Texas Gas would include Indiana, Illinois, West Virginia, and Ohio, all of which are contiguous to Kentucky. The Initial Decision concluded that "close proximity" and "contiguous" are not necessarily the same thing among states. The Presiding Judge in the Initial Decision stated that the storage facilities in Arizona are not in close proximity to storage facilities in northern California even though Arizona and California are contiguous.<sup>207</sup>

118. The Initial Decision stated that notwithstanding the Commission's "close proximity" statement in *Texas Gas*, it appears that as long as an applicant for market-based rates shows that a "good alternative" facility meets the price test, or perhaps in this

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<sup>204</sup> *Id.* P 467 (citing *Texas Gas Transmission, LLC*, 122 FERC ¶ 61,190 (2008)).

<sup>205</sup> *Id.* P 21.

<sup>206</sup> *Id.* P 466.

<sup>207</sup> *Id.* P 466.

case meets the two-pipeline proxy test for a price test, the state in which that facility resides automatically is included in the geographic market. The Initial Decision posited that the geographic market is therefore just an analogue of the market-test showing of good alternative storage providers and as such adds little, if anything, to the substantive determinations regarding the existence of market power in this case. The Initial Decision stated that Trial Staff concluded similarly when it stated that “the geographic market is merely a default mechanism derived by adding together the geographic locations of the ‘good’ alternatives and the applicant’s storage services.”<sup>208</sup>

119. The Initial Decision ultimately agreed with JIG that the appropriate geographic market is the Great Lakes Market approved by the Commission in *Bluewater* that included Michigan, northern Illinois, northern Indiana and western Ontario.<sup>209</sup> In *Bluewater*, the company included northern Ohio in its geographic market. However, the Commission eliminated northern Ohio because Bluewater had not provided evidence confirming the amount of East Ohio Gas storage capacity available to the interstate market. The Initial Decision stated that it applied this rationale for excluding Ohio from the ANRS geographic market area.<sup>210</sup>

120. The Initial Decision also agreed with JIG that the storage facilities ANRS claims are good alternatives, located in southern Illinois and southern Indiana, can be accessed by ANRS customers only by using three pipelines and as a result do not constitute good alternatives under the two-pipeline test.<sup>211</sup> The Initial Decision stated that ANRS counted ANR Pipeline and Great Lakes Pipeline as one because ANR Pipeline holds firm capacity on Great Lakes and the two are affiliated. The Initial Decision rejected that theory and reasoned that, mathematically, one pipeline plus one pipeline equals two pipelines, not one. The Initial Decision also reasoned that if ANRS is correct to count ANR Pipeline’s firm capacity on Great Lakes as “one pipeline,” then that “one pipeline” would extend from Michigan to the Gulf of Mexico. The Initial Decision posited that, had ANRS included all storage facilities connected to ANR Pipeline from Michigan to the Gulf of Mexico as good alternatives, it would have tipped the balance of the market metrics in ANRS’s favor. Instead, the Initial Decision considered only the alternative

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<sup>208</sup> *Id.* 12 (citing Trial Staff’s Reply Brief at 12).

<sup>209</sup> Initial Decision at P 476.

<sup>210</sup> *Id.* P 475.

<sup>211</sup> *Id.* at P 476.

storage facilities located in JIG's Great Lakes Market area as good alternatives. This results in the loss of CenterPoint Energy, Dominion, NiSource, NGO, and Robinson Engineering from ANRS's list of good alternative storage facilities.<sup>212</sup> The Initial Decision reasoned that these alternative storage providers should be excluded because: (1) Robinson Engineering is only available for intrastate service; (2) Dominion and NiSource storage capacities are physically unavailable to the Intervenor's markets; (3) NGO's capacity is fully subscribed by its affiliate, which releases capacity only periodically; and (4) CenterPoint storage capacity is fully subscribed.<sup>213</sup>

### **Briefs on Exceptions**

121. ANRS states that the Initial Decision erred by attempting to distinguish between sellers of storage service based upon the identity of the agency that regulated the rates for that capacity rather than utilizing the Commission's geographic market analysis. ANRS states that when the Initial Decision completed its product market analysis, it short-circuited the Commission's geographic market analysis.<sup>214</sup> ANRS posits that the Initial Decision erred by concluding that "the Commission's process for determining the relevant geographic market is less clear" and "the geographic market...adds little, if anything, to the substantive determinations regarding the existence of market power in this case."<sup>215</sup> ANRS states that Commission precedent is clear that the geographic market is a key consideration in determining whether the applicant has market power because it identifies the sellers of natural gas storage service that are good alternatives.

122. ANRS takes exception to the geographic market adopted by the Initial Decision. ANRS states that the Initial Decision erred by (1) concluding that the Commission has not adopted the two-pipeline test as the means for identifying the geographic market; (2) finding that the storage facilities owned by CenterPoint Energy, Dominion, NiSource, and Robinson Engineering are not good alternatives based on their location (Initial

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<sup>212</sup> CenterPoint and Robinson Engineering are located in southern Illinois; Dominion is located in Ohio; NiSource is located in Ohio and Indiana; and NGO is located in Ohio.

<sup>213</sup> Initial Decision at PP 480-81.

<sup>214</sup> ANRS Brief on Exceptions at 37 (citing Initial Decision at PP 451-462).

<sup>215</sup> *Id.* (citing Initial Decision at PP 7 & 468).

Decision at P 480);<sup>216</sup> (3) relying on the *Bluewater* case as support for the geographic market even though the *Bluewater* case is eight years old and involves different storage facilities and different pipeline arrangements (Initial Decision at P 476); (4) requiring that ANRS provide an unspecified level of proof regarding a price test to define its geographic market (Initial Decision at P 468); (5) mistaking and misquoting legal standards in *Texas Gas* (Initial Decision at PP 465-467, 474); and (6) concluding that state regulated storage facilities are not good alternatives.<sup>217</sup> ANRS states that by utilizing the Commission's two-pipeline test, ANRS's geographic market should have included Ohio, southern Illinois and southern Indiana.

123. ANRS states that numerous times the Commission has accepted geographic markets that included areas with alternative storage facilities directly connected to intrastate or interstate pipelines with access to the applicant's storage facilities and directly interconnect with the pipelines that access the applicant's storage facilities (two-pipeline test).<sup>218</sup> ANRS also states that the Initial Decision erred in claiming that the *Policy Statement* mandates market-based rate applicants use a price test despite subsequent Commission precedent to the contrary. ANRS states that the *Policy Statement* endorsed the two-pipeline test by quoting *Koch Gateway* when defining a

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<sup>216</sup> ANRS notes that it previously stated "NGO Transmission, Inc.'s (NGO Transmission) storage facilities are located more than two pipelines away from ANR Storage. Therefore, ANR Storage is no longer supporting NGO Transmission's storage facilities in the market power study." ANRS Reply Brief at 19 n.78. ANRS notes that on that basis, it is not taking exception to the exclusion of NGO from the geographic market.

<sup>217</sup> ANRS' exception with regard to state regulated storage facilities will be addressed in the "relevant product market" section of this Opinion.

<sup>218</sup> ANRS Brief on Exceptions at 38 (citing *Leader One Energy, LLC*, 136 FERC ¶ 61,113, at P 25 nn. 25, 32 (2011). See also *Tricor Ten Section Hub, LLC*, 136 FERC ¶ 61,242, at PP 30-36 (2011); *Ryckman Creek Resources, LLC*, 136 FERC ¶ 61,061, at PP 6, 33, 38 (2011); *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197, at PP 35, 43 (2011); *East Cheyenne Gas Storage, LLC*, 132 FERC ¶ 61,097, at PP 34, 43-44 (2010); *Blue Sky Gas Storage, LLC*, 129 FERC ¶ 61,210, at PP 23, 30 (2009); *Windy Hill Gas Storage, LLC*, 119 FERC ¶ 61,291, at PP 91-92, 95, 98 (2007); *Unocal Windy Hill Gas Storage*, 115 FERC ¶ 61,218, at PP 30, 34 (2006); *Caledonia Energy Partners, L.L.C.*, 111 FERC ¶ 61,095, at P 14 n.6 (2005); and *Cent. Okla. Oil and Gas Corp.*, 80 FERC ¶ 61,250, at 61,919 (1997)).

“good alternative.”<sup>219</sup> ANRS states that in *Koch Gateway*, the Commission determined that the alternative storage providers offered service at a price low enough based on their connections with *Koch Gateway*.<sup>220</sup>

124. ANRS states that the Initial Decision erred by concluding that the appropriate geographic market is the Great Lakes Market area approved in *Bluewater* that excludes southern Illinois, southern Indiana, and Ohio. ANRS states that, consistent with the Commission’s two-pipeline test, each of the facilities included in ANRS’ market power study is either served by pipelines that (1) interconnect with ANRS (i.e., ANR Pipeline or Great Lakes Gas Transmission Limited Partnership) or (2) directly interconnect with either ANR Pipeline or Great Lakes.<sup>221</sup>

125. ANRS claims that the Initial Decision erred by concluding that ANR Pipeline is the second pipeline under the two-pipeline test and that storage facilities located in Ohio, southern Illinois, and southern Indiana were more than two pipelines away from ANRS. ANRS argues that customers of ANR Pipeline can access ANRS’s facilities under ANR Pipeline’s tariff without taking transportation service under Great Lakes tariff. ANRS states that all firm shippers who move gas into and out of ANRS storage can use capacity owned by ANR Pipeline on Great Lakes and therefore, ANR Pipeline should not be considered the second pipeline in the two-pipeline test. ANRS states that when ANR Pipeline is properly counted as the first pipeline, then good alternatives such as CenterPoint Energy, Dominion, NiSource, and Robinson Engineering should be included in the geographic market area which would include Ohio, southern Illinois, and southern Indiana. ANRS states that the Initial Decision erred when it relied on *Bluewater* and excluded storage facilities in Ohio, including East Ohio Gas and Dominion. ANRS states that the Initial Decision ignored evidence presented by ANRS regarding Ohio storage facilities as good alternatives and simply relied on *Bluewater* instead. ANRS states that unlike *Bluewater*, the East Ohio Gas and NiSource storage facilities are directly connected at multiple points to ANR Pipeline. ANRS states that the record shows substantial transactions involving intervenors on the Ohio pipeline facilities and

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<sup>219</sup> ANRS Brief on Exceptions at 39-40 (citing the *Policy Statement*, 74 FERC ¶ 61,076, at 61,231 (1996)).

<sup>220</sup> *Id.* 39 (citing *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385, at 62,303 (1994)).

<sup>221</sup> *Id.* 42 (citing Exhibit ANR-1 at 28-29; Exhibit ANR-2 at 5:20-6:2; Exhibit ANR-6 at 2, 4).

substantial capacity available at the interconnections between ANR Pipeline and the Ohio pipeline facilities.

126. ANRS states that the Initial Decision erred in claiming that in *Texas Gas*, the Commission applied a one-pipeline test to determine that the Texas Gas geographic market included only those facilities directly connected to Texas Gas' pipeline.<sup>222</sup> ANRS states that the Commission never used the phrase "one-pipeline" in *Texas Gas*, nor did the Commission state that its analysis used only facilities connected to one pipeline [but rather that the product market definition coincidentally limited alternates to within one-pipeline]. ANRS asserts that the Commission noted in *Texas Gas* that the applicant's geographic market was selected by including not only storage providers that are directly connected to Texas Gas, but also storage providers that are directly connected to pipelines that are directly connected to Texas Gas.<sup>223</sup>

127. Trial Staff states that the Initial Decision struggled with the basic question of whether the geographic market should be defined before or after the good alternatives are identified. Trial Staff states that Commission precedent provides that the appropriate geographic market should be determined by simply combining the locations of good alternatives and the storage fields for which market-based rates are being sought. Trial Staff contends that the Initial Decision acted contrary to that precedent, setting the parameters of the geographic market prior to identifying all the good alternatives to ANRS storage. Trial Staff states that the Initial Decision defined the relevant geographic market in this case by using the relevant geographic market in *Bluewater* which encompasses Michigan, northern Illinois, northern Indiana and western Ontario. Trial Staff further states that based on that geographic market, the Initial Decision eliminated "good" storage alternatives such as CenterPoint Energy that the Initial Decision acknowledged would have been a good alternative but for his selection of a narrower geographic market.

128. Trial Staff states that there is no sound explanation for adoption of the geographic market used by the Commission in *Bluewater* (which excludes southern Illinois, southern Indiana, and Ohio) for the ANRS market-based storage rate application herein. Trial Staff states that the Initial Decision mentioned in passing Great Lakes and ANR pipeline (both affiliates) were separate pipelines, and it would take three pipelines for other

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<sup>222</sup> ANRS Brief on Exceptions at 41(citing the Initial Decision at P 465).

<sup>223</sup> *Id.* (citing *Texas Gas Transmission, LLC*, 122 FERC ¶ 61,190, at P 20 (2008)).

storage facilities to reach the markets served by ANRS.<sup>224</sup> Trial Staff states that, unlike the facts in *Bluewater*, ANRS introduced uncontested evidence that Dominion East Ohio Gas and Columbia Gas, two of the storage facilities rejected by the Initial Decision, are directly connected to ANR Pipeline. Trial Staff claims that the Initial Decision misunderstood the importance of the two-pipeline test in identifying a relevant geographic market and erroneously asserted that this approach was rejected by the Commission in *Texas Gas*. Furthermore, Trial Staff asserts that in *Texas Gas*, the Commission did not apply a one-pipeline test and never even mentioned a one pipeline test as the Initial Decision claimed.<sup>225</sup> Trial Staff states that the Initial Decision acknowledged the Commission's acceptance of the two-pipeline test for establishing an initial framework by which good alternatives can be identified.<sup>226</sup> Trial Staff notes that under the two-pipeline test, alternative storage facilities are considered possible good alternatives to the applicant's storage service if located in the same market as the applicant and connected to the same pipeline as the applicant or to a pipeline that is connected to the same pipeline as the applicant. Trial Staff states that it applied the two-pipeline test simply as the starting point for identifying storage providers that are good alternatives to ANRS storage. Trial Staff concludes that the two-pipeline test casts a reasonable geographic net in which a smaller universe of good alternatives can be determined.

### **Briefs Opposing Exceptions**

129. JIG states that the Initial Decision's consideration of intrastate storage in the product market did not short circuit the geographic market analysis. JIG states that ANRS does not explain how one would tease out intrastate versus interstate storage services as part of the geographic analysis. JIG contends that according to ANRS, the geographic market portion of the analysis is intended to identify the sellers of the relevant product, such that a seller offering the relevant product is included in the geographic market, while a seller that does not is excluded. JIG concludes that ANRS never explains how this binary choice would be applied to sellers that provide both interstate service under Part 284.224 as well as wholly intrastate service.

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<sup>224</sup> Trial Staff Brief on Exceptions at 54 (citing P 476 of the Initial Decision).

<sup>225</sup> *Id.* 55 (citing Initial Decision at P 465).

<sup>226</sup> *Id.* (citing Initial Decision at P 464 and 474).

130. JIG states that the Initial Decision correctly rejected the notion that a two-pipeline test should be used to determine the appropriate geographic market in this case. JIG asserts that ANRS itself did not use a two-pipeline test to define the geographic market, but rather used it selectively to ratify portions of a geographic market that it defined by combining four other market segments into a market referred to as the Central Great Lakes Market. JIG states that, to the extent that the Commission has used something resembling a two-pipeline test, it has been applied in the context of markets that were geographically compact and in which connecting pipelines were unaffiliated with the applicant. JIG states that if the two-pipeline test were applied in this case, it would lead to absurd results. JIG claims that if ANRS's two-pipeline test were literally applied, it would result in a pipeline that extends from Michigan to the Gulf of Mexico and would result in a massive geographic market. JIG states that under ANRS's hypothetical two-pipeline route, there is no analysis of the difference in transportation costs making use of ANR Pipeline (includes rate zones) or any other interconnecting pipelines. JIG states that the Commission has found some good storage alternatives to be located within a two-pipeline route from an applicant's facilities, where the totality of facts shows that the facilities are contiguous, in proximity to the market, or otherwise have a price that represents a good alternative. JIG asserts however, that this does not equate to the establishment of any "test" at all. JIG claims that if it did, the same "test" would exclude certain storage facilities located in Michigan as they would require more than two pipelines to access. JIG claims that the Initial Decision correctly rejected ANRS's treatment of ANR Pipeline and Great Lakes as a single pipeline under the "two-pipeline test." JIG states that the ANRS storage facilities are located approximately seventy miles north of a point of interconnection between Great Lakes and ANR Pipeline, and that point is accessible via interconnecting transportation on Great Lakes. JIG states that to reach any other storage facility via ANR Pipeline located south of that point requires the use of both pipelines. JIG concludes that the Initial Decision considered whether each and every one of the alternatives included in the ANRS market power study qualified as a good alternative, both within and outside of the geographic market that the Initial Decision ultimately adopted.

131. JIG states that the Initial Decision properly adopted the geographic market in *Bluewater* and excluded Ohio storage. JIG states that the Initial Decision performed essentially the same analysis as in *Bluewater* and determined that the storage services provided by facilities located in Ohio, southern Illinois, and southern Indiana fail to qualify as good alternatives to storage services provided by ANRS. JIG states that the storage alternatives located in southern Illinois and southern Indiana (CenterPoint Energy and Robinson Engineering) are small facilities that have a *de minimis* impact on the market power calculations in this proceeding. JIG states that, from a market power

evaluation standpoint, the more significant facilities are those located in Ohio, DEO and NiSource storage.<sup>227</sup> JIG states that the Initial Decision recognized that the storage facilities owned by DEO and NiSource in Ohio are located outside of the relevant geographic market defined in *Bluewater*, but also found that physical limitations prevent gas flow from DEO and NiSource storage facilities into ANR Pipeline.

### **Commission Determination**

132. The Commission reverses the Initial Decision. The Initial Decision stated that defining the geographic market is “just an analogue of the market-test showing of good alternatives storage providers and as such adds little, if anything to substantive determinations regarding existence of market power in this case.”<sup>228</sup> As such, the Initial Decision combined its analysis of the geographic market with the determination of good alternatives. This argument found support from statements of Trial Staff, who stated that the relevant geographic market consists of the collection of good alternatives and the applicant. In essence, Trial Staff does not believe the geographic market is in fact a geographic area, but a list containing the applicant and good alternatives.<sup>229</sup> Additional confusion was created by ANRS when it used the same test for determining the geographic market as it used for determining good alternatives.<sup>230</sup>

133. The Commission has stated in the past that the collection of alternative sellers and the applicant constitutes the geographic market.<sup>231</sup> Indeed the Policy Statement defines the geographic market as all the sellers from whom a customer could purchase service if it attempted to avoid a price increase imposed by the pipeline.<sup>232</sup> However, while ultimately, in a practical sense, the extent of the geographic market will be defined by the

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<sup>227</sup> JIG states that NGO, which is storage provider in Ohio, is no longer at issue in this proceeding as ANRS has conceded that it is not part of the relevant geographic market.

<sup>228</sup> Initial Decision at P 468.

<sup>229</sup> Trial Staff Brief on Exceptions at 57.

<sup>230</sup> Ex. ANR-153 at 45.

<sup>231</sup> *Red Lake Gas Storage, L.P.*, 103 FERC ¶ 61,277, at P 3 (2003).

<sup>232</sup> Policy Statement at P 61,232.

location of competitive alternatives,<sup>233</sup> defining the geographic market is a necessary separate step that serves to narrow the list of potential competitive alternatives to the actual geographic area in which the applicant competes. Trial Staff seems to agree with this, stating that it is appropriate to cast a reasonable geographic net in which a smaller universe of good storage alternatives can be determined.<sup>234</sup> Trial Staff's witness Savitski correctly testified that a geographic market is an area that encompasses the relevant alternatives for a given natural gas storage service.<sup>235</sup> Therefore, applicants for market-based rate authority must, as a separate step, define the relevant geographic market in which the applicant competes

134. By improperly conflating market definition with the identification of good alternatives, the Initial Decision developed a too narrow geographic market. The extent of a geographic market is not dependent on the existence of good alternatives in that area. The geographic market is where the applicant provides service, regardless of whether competitive alternatives also compete in that region. An absolute monopolist facing no competitive alternatives still provides service in a certain geographic location. To limit a geographic market to only those areas where competitive alternatives exist would mean that even an absolute monopolist operating nationwide would have no geographic market.

135. Contrary to the findings of the Initial Decision, as well as the arguments of ANRS, the Commission has never formally adopted a strict "two pipeline" or "one pipeline" test for determining the appropriate geographic market.<sup>236</sup> The Commission reviews all applications on a case-by-case basis. Many of the cases cited by ANRS in support of the so-called "two pipeline" test were unopposed. It is certainly true that the number of connections with the applicant is relevant in determining the scope of the geographic market, for transportation costs serve as the primary limiter in identifying what area the applicant competes. The further away a potential competitor is from the applicant, and the more connections required, the likelier transportation costs become an impediment to effective competition. However, the Commission does not find that any area connected directly, or one-step removed, from the applicant is *per se* within the relevant geographic market. In fact, even ANRS did not apply a strict two-pipeline test to its application.

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<sup>233</sup> *Koch Gateway Pipeline Co.*, 85 FERC ¶ 61,013, at 61,042 (1998).

<sup>234</sup> Trial Staff Brief on Exceptions at 56-57.

<sup>235</sup> Ex. S-1 at 7.

<sup>236</sup> Initial Decision at P 474.

136. The Commission in *Koch*, for example, did not include in the geographic market all areas reached by pipelines connected, directly or one level removed, to Koch. The Commission instead adopted a narrower geographic market definition that included the states of Texas, Louisiana (the physical location of the Koch gateway facility) and Mississippi.<sup>237</sup> In *Texas Gas*, the Commission rejected the argument that the geographic market included storage providers that were directly connected as well as storage providers that are directly connected to pipelines that were directly connected to the applicant. The Commission found that the applicant had failed to demonstrate that the availability and cost (including transportation rates) of alternative storage services provided viable substitutes.<sup>238</sup> In restricting the geographic market to those areas directly accessible to the applicant's customers, the Commission acknowledged "the uncertainty of third party transportation capacity and the added transportation cost of accessing those storage alternatives."<sup>239</sup>

137. The Initial Decision incorrectly found that the Commission's ruling in *Texas Gas* created a "one-pipeline" test that limited the geographic market to only those areas reached by pipelines directly connected to the applicant.<sup>240</sup> ANRS and Trial Staff both criticize the ID by stating that the Commission never used the phrase "one-pipeline" in *Texas Gas*. While this is accurate, neither has the Commission used the phrase "two-pipeline" in the cases cited by ANRS or Trial Staff in support of the existence of a two-pipeline test. The Commission reiterates that in evaluating geographic markets, the individual facts of the case control the analysis, and the number and extent of pipeline connections, while relevant, cannot alone determine the proper scope of the relevant geographic market.

138. Finally, the Commission affirms the Initial Decision's finding that the geographic market does not automatically include contiguous states.<sup>241</sup> In *Red Lake*, the Commission found that the high costs and reliability issues in transporting natural gas between northern and southern California meant that northern California was a separate geographic market not only from Arizona, the location of Red Lake, but of southern

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<sup>237</sup> *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385, at 62,303 (1994).

<sup>238</sup> *Texas Gas Transmission, LLC*, 122 FERC ¶ 61,190, at PP 20-21 (2008).

<sup>239</sup> *Id.* P 21.

<sup>240</sup> Initial Decision at P 465.

<sup>241</sup> *Id.* P 466.

California as well.<sup>242</sup> Again, the Commission reviews applications on a case-by-case basis.

139. In reviewing the geographic market proposed by ANRS, the applicant provided sufficient evidence that its Central Great Lakes Market is appropriate. Areas in close geographic proximity that are reachable over an interconnected system represent a reasonable extent of the geographic market for ANRS. Within this geographic market, reasonable transportation costs allow ANRS to compete with alternative service providers.

140. The Initial Decision erred in excluding Ohio, southern Indiana and southern Illinois from the relevant geographic market. The Initial Decision excluded Ohio on the grounds that the Commission did the same thing in *Bluewater*.<sup>243</sup> In *Bluewater*, the Commission excluded storage located in Ohio “for purposes of conducting the market power analysis” based on the applicant providing no evidence of the amount of storage capacity that Ohio gas made available to the interstate market. Further, Ohio gas was not sufficiently connected to *Bluewater*.<sup>244</sup> These arguments, however, go to whether the storage providers were good alternatives. The Commission did not find that *Bluewater* did not compete in Ohio. Again, the Commission holds that defining the relevant geographic market is a separate and antecedent step in the market power analysis.

141. The Initial Decision also erred, on similar grounds, in excluding southern Illinois and southern Indiana from the relevant geographic market.<sup>245</sup> The Initial Decision found that storage facilities in these regions can only be accessed by ANRS customers using three pipelines, and therefore these facilities fail the Commission’s two pipeline test.<sup>246</sup> As discussed *supra*, the Commission has not adopted a bright-line “two-pipeline” test. Both southern Illinois and southern Indiana are located in contiguous states, are within close proximity to ANRS, are sufficiently interconnected with ANRS, and represent a geographic area in which ANRS provides service. The Commission therefore adopts the Central Great Lakes Market as the appropriate geographic market in this proceeding.

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<sup>242</sup> *Red Lake Gas Storage, L.P.*, 103 FERC ¶ 61,277, at P 15 (2003).

<sup>243</sup> Initial Decision at P 475.

<sup>244</sup> *Bluewater*, 117 FERC ¶ 61,122, at PP 24-25.

<sup>245</sup> Initial Decision at P 476.

<sup>246</sup> *Id.* at P 476.

## V. Competitive Alternatives

142. As part of the test for determining the absence of market power, ANRS must identify the competitive or “good” alternatives to its service. The Commission uses a three-part rubric for evaluating good alternatives: a good alternative must be available soon enough, have a price low enough, and have a quality high enough to permit customers to substitute the alternative for the applicant's service.<sup>247</sup> The Policy Statement sets out various examples relevant to defining good alternatives.<sup>248</sup>

### 2014 Initial Decision

143. The Initial Decision stated that even though the Policy Statement requires a price test, the Commission has demonstrated a willingness to apply other tests that it seems to believe are adequate substitutes if an applicant does not include price data for good alternatives in its application. The Initial Decision stated that in *UGI Storage Co.*, the Commission cited ten cases in which it had approved market-based rates applications in the New York and Pennsylvania geographic markets, and in none of those cases did the applicant submit pricing information. However, the Initial Decision stated that the assumptions on price comparability that the Commission was willing to make in the above cases of small independent storage providers do not appear to be reasonable for very large storage providers, as is the case here, and requires closer scrutiny.

144. The Initial Decision excluded numerous intrastate storage providers from the list of good alternatives based on a finding that intrastate service not subject to a Part 284 certificate is unavailable.<sup>249</sup> The Initial Decision excluded Dominion and NiSource from the list of good alternatives upon finding that the storage capacity is physically unavailable to the interstate market.<sup>250</sup> The Initial Decision excluded NGO and

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<sup>247</sup> *Id.* 61,230.

<sup>248</sup> “The applicant must also show how each of the substitute services in the product market are adequate substitutes to the applicant's service in terms of quality, price and availability. For example, the relevant product market may consist of off-peak interruptible transportation service only. The Commission will consider any substitutes for the relevant product that can be considered competitive alternatives, *e.g.*, storage delivery services. Pipelines might suggest numerous alternatives to FT in their applications: IT, storage services, residual fuel oil, *etc.*” *Id.* 61,231.

<sup>249</sup> Initial Decision at P 480.

<sup>250</sup> *Id.*

CenterPoint from the list of good alternatives based on the lack of evidence of storage capacity that either make available to the interstate market.<sup>251</sup>

145. Finally, the Initial Decision found that interruptible storage service should be excluded from the analysis because it lacked the quality of firm service and therefore was not part of the relevant product market.<sup>252</sup>

### **Briefs on Exceptions**

146. ANRS states that the Initial Decision erred in claiming that the *Policy Statement* mandates market-based rate applicants utilize a price test because Koch Gateway's test was not a sum-of-the-components price test, but instead the Commission determined that the alternative storage providers offered service at a price low enough based on their connection with Koch Gateway, and the *Policy Statement* endorsed the two-pipeline test by quoting *Koch Gateway* when defining a "good alternative."<sup>253</sup> ANRS further states that if the *Policy Statement* did somehow reject *Koch Gateway*, it is a non-binding policy statement and thus does not foreclose ANRS' showing under the two-pipeline test.<sup>254</sup>

147. ANRS states that the Initial Decision incorrectly asserted that a delivered price test would involve just 240 price permutations. ANRS claims that a delivered price test would involve 10,000 price permutations based upon one hundred alternatives with ten origins and ten destinations. ANRS states that the Commission has repeatedly applied the two-pipeline test to identify good alternatives. ANRS states that when a storage alternative is connected to the applicant or directly to a pipeline that is connected to the applicant, the Commission determined that the prices of these alternatives, including storage and transportation, are probably close to the city gate price using the applicant's storage, at least for the states adjacent to the state in which the storage is located. ANRS states that it relied upon the two-pipeline test to determine the relevant geographic market, but also provided extensive price information and price analyses demonstrating that the storage alternatives identified are good alternatives that compete with the storage services provided by ANRS.

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<sup>251</sup> *Id.* PP 481, 493.

<sup>252</sup> *Id.* P 443.

<sup>253</sup> ANRS Brief on Exceptions at 40 (citing the *Policy Statement*, 74 FERC ¶ 61,076, at 61,231 (quoting *Koch Gateway*) (1996)).

<sup>254</sup> *Id.* 40.

148. ANRS states that the Initial Decision erred by holding that CenterPoint's storage services were not a good alternative because its storage capacity was fully subscribed and ANRS had not shown it to be available for release to the interstate market. ANRS states that this holding directly conflicts with Commission precedent in *UGI*, where the Commission found that "including storage capacity subject to long-term contracts in its determination of market concentration is appropriate."<sup>255</sup> ANRS distinguishes *Bluewater*, where the Commission rejected a storage facility because the applicant had failed to show that capacity would be available,<sup>256</sup> based on the fact that *UGI* is more recent and has superseded *Bluewater*. ANRS also points out that Witness Derryberry and Witness Wilson presented no evidence that Centerpoint was not a good alternative because it was fully subscribed.

149. Further, ANRS argues that asset management agreements, encouraged by Order No. 712 and revised capacity release policies, can make it easier for retail storage to compete in the interstate natural gas storage market.<sup>257</sup>

150. Trial Staff agrees with ANRS that a price test to determine good alternatives to ANRS storage is not feasible, and states that in spite of the Commission's statement in the Policy Statement, price analyses have not been required to be included in market-based storage rate applications and they have not been submitted.<sup>258</sup> Trial Staff states that the Initial Decision's contention that at least some effort should have been made by either ANRS or Trial Staff to perform a price test as required by the Alternative Rate Policy Statement is misplaced and gives too little weight to the problems in attempting such an exercise. Trial Staff claims that there are hundreds, and possibly thousands, of different price permutations that must be computed and analyzed to determine good alternatives to ANRS storage, and this is simply infeasible. Trial Staff further states that a reliable price test must include not only the storage costs but also the transportation costs of delivering each ANRS customer's storage gas to and from each possible storage alternative. Trial Staff claims that, though conducting a price test for a representative set

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<sup>255</sup> ANRS Brief Opposing Exceptions at 85 (citing *UGI*, 133 FERC ¶ 61,073, at P 85).

<sup>256</sup> ANRS Brief on Exceptions at 85 (citing *Bluewater*, 117 FERC ¶ 61,122, at P 26).

<sup>257</sup> *Id.* 80 (citing *Promotion of a More Efficient Capacity Release Market*, 123 FERC ¶ 61,286, at PP 109-110 (2008) (Order No. 712)).

<sup>258</sup> Trial Staff Brief on Exceptions at 39.

of customers would decrease the quantity of data to be analyzed, it also introduces subjectivity in the choice of the representative customers. Trial Staff argues that the Initial Decision incorrectly assumed that a comparison of the storage price data to be provided by ANRS storage as part of its semi-annual report is the same price comparison as the price test to determine whether storage alternatives in the market are good alternatives.<sup>259</sup> Trial Staff argues that storage price data provided by ANRS in its semi-annual report does not take into account transportation costs and, therefore, is not a good test for determining whether storage alternatives in the market are good alternatives.

151. Trial Staff also argues that even an abbreviated price test using limited data would not yield reliable or accurate results. Trial Staff asserts that Trial Staff Witness Savitski concluded that such an abbreviated test would be too subjective, and moreover, the complexity of the undertaking would not be completely removed. Nevertheless, Trial Staff states that it supports a price test for the local gas production included in ANRS' market power study.<sup>260</sup>

152. Trial Staff also argues that the use of storage price data to detect the potential for affiliate abuse cannot be used as a price test to determine good alternatives. Trial Staff points out that the Initial Decision stated that it found it "troubling that Staff believes this price test would be good enough to police affiliate abuse, but yet be inadequate for use in determining whether to grant" market-based rates.<sup>261</sup> Trial Staff clarifies that the affiliate abuse price test is a completely different test, consisting merely of a comparison of ANRS' prices before and after market-based rates are granted, and functions merely as a screen for possible affiliate abuse.

153. Finally, Trial Staff points out that, prior to Trial Staff's raising the issue of a price test, JIG stated in passing that a price test was not performed but never discusses the importance or need for a price test. Specifically, JIG Witness Wilson noted in direct testimony that ANRS did not "evaluate the cost for its customers to use storage facilities not connected directly to ANR-P[ipeline] or Great Lakes."<sup>262</sup> JIG states this comprised all of JIG's testimony, and that Mr. Wilson never indicated a problem with the omission

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<sup>259</sup> *Id.* (citing Initial Decision at 471).

<sup>260</sup> *Id.* 47.

<sup>261</sup> *Id.* 47-48 (citing Initial Decision at P 471).

<sup>262</sup> *Id.* 50 (citing Ex. JIG-1 at 33).

until during cross-answering testimony Mr. Wilson argued that sufficient price data are available to conduct a price test and that a price test is particularly important for determining good alternatives.<sup>263</sup>

### **Briefs Opposing Exceptions**

154. JIG states that ANRS chose not to address or analyze the economics and costs of transporting on both ANR Pipeline and Great Lakes Pipeline to third pipelines and storage facilities that might be reached. JIG states that ANR Pipeline is a vast zoned pipeline and given that there is no record evidence of the costs of transporting even within its market zone, the record is left devoid of any support for treating a two-pipeline transportation route on these TransCanada affiliates as the analytical equivalent of a single pipeline. Further, JIG notes that ANRS made no analysis of the difference in transportation costs a shipper making use of the hypothetical two-pipeline route would encounter in making use of the ANR system, let alone any interconnecting pipelines.<sup>264</sup> JIG argues that ANRS provided no evidence that Great Lakes and ANR Pipeline offer a combined service that would allow ANRS customers to access alternative storage facilities at a rate that would represent the equivalent of a single pipeline's transportation cost.<sup>265</sup> JIG further states that the Initial Decision rejected ANRS' proposed geographic market also because he considered each of the alternatives included in its Market Power Study and found they lacked sufficient available capacity.<sup>266</sup> JIG asserts that contrary to the contentions of ANRS and Trial Staff, the Initial Decision performed a careful examination of all available evidence in the record and determined that storage facilities in southern Indiana, southern Illinois, and Ohio currently do not qualify as good alternatives.<sup>267</sup> Specifically, JIG states that the Initial Decision considered CenterPoint and Robinson Engineering facilities in southern Illinois and southern Indiana and found them unsuitable because of fully-subscribed capacity, and lack of a Part 284.224 certificate, respectively. JIG states that the Initial Decision also considered DEO and

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<sup>263</sup> *Id.* 50-51 (citing Ex. JIG-23 at 18).

<sup>264</sup> JIG Brief Opposing Exceptions at 63-64 (citing *Enterprise TE Products Pipeline Co.*, 146 FERC ¶ 61,157, at 41 (2014)).

<sup>265</sup> *Id.* 66.

<sup>266</sup> *Id.* 68.

<sup>267</sup> *Id.* 69 (citing Initial Decision at PP 480-481).

NiSource storage to be unsuitable good alternatives because physical limitations prevent natural gas to flow from DEO and NiSource facilities into ANR Pipeline, and that the vast majority of DEO's capacity is not available to the interstate market.<sup>268</sup> JIG concludes that ANRS' claim of a single pipeline approach should be rejected. Finally, JIG agrees with the Initial Decision's decision that ANRS should have provided a price test to support its market-based storage rate proposal.

### **Commission Determination**

155. In determining the good alternatives to ANRS, the Initial Decision eliminated several potential alternatives based on a lack of availability or quality. While referencing price, the Initial Decision did not eliminate any proposed competitive alternatives based solely on price. However, due to the novel nature of this proceeding, the Commission will address all three criteria for determining a good alternative: price, availability, and quality.

### **Price**

156. Regarding price, the Policy Statement set a standard 10 percent pricing threshold, so that a good alternative's price must be at or below the applicant's approved maximum cost-based rate plus 10 percent. However, this standard did not preclude individuals from making an argument for higher or lower thresholds in particular cases.<sup>269</sup>

157. In this proceeding, Trial Staff set forth the most comprehensive argument concerning the role of price in determining good alternatives. Trial Staff witness Dr. Savitsky testified that a good alternative is such that, if the applicant increases its tariff rate by a small, but significant, non-transitory increase in price, its customers will find the alternative offers a competitive price.<sup>270</sup> Dr. Savitsky testified that a good alternative is one that offers a netback (price to shipper minus transportation costs) at least as large as the applicant's threshold price.<sup>271</sup> Using these definitions, Trial Staff argues that it is simply too difficult to compare all of the potential alternatives to ANRS,

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<sup>268</sup> *Id.* 71 (citing Initial Decision at PP 143, 145).

<sup>269</sup> *Id.* 61,232.

<sup>270</sup> Ex. S-1, at 8.

<sup>271</sup> *Id.* 11.

for differences in transportation costs, gas prices, etc. would make such comparisons meaningless.<sup>272</sup>

158. While the price test Trial Staff describes may indeed be difficult, the Commission no longer requires that an applicant for market-based rates compare the price of potential competitive alternatives to the applicant's tariff rates. In the Policy Statement, the Commission held that if an applicant could sustain an increase in its rate in the order of ten percent or more without losing significant market share, the applicant was in a position to exercise market power.<sup>273</sup> In a subsequent proceeding, the Commission required that all alternatives be within ten percent of the applicant's maximum tariff rate, and required significant price data be filed with the application.<sup>274</sup> However, as the Commission explained in *UGI*:

[W]hen the Alternative Rate Policy Statement and *Koch Gateway* were issued, virtually all interstate natural gas companies were charging cost-based rates for storage and the Commission had not yet authorized the numerous new storage projects ... for which it has granted market-based rate authority in recent years. The Commission has not required these companies to demonstrate that alternatives are available at what would be their cost-based rates, if calculated. Indeed, since issuance of the Alternative Rate Policy Statement and *Koch Gateway*, the Commission has not required any applicant for market-based storage rate authority to demonstrate that alternatives are available at the applicant's existing embedded cost-based rate.<sup>275</sup>

159. The ability of an applicant to increase rates upon receiving market-based rate authority does not mean that the applicant has significant market power; it may simply mean that the applicant's current tariff rate is below the competitive market price.<sup>276</sup> Trial Staff's claim that a price test in this proceeding would be too difficult is rooted in an

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<sup>272</sup> *Id.* 17.

<sup>273</sup> Policy Statement at 61,232.

<sup>274</sup> *Koch Gateway Pipeline Co.*, 85 FERC ¶ 61,013, at 61,043 (1998).

<sup>275</sup> *UGI Storage Co.*, 134 FERC ¶ 61,239, at P 37 (2011).

<sup>276</sup> *UGI Storage Co.*, 133 FERC ¶ 61,073, at P 84 (2010) (citing *Explorer Pipeline Co.*, 87 FERC ¶ 61,374, at 62,392 (1999)).

improper understanding of the Commission's current policy on determining price comparability of potential good alternatives.

160. Thus, the Commission agrees with the Initial Decision that at least some effort must be made to comply with the price test.<sup>277</sup> The Initial Decision incorrectly states that the Commission has articulated a one-pipeline test, a two-pipeline test, and a very specific Policy Statement test to determine good alternatives in terms of price.<sup>278</sup> The Commission instead finds that, consistent with prior rulings, storage providers that are interconnected to, and in close proximity with, the applicant are adequately comparable in price.<sup>279</sup> This presumption can, in certain instances, be rebutted with evidence to the contrary. Evidence that would demonstrate that alternatives are not good alternatives in terms of price would be, for example, evidence of high costs associated with transporting natural gas between the two potential alternatives.<sup>280</sup>

### **Availability**

161. Regarding timeliness, the Policy Statement explained that the Commission will not generally define a specific time period within which a product must become available in order to be a substitute. "However, if a pipeline applicant relies on the existence of capacity that will not be available immediately, it should also show that its customers will not be committed to long term contracts on its system within the relevant time period. In this regard, customers should be given the option of reducing service demand levels once the alternative capacity and/or service becomes available."<sup>281</sup>

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<sup>277</sup> Initial Decision at P 472.

<sup>278</sup> *Id.* P 474.

<sup>279</sup> *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385 (1994). Sufficient interconnection is to be determined on a case-by-case basis. The Commission continues to refrain from adopting a strict one-pipeline or two-pipeline test for sufficient interconnection.

<sup>280</sup> *Red Lake Gas Storage, L.P.*, 103 FERC ¶ 61,277, at P 15 (2003).

<sup>281</sup> *Id.* 61,231.

### Commission Determination

162. The Commission reverses the Initial Decision's exclusion of subscribed capacity as unavailable. If an alternative is fully subscribed, and there is no ability to release or otherwise re-assign capacity, that alternative is not a good alternative.<sup>282</sup> However, unutilized capacity that is committed under contract can nevertheless become available through capacity release.<sup>283</sup> Available capacity includes both capacity that is unsubscribed or that may reasonably be expected to become available.<sup>284</sup> In *UGI*, the Commission found that subscribed storage capacity subject to the Commission's capacity release requirements were properly included in the market power analysis.<sup>285</sup> On rehearing, the Commission clarified that, while it agreed with the fact that because capacity could be released it did not guarantee that it would be released, *UGI* had demonstrated that significant capacity was being released, and that over half of the entire gas storage market was subject to capacity release at cost-based rates.<sup>286</sup> In the instant proceeding, ANRS demonstrated that intrastate storage that had been committed could be released, sublet, assigned or otherwise used to serve a different entity.<sup>287</sup>

163. The Commission also reverses the Initial Decision's exclusion of facilities based solely on the absence of Part 284 certification. As discussed *supra*, intrastate storage service should not be excluded from the market power analysis based solely on the facility not possessing a Part 284 certification. The criterion for determining a good alternative is that it be available *soon enough*,<sup>288</sup> not that it be available immediately. Facilities can seek Part 284 certification soon enough to potentially discipline any attempt by ANRS to raise prices above competitive levels.

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<sup>282</sup> *Red Lake Gas Storage, L.P.*, 103 FERC ¶ 61,277, at P 18 (2003).

<sup>283</sup> *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385, at 62,303 (1994).

<sup>284</sup> *Koch Gateway Pipeline Co.*, 89 FERC ¶ 61,046, at 61,132 (1999), *see also Red Lake Gas Storage, L.P.*, 103 FERC ¶ 61,277, at P 19 (2003).

<sup>285</sup> *UGI Storage Co.*, 133 FERC ¶ 61,073, at P 81 (2010).

<sup>286</sup> *UGI Storage Co.*, 134 FERC ¶ 61,239, at PP 42, 45 (2011).

<sup>287</sup> Ex. ANR-65 at 34.

<sup>288</sup> Policy Statement at 61,231.

### **Quality**

164. Regarding quality, a good alternative must provide service in which the quality is at least as high as that of the service provided by the applicant.<sup>289</sup> The Policy Statement explains that while, in the aftermath of Order Nos. 436 and 636, all interstate pipelines provide operationally comparable firm transportation service, overall packages of services may not always be comparable. For example, no-notice service might not be available from another pipeline. The Policy Statement also discusses the possibility that applicants might wish to demonstrate that intrastate pipelines offer comparable transportation service.<sup>290</sup> This example is further discussed in the intrastate section.

165. The Commission, *supra*, excluded interruptible service on other grounds, and therefore no finding need be made in regard to the quality of interruptible versus firm storage service.

### **VI. Market Metrics**

166. Applicants for market-based rate authority must set forth market concentration calculations using the HHI.<sup>291</sup> Applicants must also set forth market share calculations, inclusive of affiliate service offerings, in the relevant markets.<sup>292</sup>

167. In its application, ANRS calculated the total working gas for its market was 1,544,434 MMcf and that total daily deliverability equaled 35,115 MMcf. ANRS' HHI for the relevant market was 969 for working gas and 1,088 for daily deliverability. ANRS' calculated market shares of 14.95 percent of working gas and 14.34 percent of daily deliverability. Intervenors calculated a market size of 676,848 MMcf of working gas and 14,503 MMcfd of daily deliverability, leading an HHI of 2,263 in working gas and 2,334 in daily deliverability, and a market share for ANRS of 39 percent for working gas and 38 percent for daily deliverability.

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.* 61,232.

<sup>291</sup> 18 C.F.R. § 284.503 (b)(7) (2014).

<sup>292</sup> *Id.*

### **2014 Initial Decision**

168. The Initial Decision stated that ANRS listed 19 storage owners that are good alternatives to ANRS' storage, and also included Michigan local production as a good alternative, and that ANRS also included TransCanada Corporation storage volumes. The Initial Decision stated that "metrics" include computations of working gas, daily deliverability, and market shares and HHIs for each.<sup>293</sup>

169. The Initial Decision stated that ANRS, JIG, and Trial Staff submitted competing metrics for each of the alternative storage facilities. The ID adopted JIG's metrics, finding both Trial Staff's and ANRS' metrics unhelpful because they include interruptible storage in the metrics for working gas and daily deliverability, and, additionally, found Trial Staff's metrics troublesome because they do not contain information on daily deliverability for most of the facilities.<sup>294</sup>

170. The Initial Decision acknowledged that ANRS Witness Nowaczewski criticized JIG's daily deliverability estimates, testifying they are inaccurate because they "rely on a direct relationship between working gas and daily deliverability,"<sup>295</sup> and that a storage operator's volume-to-deliverability relationship cannot be characterized reliably as a one-to-one linear relationship. The Initial Decision stated that Mr. Nowaczewski explained that a storage operator may choose to design for maximum deliverability, maximum volume, or the best combination of volume and deliverability,<sup>296</sup> and that Intervenor were wrong not to examine company storage data by individual fields.

171. The Initial Decision allowed that Mr. Nowaczewski's testimony is an accurate portrayal of the engineering function of natural gas storage fields but is irrelevant to a determination of daily deliverability volumes available under the state tariffs involved in this case.<sup>297</sup> The Initial Decision further states that Intervenor's one-to-one ratio for reducing daily delivery when working gas is reduced is correct because such a reduction reflects a simple allocation of existing capacity, and that Intervenor's one-to-one

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<sup>293</sup> Initial Decision at P 482.

<sup>294</sup> *Id.* PP 483-487.

<sup>295</sup> *Id.* P 488 (citing Ex. ANR-48 at 3).

<sup>296</sup> *Id.* (citing Ex. ANR-45 at 7).

<sup>297</sup> *Id.* P 490.

reduction is a simple accounting measure that has nothing to do with engineering.<sup>298</sup> However, the Initial Decision further discussed how Mr. Nowaczewski testified that the major flaw in Intervenor's Exhibit No. NSP-7 study is the direct proportioning of working volume and deliverability, particularly for Enbridge, Spectra, DTE, and Dominion, because the storage fields of all these companies have optimal operating characteristics such that no one should claim that a reduction in maximum inventory somehow decreases maximum deliverability, especially at a 1:1 proportionality. The Initial Decision then stated, that even if it were to find that this criticism of Intervenor's reduction in daily deliverability volumes has merit, which the Initial Decision emphasized it did not, restoring the levels to those claimed by ANRS would not change the outcome of the case. The Initial Decision then listed, in table form, the alternative storage facilities with corresponding market shares and HHIs for working gas and daily deliverability that reflect Mr. Nowaczewski's criticism.<sup>299</sup>

172. The Initial Decision explained that it found NiSource and Dominion supplies to be unavailable due to physical limitations, as initially testified to by Tenaska Witness Litjen. The Initial Decision further explained that neither ANRS' witnesses Kirk and Bennett, nor Trial Staff witness Mills were able to refute this testimony.<sup>300</sup>

173. The Initial Decision listed each facility claimed by ANRS as a good alternative, and made a determination as to each, along with a short justification for the decision to include or exclude the facilities from the market metrics analysis.<sup>301</sup> The Initial Decision's determination were as follows:

- The Initial Decision found Ameren is *not* a good alternative because none of the facilities' volumes are available for interstate service without a Part 284 certificate.
- The Initial Decision found Bluewater Gas Storage is a good alternative because ANRS and JIG agree that Bluewater is a good alternative. The Initial Decision adopts ANRS' and JIG's volumes of 29,200 MMcf for working gas and 826 MMcfd for daily deliverability.

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<sup>298</sup> *Id.*

<sup>299</sup> Initial Decision at P 492 & Table 1: Changes to the Great Lakes Market that Account for Mr. Nowaczewski's Testimony at Ex. ANR-45 at 18.

<sup>300</sup> *Id.* PP 495-498.

<sup>301</sup> *Id.* P 493.

- The Initial Decision found Centerpoint Energy is *not* a good alternative because ANRS has not shown that any of its volumes are available for release to the interstate market.
- The Initial Decision found CMS Energy Corp. is *not* a good alternative because CMS does not possess a Part 284 certificate.
- The Initial Decision found Dominion is *not* a good alternative because the meter connections between ANR Pipeline and Dominion are set up to measure flows only from ANR Pipeline into Dominion and are thus physically unavailable to Intervenors.
- The Initial Decision found DTE Energy is a good alternative because the Initial Decision agrees with Intervenors' arguments to exclude the Blue Lake capacity because it is marketed and operated by ANR. The Initial Decision adopts volumes of 142,267 MMcf for working gas and 3,576 MMcfd for daily deliverability.
- The Initial Decision found Enbridge, Inc. is a good alternative and adopts Intervenors' arguments that 16,700 MMcf for working gas and 4128 MMcfd of daily deliverability are available.
- The Initial Decision found Integrlys is *not* a good alternative because Intervenors noted that Integrlys does not offer interstates storage service on a firm basis.
- The Initial Decision found Kinder Morgan, Inc. is a good alternative because Intervenors agree with ANRS that Kinder Morgan has 82,757 MMcf of working gas and 2,005 MMcfd of daily deliverability available.
- The Initial Decision found Loews Corp. is a good alternative because Intervenors and ANRS agree that 4,996 MMcf of working gas is available, and Intervenors state that Loews has 50 MMcfd of daily deliverability.
- The Initial Decision found NGO Transmission, Inc. is *not* a good alternative because ANRS has not shown that NGO's fully-subscribed capacity is available to the interstate market and is located in Ohio, outside the Great Lakes Market.
- The Initial Decision found Nicor, Inc. is *not* a good alternative because all of its capacity is either offered on an interruptible basis to the interstate market or is dedicated to in-state services.
- The Initial Decision found NiSource is *not* a good alternative because part of its capacity is owned by Northern Indiana Public Service Company which does not hold a Part 284.224 certificate and the remaining capacity is outside the Great Lakes Market in Ohio and is not physically available to Intervenors.
- The Initial Decision found ProLiance is *not* a good alternative because it does not hold a Part 284.224 certificate.

- The Initial Decision found Robinson Engineering is *not* a good alternative because neither it nor its owner, Egyptian Gas Storage Company, hold Part 284.224 certificates and are additionally outside the Great Lakes Market.
- The Initial Decision found SEMCO Energy, Inc. is *not* a good alternative because part of its capacity is dedicated to intrastate service, without a Part 284.224 certificate and the other part, though it has a Part 284.224 certificate, is included in TransCanada's storage total.
- The Initial Decision found that Southern Union Co. is a good alternative because both ANRS and the Intervenors agree that it is available.
- The Initial Decision found that Spectra Energy is a good alternative but limited daily deliverability to 1,398 MMcfd and 30 Bcf [30,000 MMcf] for working capacity because the Initial Decision deferred to Tenaska Witness Litjen's operational expertise.
- The Initial Decision found Vectren Corp. is *not* a good alternative because it does not hold a Part 284.224 certificate.
- The Initial Decision found it appropriate to include the Intervenor's estimate of TransCanada's volumes in the total calculation of 251,135 MMcf for working gas and 5,573 MMcfd for daily deliverability.
- The Initial Decision found that Michigan local production provides 57,839 MMcf of working gas and 374 MMcfd of daily deliverability as a good alternative because ANRS and the Intervenors agree on this.

174. The Initial Decision then listed in Table 2 the working gas and daily deliverability volumes, along with computed market shares and HHIs for the storage providers that are good alternatives to ANRS facilities, as well as TransCanada Corp.'s market shares and HHIs.<sup>302</sup>

175. The Initial Decision stated that ANRS asserted that the Commission has approved applications for market-based rates in cases in which applicants have had market shares as high as 22 percent.<sup>303</sup> But the Initial Decision distinguished *Copiah*, stating that the Commission in that case found that potential market power problem was mitigated

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<sup>302</sup> Initial Decision at P 499 & Table 2: Great Lakes Market.

<sup>303</sup> *Id.* P 501 (citing *Copiah Storage, LLC*, 121 FERC ¶ 61,272 (2007)).

because the applicant was located in a major production, transportation, and storage area in the Gulf Coast.<sup>304</sup>

176. The Initial Decision utilized a chart (Table 2: Great Lakes Market) showing that TransCanada/ANRS' working gas market share is 39 percent, and its daily deliverability market share is 38 percent, its working gas HHI is 2,263, and its daily deliverability HHI is 2,334. Accordingly, the Initial Decision found that these data demonstrated that ANRS does have significant market power.<sup>305</sup>

### **Briefs on Exceptions**

177. ANRS states that the Initial Decision erroneously allocated the capacity of the Blue Lake and Eaton Rapids facilities to TransCanada, finding that none of those facilities' capacities should be considered a good alternative, based on the fact that ANRS operates and markets the Blue Lake and Easton Rapids capacity. Rather, ANRS states, the Initial Decision should have allocated the capacity of these facilities to TransCanada based on TransCanada's 75 ownership interest in Blue Lake and 50 percent ownership interest in Eaton Rapids, consistent with the *Steckman Ridge* methodology.<sup>306</sup>

178. ANRS also claims the Initial Decision improperly reduced the daily deliverability metrics for certain facilities based solely upon an assumed 1:1 relationship between daily deliverability and working gas.<sup>307</sup> Specifically, ANRS states that the Initial Decision misinterpreted Witness Nowaczewski's testimony, and that JIG Witness Wilson admitted at hearing that daily deliverability can be decoupled from working gas levels, and that the Initial Decision erroneously rejected the evidence Trial Staff presented for rejecting the 1:1 relationship.<sup>308</sup>

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.* PP 499-502. The Presiding Judge's chart reflected market shares and HHIs for the storage providers that the Initial Decision determined were good alternatives to ANRS' facilities, as well as TransCanada Corp.'s market shares and HHIs.

<sup>306</sup> ANRS Brief on Exceptions at 86-87 (citing *Steckman Ridge, LP*, 123 FERC ¶ 61,248, at P 34 & nn.24-25).

<sup>307</sup> ANRS Brief Opposing Exceptions at 88.

<sup>308</sup> ANRS Brief on Exceptions at 89-90.

179. Trial Staff claims that the list of good alternatives and the resulting market metrics supported by Trial Staff should be adopted. Specifically, it states that Trial Staff's evaluation of the potential good alternatives was based on sound reasoning and should not have been discarded, that ANRS storage Witness Nowaczewski and Trial Staff Witness Mills conclusively showed that Northern States Witness Derryberry's Analysis of daily deliverability was erroneous, and that NiSource, Dominion, and CenterPoint Energy are good alternatives because of irregularities in the testimonies and exhibits sponsored by witnesses Mr. Litjen and Mr. Wilson.<sup>309</sup>

### **Briefs Opposing Exceptions**

180. JIG states that the Initial Decision correctly attributed Blue Lake and Eaton Rapids storage capacity to ANRS. JIG states that the Initial Decision's analysis was not contrary to *Steckman Ridge*, as claimed by ANRS, but is, in fact, consistent with it, because the Commission in *Steckman Ridge* did not actually consider the issue of control. JIG states that ANRS failed to acknowledge that the Initial Decision's analysis was also fully consistent with how those same facilities had been treated in the past, including in previous market power studies placed into the record here by ANRS itself.<sup>310</sup> JIG continues to state, that most importantly, ANRS failed to establish that the Initial Decision wrongly concluded that ANRS does effectively control both the Eaton Rapids and Blue Lake storage facilities.<sup>311</sup>

181. JIG also states that the Initial Decision's adoption of JIG's approach to deliverability was reasonable. JIG states that, for four storage providers where JIG's analysis reduced working gas capacity to remove capacity dedicated to intrastate markets, i.e., DTE, Dominion, Enbridge, NiSource and Spectra, JIG also proportionately reduced their deliverability.<sup>312</sup> JIG states that it reasoned that the working gas/deliverability relationships for the individual storage fields included in ANRS' Market Power Study would not change simply by allocating storage services between interstate and intrastate markets, and hence JIG's 1:1 proportional allocation preserved the working gas/deliverability link for each storage field in ANRS' Market Power Study.<sup>313</sup> JIG states

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<sup>309</sup> Trial Staff Brief on Exceptions at 62-73.

<sup>310</sup> JIG Brief Opposing Exceptions at 73 & n.207 (citing Ex. ANR-110).

<sup>311</sup> *Id.* 74.

<sup>312</sup> *Id.* 75 (citing Ex. NSP-8 at 8, Ex. NSP-7, Ex. NSP-9).

<sup>313</sup> *Id.* 75 (citing JIG Initial Brief at 146-148).

that Trial Staff Witness Savitski testified that JIG's proportionality makes sense.<sup>314</sup> JIG states also that Witness Nowaczewski's testimony made clear that he was not offering testimony on the proportion of capacities that should be included in the market power study, and that the Initial Decision correctly found his testimony beside the point.<sup>315</sup> JIG also states that ANRS' complaint that the Initial Decision's use of a proportional allocation to establish deliverability metrics fails to take into account that differing demands from state and federally regulated customers might lead it to alter working gas capacities for each is sheer speculation.<sup>316</sup> JIG also states that ANRS' final challenge to the Initial Decision's deliverability findings is that the Presiding Judge used ANRS' maximum daily deliverability as opposed to its lower contract deliverability is inconsistent because ANRS used maximum deliverability for all other providers in the market power study.<sup>317</sup>

182. JIG addresses Trial Staff's exceptions. First, JIG states that Trial Staff disagrees with the Initial Decision's failure to discuss Trial Staff's argument that deliverability should be developed by applying the storage ratchets in ANRS' tariff to each of the storage providers in ANRS' Market Power Study. JIG responds that this argument is flawed because storage ratchets are the rate at which individual shippers are permitted to withdraw their inventory over the course of a withdrawal season, and Trial Staff never explained why storage ratchets are an appropriate basis for assigning deliverability between markets.<sup>318</sup> Second, JIG notes that Trial Staff disagrees with the Initial Decision's refusal to adopt Trial Staff's tariff-based approach to calculating deliverability because the Initial Decision accepted JIG's working capacity analysis, which was in part also based upon a review of storage operators' tariffs. JIG responds that the Initial Decision clearly concluded that Trial Staff's presentation was so flawed as to not warrant comment.<sup>319</sup>

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<sup>314</sup> *Id.* 77.

<sup>315</sup> *Id.* at 78.

<sup>316</sup> JIG Brief Opposing Exceptions at 79.

<sup>317</sup> *Id.* 80.

<sup>318</sup> *Id.* 81.

<sup>319</sup> *Id.* 82.

### **Commission Determination**

183. The Commission reverses the Initial Decision's market metric calculations. As discussed *supra*, the Initial Decision improperly excluded a number of good alternatives, including intrastate alternatives and alternatives subject to capacity release, on the mistaken premise that these alternatives were never available, or otherwise were not in the relevant markets.

184. No participant provided a proper calculation of market metrics. While Intervenors made the same mistake as the Initial Decision in excluding good alternatives, ANRS and Trial Staff incorrectly included interruptible service without demonstrating that interruptible service was a part of the relevant product market. While Intervenors did attempt to separate interruptible service from the market metrics, this was based on speculation on what intrastate providers would make available, but ignored that intrastate providers themselves were good alternatives.

185. The question becomes whether ANRS met its evidentiary burden by providing sufficient evidence to properly calculate the market metrics in this proceeding. The Commission will review the market metric calculations performed by ANRS to determine whether the burden was met.

186. ANRS testified that Ameren provided 25,766 MMcf of working gas, and 570 MMcfd of daily deliverability. The Initial Decision found that Ameren was not a good alternative to ANRS because it did not currently hold a Part 284 Certificate.<sup>320</sup> As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intrastate storage provider from the list of good alternatives to ANRS. Further, use of intrastate capacity affects demand, and therefore price, for interstate firm service.<sup>321</sup> The Commission finds that Ameren provides 25,766 MMcf of working gas and 570 MMcfd of daily deliverability to the relevant market.

187. ANRS testified that Bluewater Gas Storage provided 29,200 MMcf of working gas, and 826 MMcfd of daily deliverability. The Initial Decision agreed with ANRS that *Bluewater* was a good alternative to ANRS, with 29,200 MMcf of working gas and 826 MMcfd of daily deliverability.<sup>322</sup> The Commission affirms the Initial Decision.

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<sup>320</sup> Initial Decision at P 493.

<sup>321</sup> Ex. ANR-239.

<sup>322</sup> *Id.*

188. ANRS testified that CenterPoint provided 1,600 MMcf of working gas, and 26 MMcfd of daily deliverability. The Initial Decision excluded CenterPoint from the good alternatives to ANRS because it was fully subscribed, and because it was located outside the relevant geographic market.<sup>323</sup> The Commission reverses the Initial Decision. CenterPoint is located in the appropriately drawn geographic market. Further, the Initial Decision failed to recognize the relevance of the Commission's capacity release requirements, and the ability of an alternative subject to capacity release to discipline any anti-competitive price increase by ANRS. The Commission finds that CenterPoint provides 1,600 MMcf of working gas, and 26 MMcfd of daily deliverability to the relevant market.

189. ANRS testified that CMS Energy Corp. provided 139,373 MMcf of working gas, and 4,078 MMcfd of daily deliverability. The Initial Decision found that because CMS had surrendered its Part 284 certificate, and provided service only to customers behind city gates, it was not a good alternative to ANRS.<sup>324</sup> As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intrastate storage provider from the list of good alternatives to ANRS. Further, use of intrastate capacity affects demand, and therefore price, for interstate firm service.<sup>325</sup> The Commission reverses the Initial Decision and finds that CMS Energy provides 139,373 MMcf of working gas, and 4,078 MMcfd of daily deliverability to the relevant market.

190. ANRS testified that Dominion provided 63,120 MMcf of working gas, and 2,788 MMcfd of daily deliverability. The Initial Decision found that Dominion only had 5,000 MMcf of working gas and 186 MMcfd of daily deliverability available on a firm basis to the interstate market.<sup>326</sup> The Initial Decision also found that these volumes were physically unavailable to the Intervenors because the gas needed to flow from Dominion into ANR pipeline, and the meter connections between ANR Pipeline and Dominion are set up to measure flows in one-way only. The Initial Decision further determined that Dominion was located outside the relevant geographic market.<sup>327</sup>

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> Ex. ANR-239.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

191. The Commission reverses the Initial Decision. As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intra-state storage provider from the list of good alternatives to ANRS. Further, use of intra-state capacity effects demand, and therefore price, for interstate firm service.<sup>328</sup> Further, the facility changes required to make Dominion physically available could occur within a sufficiently brief period of time, and with minimal financial investment, such that Dominion could serve as a good alternative upon an anti-competitive price increase by ANRS. Dominion is also available to customers through the use of exchanges. The Commission finds that Dominion provides 63,120 MMcf of working gas, and 2,788 MMcfd of daily deliverability to the relevant market.

192. ANRS testified that DTE Energy provided 234,009 MMcf of working gas, and 6,320 MMcfd of daily deliverability. The Initial Decision accepted the intervenor's calculations of 142,267 MMcf of working gas and 3,576 MMcfd of daily deliverables. The Initial Decision reduced DTE Energy's market share based on perceived availability in the interstate market, and the fact that Blue Lake Holdings, Inc., one of the three storage areas, is an affiliate of TransCanada. The Commission reverses the Initial Decision's ruling concerning the availability of DTE Energy, for reasons discussed herein.

193. Concerning affiliates, the Policy Statement requires that applicants aggregate the capacity of affiliated companies into one estimate.<sup>329</sup> An affiliate is a company that controls, is controlled by, or is under common control with, another company.<sup>330</sup> Control includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of management or policies of the company.<sup>331</sup> A voting interest of ten percent or more creates a rebuttable presumption of control.<sup>332</sup>

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<sup>328</sup> *Id.*

<sup>329</sup> Policy Statement at 61,234, n.59.

<sup>330</sup> 18 C.F.R. § 161.2 (2014), cited in *WPS-ESI Gas Storage, LLC*, 108 FERC ¶ 61,061, at P 14 (2004).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

194. In *Steckman Ridge*, the Commission accepted capacity allocations based on percentages of ownership.<sup>333</sup> ANRS relies on *Steckman Ridge* in reducing capacity allocations from Blue Lake to 75 percent, the ownership interest of TransCanada.<sup>334</sup> In *Steckman Ridge*, the issue was not raised as to whether allocating capacity based on ownership percentage was proper when it concerned an affiliate of the applicant. Steckman Ridge allocated all affiliate capacity to itself when determining market share. If the Commission were disregarding the Policy Statement's specific guidance on affiliate capacity attribution, it would have been explicit in doing so.

195. The Commission reaffirms the Policy Statement's rules concerning affiliate capacity attribution. ANRS did not overcome the presumption that TransCanada's 75 percent interest in Blue Lake requires all of the Blue Lake Capacity to be included in TransCanada's total market share. The Commission determines that Blue Lake's capacity of 11,772 MMcf is properly attributed to TransCanada. The capacity of DTE Energy in the relevant market is 222,237 MMcf of working gas and 6,320 MMcfd of daily deliverability.

196. ANRS testified that Enbridge provided 100,946 MMcf of working gas, and 2,529 MMcfd of daily deliverability. The Initial Decision determined that 16,700 MMcf of working gas and 418 MMcfd of daily deliverability were available as good alternatives. The Commission reverses the Initial Decision. Capacity should not be excluded from the market calculation solely due to it currently providing intrastate service. Further, subscribed capacity also belongs in the market calculations, as discussed *supra*. The Commission finds that Enbridge provides 100,946 MMcf of working gas and 2,529 MMcfd of daily deliverability to the relevant market.

197. ANRS testified that Integrys (Mich. Gas Utilities Corp. / People's Energy) provided 42,137 MMcf of working gas, and 840 MMcfd of daily deliverability. The Initial Decision eliminated Integrys as a good alternative because it only offers interruptible service. While the Initial Decision was correct to exclude interruptible service, the Commission reverses the Initial Decision's calculations concerning Integrys. All but 7,000 MMcf of Integrys' capacity is not interruptible, but is instead reserved to provide service behind city gates. This capacity, as discussed, properly belongs in the relevant market. The Commission will reduce Integrys capacity by 7,000 MMcf, as ANRS did not demonstrate that this capacity was anything but interruptible service, as

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<sup>333</sup> *Steckman Ridge, LP*, 123 FERC ¶ 61,248 at P 34 (2008).

<sup>334</sup> Ex. ANR-7 at 1-2.

Intervenors contend.<sup>335</sup> The Commission finds that Integrys provides 35,137 MMcf of working gas and 840 MMcfd of daily deliverability to the relevant market.

198. ANRS testified that Kinder Morgan provided 82,757 MMcf of working gas, and 2,005 MMcfd of daily deliverability. The Initial Decision agreed with ANRS. The Commission affirms the Initial Decision.

199. ANRS testified that Loews Corp. provided 4,996 MMcf of working gas, and 131 MMcfd of daily deliverability. The Initial Decision agreed that Loews was a good alternative, but determined that only 80 MMcfd were available. The Commission affirms the Initial Decision in finding that Loews is a good alternative. The Commission accepts the calculations of ANRS and Trial Staff and finds that Loews provides 4,996 MMcf of working gas and 131 MMcfd of daily deliverability to the relevant market.

200. ANRS testified that NGO Transmission, Inc. provided 2,209 MMcf of working gas, and 43 MMcfd of daily deliverability. The Initial Decision eliminated NGO because it was fully subscribed, was not shown to be available, and is located outside the relevant geographic market. ANRS subsequently eliminated NGO as a good alternative. The Commission affirms the Initial Decision as ANRS excluded NGO from its market.

201. ANRS testified that NICOR, Inc. provided 149,740 MMcf of working gas, and 2,800 MMcfd of daily deliverability. The Initial Decision eliminated NICOR as a good alternative because most of its service is dedicated to in-state service, and the remainder is only offered on an interruptible basis. The Commission reverses the Initial Decision. For reasons discussed *supra*, it is improper to eliminate intrastate service from the list of good alternatives. The Commission finds that NICOR provides 149,740 MMcf of working gas and 2,800 MMcfd of daily deliverability to the relevant market.

202. ANRS testified that NiSource, Inc. provided 169,065 MMcf of working gas, and 2,321 MMcfd of daily deliverability. The Initial Decision found that NiSource does not hold a Part 284 certificate, is located outside of the relevant geographic market, and is physically unavailable to the Intervenors. The Commission reverses the Initial Decision. As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intra-state storage provider from the list of good alternatives to ANRS. Use of intra-state capacity effects demand, and therefore price, for interstate firm service.<sup>336</sup> Further, the facility changes required to make NiSource physically available could occur within a

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<sup>335</sup> Ex. TGS-1 at 10.

<sup>336</sup> Ex. ANR-239.

sufficiently brief period of time, and with minimal financial investment, such that NiSource could serve as a good alternative upon an anti-competitive price increase by ANRS. The Commission finds that NiSource provides 169,065 MMcf of working gas and 2,321 MMcfd of daily deliverability to the relevant market.

203. ANRS testified that ProLiance provided 732 MMcf of working gas, and 10 MMcfd of daily deliverability. The Initial Decision eliminated ProLiance due to its lack of a Part 284 certificate. The Commission reverses the Initial Decision. As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intrastate storage provider from the list of good alternatives to ANRS. Further, use of intrastate capacity effects demand, and therefore price, for interstate firm service.<sup>337</sup> The Commission finds that ProLiance supplies 732 MMcf of working gas and 10 MMcfd of daily deliverability to the relevant market.

204. ANRS testified that Robinson Engineering provided 925 MMcf of working gas, and 5 MMcfd of daily deliverability. The Initial Decision eliminated Robinson due to its lack of a Part 284 certificate, and it being outside of the relevant geographic market. The Commission reverses the Initial Decision. As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intrastate storage provider from the list of good alternatives to ANRS. Further, use of intrastate capacity effects demand, and therefore price, for interstate firm service.<sup>338</sup> The Commission finds that Robinson Engineering is within the geographic market of ANRS, and provides 925 MMcf of working gas and 5 MMcfd of daily deliverability to the relevant market.

205. ANRS testified that SEMCO Energy provided 11,265 MMcf of working gas, and 215 MMcfd of daily deliverability. The Initial Decision eliminated SEMCO for not having a Part 284 certificate, and found that fifty percent of Eaton Rapids, a part of SEMCO, was owned by ANRS and therefore the entire Eaton Rapids capacity, 6,400 MMcf, should be included in ANRS' market share. The Commission reverses the Initial Decision. As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intra-state storage provider from the list of good alternatives to ANRS. Further, use of intra-state capacity effects demand, and therefore price, for interstate firm service.<sup>339</sup>

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<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

206. As discussed *supra*, the Policy Statement states that a voting interest of ten percent or more creates a rebuttable presumption of control.<sup>340</sup> Yet that presumption must take into account the entire ownership structure. Clearly a company could not use ten percent to control a company if another entity owns 90 percent. ANRS' fifty percent share is not sufficient to outvote the remaining 50 percent if held by a single entity. The Initial Decision found that ANRS is responsible for marketing and operating the Eaton Rapids facilities.<sup>341</sup> However, operation is not equivalent to control. Pursuant to the Commission's ruling in *Steckman Ridge*, 3200 MMcf of working gas from Eaton Rapids is properly attributed to SEMCO.<sup>342</sup> The Commission finds that 8,065 MMcf of working gas and 215 MMcfd of daily deliverability are provided by SEMCO into the relevant market.

207. ANRS testified that Southern Union Co. provided 25,225 MMcf of working gas, and 530 MMcfd of daily deliverability. The Initial Decision agreed with ANRS that Southern Union was a good alternative. The Commission affirms the Initial Decision.

208. ANRS testified that Spectra Energy (Union Gas) provided 158,095 MMcf of working gas, and 3,128 MMcfd of daily deliverability. The Initial Decision accepted the Intervenor's calculations, based on significant capacity being reserved for customers behind city gates, and for transportation costs to Ontario, Canada. The Commission reverses the Initial Decision. Transportation costs between Michigan and Ontario are not significant enough to prevent Ontario from being the geographic market, or for alternatives in Ontario to be good alternatives in terms of price.<sup>343</sup> Further, as discussed, capacity reserved for customers behind city gates should not be eliminated from the relevant market. The Commission finds that Spectra provides 158,095 MMcf of working gas and 3,128 MMcfd of daily deliverability to the relevant market.

209. ANRS testified that TransCanada Corp. provided 232,518 MMcf of working gas, and 5,318 MMcfd of daily deliverability. The Initial Decision determined that TransCanada had 251,135 MMcf of working gas and 5,573 MMcfd of daily deliverability. As discussed *supra*, 11,772 MMcf of working gas from Blue Lake is

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<sup>340</sup> *Id.*

<sup>341</sup> Initial Decision at P 493.

<sup>342</sup> *Steckman Ridge, LP*, 123 FERC ¶ 61,248, at P 34 (2008).

<sup>343</sup> *See generally Koch Gateway Pipeline Co.*, 85 FERC ¶ 61,013, at 61,041 (1998).

properly attributable to TransCanada, based on its 75 percent ownership interest. Also, 3,200 of working gas from Eaton Rapids is attributable to TransCanada due to its fifty percent ownership stake. The Commission finds that TransCanada provides 247,490 MMcf of working gas and 5,318 of daily deliverability to the relevant market.

210. ANRS testified that Vectren Corp. provided 12,917 MMcf of working gas, and 258 MMcfd of daily deliverability. The Initial Decision eliminated Vectren for not having a Part 284 certificate. The Commission reverses the Initial Decision. As discussed *supra*, the current absence of a Part 284 certificate does not eliminate an intrastate storage provider from the list of good alternatives to ANRS. Further, use of intrastate capacity effects demand, and therefore price, for interstate firm service.<sup>344</sup> The Commission finds that Vectren provides 12,917 MMcf of working gas and 258 MMcfd of daily deliverability to the relevant market.

211. Finally, ANRS testified that Michigan local production provided 57,839 MMcf of working gas, and 374 MMcfd of daily deliverability. The Initial Decision agreed with ANRS. The Commission affirms the Initial Decision.

212. ANRS' total market for working gas is 1,544,434 MMcf, and the total size of the daily deliverable market is 35,115 MMcf. The company calculated a market share of 14.95 percent of working gas, and 14.34 percent for daily deliverability. ANRS' HHI calculations were 969 for working gas and 1,088 for daily deliverability. The Initial Decision determined the total market for working gas is 678,848 MMcf and the total size of the daily deliverability market is 14,503 MMcfd.<sup>345</sup> The Initial Decision calculated market shares for ANRS of 39 percent for working gas and 38 percent for daily deliverability. The Initial Decision's HHI calculations were 2,263 for working gas and 2,334 for daily deliverability.<sup>346</sup>

213. The Commission finds that the size of the total market for working gas is 1,535,225 MMcf, and the total size of the market for daily deliverability is 35,072 MMcfd. The Commission calculates ANRS/ TransCanada's market share as 16.12 percent of working gas and 15.16 percent of daily deliverability. The HHI calculations for working gas and daily deliverability are 951 and 1,010, respectively.

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<sup>344</sup> Ex. ANR-239.

<sup>345</sup> Initial Decision at P 494.

<sup>346</sup> *Id.* P 502.

214. In the Policy Statement, the Commission stated that it would give an application closer scrutiny if the applicant's HHIs were above 1800.<sup>347</sup> The low HHIs in this proceeding indicate that customers have large quantities of good alternatives available from many independent sellers.<sup>348</sup>

215. ANRS' market share of 16.12 percent for working gas, however, requires closer scrutiny. In cases involving similar market share calculations, the Commission has approved applications for market-based rates only after finding that the applicants were new entrants to competitive markets that were dominated by other entities charging cost-based rates. In *Wyckoff*, the Commission approved an applicant with a 16 percent market share because it was a new entrant into a market facing an incumbent with a 42 percent market share charging cost-based rates.<sup>349</sup> In this proceeding, ANRS is an existing company and is itself the largest storage provider in the market.

216. In prior proceedings the Commission has raised concern over a 22 percent market share, yet approved the application based on other factors weighing in the applicant's favor. As the Commission stated in *Copiah*:

The Commission would ordinarily be concerned that Copiah and its affiliates represent 22 percent of the market for peak deliverability. Such a high percentage may signify the potential for a company to exercise market power that would inhibit competition, and deny customers viable options. However, because Copiah is located within the major production, transportation and storage area in the Gulf Coast, the Commission agrees with the conclusion in Copiah's study that there exist a large number of alternatives available to shippers on pipelines interconnected with Texas Eastern, which will interconnect with Copiah. The Commission finds this further demonstrates that Copiah will be unable to exercise market power for hub services after the proposed expansion, a conclusion that is consistent with prior Commission determinations with respect to Copiah and its affiliates.<sup>350</sup>

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<sup>347</sup> Policy Statement at P 51.

<sup>348</sup> *Avoca*, 68 FERC at 61,150.

<sup>349</sup> *Wyckoff Gas Storage Co., L.L.C.*, 105 FERC ¶ 61,027 (2003).

<sup>350</sup> *Copiah Storage, LLC*, 121 FERC ¶ 61,272, at 62,394 (2007).

217. While ANRS does not reach a 22 percent market share, neither does it reside in a similar region as Copiah. It is unquestioned that ANRS is the largest storage service provider in the market, with over 25,000 MMcf more working gas than its nearest competitor, DTE Energy.

218. Finally, in *Red Lake*, the Commission rejected an application for market-based rate authority from an applicant with a market share of 10.20 for working gas and 19.87 for daily deliverability.<sup>351</sup> In that proceeding the market was highly concentrated, with HHIs of 8,167 and 6,816.

219. While ANRS' market is not nearly as concentrated as that in *Red Lake*, the Commission is concerned that ANRS, as the single largest storage provider in a market area, could still exercise market power. While the Commission included intrastate facilities and facilities that were fully subscribed based on those facilities impact on demand as well as ability to quickly offer firm interstate service and discipline a potential anticompetitive price increase by ANRS, the sheer number of facilities that would have to either (a) acquire a Part 284 certificate, and/or (b) release capacity, in order to prevent an exercise of market power by ANRS is substantial. Any delay in these facilities almost uniformly shifting operations could prevent the market from disciplining ANRS' potential price increase. While each facility is theoretically a good alternative to ANRS, the requirement that a substantial number of them all enter the interstate market with available capacity in order to discipline ANRS is concerning.

220. Based on the size of the applicant in relation to the market, the relative lack of current competitors providing firm interstate storage service, the need for a substantial number of other facilities among the good alternatives to shift operations in order to offer firm interstate service, and also considering the fact that ANRS is not a new entrant but a strong incumbent, the Commission finds that ANRS has not met its evidentiary burden to show it lacks significant market power in the relevant markets.

## **VII. Other Relevant Factors**

### **2014 Initial Decision**

221. The Initial Decision first reviews the Commission's approach to evaluating "other factors" in deciding whether to allow market-based rates, finding that "other factors" are evaluated if market share or HHI market metrics suggest significant market power, and the purpose of this evaluation is to determine whether market power can be sufficiently

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<sup>351</sup> *Red Lake Storage, L.P.*, 102 FERC ¶ 61,077 (2003).

mitigated.<sup>352</sup> The Initial Decision stated that ANRS presented four “other factors” in its petition: (1) ease of entry; (2) replacement capacity; (3) the conservative nature of the market-power study; and, (4) the efficiency benefits of market-based rates, and that in ANRS’ Initial Brief it proffered two new “other factors”: (1) the effects of the natural gas trading and storage markets and (2) the Intervenor’s sophistication.<sup>353</sup> However, the Initial Decision states that, as it discussed previously regarding the nature of the applicant’s burden of proof, it disregards the factors presented in the Initial Brief.

222. The Initial Decision stated that Intervenor’s argue that the “other factors” do not alter the Initial Decision’s determination of market power, and in fact argue that changing market conditions support denying the Petition, and the Initial Decision stated that ANRS disagrees. The Initial Decision stated that Trial Staff found other relevant factors are insufficient to alter its position that ANRS would lack market power, and that this argument is based in part on the belief that the Commission examines other relevant factors only when the HHI exceeds 1,800.<sup>354</sup> The Initial Decision concluded that it agreed with the Intervenor that the “other factors” are too inconclusive to affect the outcome of the case.

223. The Initial Decision addressed each of ANRS’ “other factors” separately. Regarding ease of entry, the Initial Decision stated that ease of entry can be divided into two categories: geologic suitability and regulatory and economic suitability. The Initial Decision stated that ANRS argued that the market is geologically suited for new development, and based on the record, the Initial Decision agreed. With regard to regulatory and economic ease of entry, the Initial Decision stated that ANRS claimed that ease of entry was easy based on the amount of new storage capacity added recently and that will be in service in two years, the number and size of existing providers, and the increase in local production.<sup>355</sup> The Initial Decision stated that Intervenor’s counter that the majority of new storage projects in the region were owned or operated by large incumbent storage operators, and that Trial Staff is uncertain whether new storage could be brought online economically within two years and that further analysis is needed on the question of ease of entry. The Initial Decision found that recent market entrants demonstrate that entry into the Central Great Lakes market is not easy for most potential

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<sup>352</sup> Initial Decision at P 504.

<sup>353</sup> *Id.* PP 505-506 (citing Ex. ANR-2 at 7-10; ANRS Initial Br. 94-95).

<sup>354</sup> *Id.* P 508 (citing Trial Staff Initial Brief at 51-52).

<sup>355</sup> *Id.* P 515.

market participants. Specifically, the Initial Decision noted that in 13 years only five projects were constructed, and that Bluewater was the only project conducted by a small, independent company.<sup>356</sup> The Initial Decision also noted that the situation for ANRS is different from that of the small storage operator in Central New York for which the Commission approved market-based storage rates because the applicant in that case was surrounded by dominant market participants with cost-based rates,<sup>357</sup> unlike in this case.

224. Regarding replacement capacity, the Initial Decision found that it put no weight on this factor in the deliberative process because of lack of Commission guidance as to how to evaluate whether replacement capacity is high or low, and furthermore, that replacement capacity is purposeless because it derives directly from market share, which is a factor considered by the Commission in the market metrics analysis, a sentiment that the Initial Decision stated Trial Staff agreed with.<sup>358</sup> The Initial Decision also noted that it found both working gas and daily deliverability to offer 2.6 times replacement capacity, and that ANRS argued working gas to be 5.7 times and daily deliverability to be 6.0 times replacement capacity.

225. Regarding changing market conditions, the Initial Decision notes that both ANRS and Intervenors argue that changing market conditions support their positions, with ANRS arguing that a growth in unconventional gas will result in a decline in the value of storage, while Intervenors argue that an increase in gas supply coupled with increased demand will increase the value of storage. Initial Decision noted that Trial Staff believed these forecasts too uncertain and the Initial Decision agreed with Trial Staff.<sup>359</sup>

226. Regarding efficiency benefits, the Initial Decision stated that ANRS argued that market-based rates promote allocative efficiency, but noted that ANRS premises this on the theory that it lacks market power, and that Intervenors respond that granting market-based rates would decrease efficiency because ANRS possess market power, allowing it to exercise physical or economic withholding and undue discrimination.<sup>360</sup> The Initial

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<sup>356</sup> *Id.* P 519.

<sup>357</sup> *Id.* P 520 (citing *Central New York*, 94 FERC at 61,706).

<sup>358</sup> Initial Decision at P 512 (citing Staff Reply Brief at 40).

<sup>359</sup> *Id.* P 527.

<sup>360</sup> *Id.* P 528.

Decision agreed with Intervenors that granting ANRS market-based rates would not enhance the efficiency of the market.

227. Regarding the conservative nature of the market power study, the Initial Decision stated that ANRS argued that the conservative nature of its market power study should be considered a relevant factor, and the Initial Decision pointed out that Trial Staff observed that the purported conservative nature of a market power study has not constituted an “other relevant factor” in previous Commission decisions. Yet, the Initial Decision stated that the Commission has stated that it will consider “all” other relevant factors. In any case, the Initial Decision stated that ANRS’ market power study is not conservative.<sup>361</sup>

228. Regarding affiliate abuse, the Initial Decision stated that JIG argued that the affiliate relationships between ANRS, ANR Pipeline, Great Lakes, and TransCanada mainline, their combined market share, and the potential for them to exercise combined market power are compelling additional reasons to deny ANRS’ application.<sup>362</sup> The Initial Decision further stated that JIG argued that the Commission has imposed a higher standard for scrutiny of affiliate abuse when a petitioner’s market share exceeds 10 percent, and that every party agrees that ANRS’ market share exceeds 10 percent.<sup>363</sup> The Initial Decision added that JIG stated that the same personnel market ANRS’ storage and ANR pipeline’s capacity, allowing the two entities to work together to exercise market power. The Initial Decision noted that Trial Staff acknowledged that the potential for affiliate abuse exists here because ANRS’ storage facilities are only accessible using pipeline facilities owned by ANRS affiliates, and that ANRS owns or is affiliated with a large number of other storage facilities in the region. The Initial Decision noted that Trial Staff also found that the market share exceeding 10 percent requires the Commission to consider additional reporting requirements.<sup>364</sup> Yet, the Initial Decision stated that Trial Staff believes that affiliate abuse would not easily occur because of the Commission’s open-access regulations. The Initial Decision stated that Trial Staff advocated two requirements to deal with these concerns: requiring ANRS to file a new market power analysis every three years and requiring ANRS to provide semi-annual reports of operating data on an ongoing basis 30 days after each year’s storage injection and withdrawal season.

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<sup>361</sup> *Id.* P 532.

<sup>362</sup> *Id.* P 533 (citing JIG Initial Brief at 155-156).

<sup>363</sup> *Id.* (citing JIG Initial Brief at 159).

<sup>364</sup> Initial Decision at P 535.

229. The Initial Decision stated that ANRS denied the possibility of affiliate abuse because ANRS stated that first, it does not have market power, second, JIG's allegations of affiliate abuse are conjectural, third, ANRS disagrees that I would be likely to time its expansions to limit competition with affiliates because it would be uneconomical, fourth, the Intervenor misapplied the case law, and fifth, the Intervenor failed to account for Commission regulations that prohibit the bundling of services by interstate pipelines.<sup>365</sup> The Initial Decision also noted that JIG did not agree that reporting requirements would be sufficient to detect affiliate abuse.

230. Ultimately, the Initial Decision concluded that the existence of affiliate abuse was not sufficiently proven, and so it was not relevant as an "other factor" to be considered in assessing ANRS' market power or lack thereof.<sup>366</sup>

### **Briefs on Exceptions**

231. ANRS argues that the Initial Decision erred in finding that an evaluation of replacement capacity should have no role in the determination of whether ANRS lacks market power. ANRS states that the record in this case demonstrates that there is enough capacity in the market to replace working gas capacity 5.7 times and daily deliverability 6.0 times. ANRS concludes that the amount of replacement capacity in the market demonstrates that ANRS is not able to profitably increase prices and, therefore, cannot exercise market power. In addition, ANRS argues that the Initial Decision erred by finding that entry into the Central Great Lakes is not easy for most potential market participants. ANRS states that it was the only party to provide geological evidence and conclusions supporting the potential for additional storage in the Central Great Lakes market. ANRS states that entry into Michigan, Southwestern Ontario, Ohio, and southern and central Illinois and Indiana is easy since they contain numerous potential storage reservoirs.<sup>367</sup> ANRS states that it provided evidence on the ease of entry into the market, such as the presence of more than 115 storage facilities owned by 20 separate storage companies and that 30 percent of the market is served by small storage providers and numerous local producers.<sup>368</sup> ANRS states that since 2004, four projects adding a total of

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<sup>365</sup> *Id.*

<sup>366</sup> *Id.* P 541.

<sup>367</sup> ANRS Brief on Exceptions at 95 (citing Ex. ANR-45 at 24:1-26:7).

<sup>368</sup> *Id.* 93 (citing Exhibit ANR-116).

49,040 MMcf of working gas capacity and 795 MMcf/d of daily deliverability have entered the Central Great Lakes Market.<sup>369</sup>

232. ANRS states that the Initial Decision erred in finding that the changes in the natural gas industry are too speculative to be considered. ANRS states that it provided evidence that the natural gas market is changing. ANRS states that increased production is acting as a substitute to storage, and is thereby decreasing the demand and value of storage.<sup>370</sup> ANRS claims that additional flowing gas supplies available in the winter directly reduce the need to satisfy demand instead from storage. ANRS concludes that it has been impacted by these changes, and as a result, ANRS does not and cannot possess market power. Finally, ANRS states that its customers also have access to balancing and no-notice service, as well as seasonal and swing contracts by natural gas marketers, and that these are effective substitutes to ANRS storage service.

233. ANRS states that the Initial Decision erred in finding that market-based rates would decrease market efficiency. ANRS claims that the Commission has recognized that market-based rates promote economic efficiency because competitors with market-based rate authority can better respond to changes in market demand and supply conditions,<sup>371</sup> and market-based rates send efficient price signals which enable market participants to assign scarce capacity to those who value it most.<sup>372</sup>

234. ANRS states that the Initial Decision correctly found that JIG did not prove its allegations of affiliate abuse. ANRS states that it is unclear how the aggregation of capacity ANR Pipeline purchased from ANRS could give ANR Pipeline an advantage when ANR Pipeline has cost-based rates. The company also posits that market-based rate authority for its Part 284 service does not change the Part 157 rate at which ANR Pipeline takes service from ANRS.<sup>373</sup>

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<sup>369</sup> *Id.* 96 (citing Ex. ANR-1 at 41. ANRS notes that these projects are owned by Bluewater, Columbia Gas, Natural Gas Pipeline Company of America LLC, and Texas Gas).

<sup>370</sup> *Id.* 97 (citing Ex. ANR-1 at 43; ANR-128 at 9-10, 14-16, 26-29; and ANR-153 at 50-55).

<sup>371</sup> *Id.* 98.

<sup>372</sup> *Id.* 98 (citing *UGI Storage Co.*, 133 FERC ¶ 61,073, at P 46 (2010)).

<sup>373</sup> ANRS Brief on Exceptions at 98-99.

235. With regard to sophisticated counterparties, ANRS states that the Initial Decision failed to consider this issue. ANRS states that it demonstrated why the large size and numerous transactions in the Central Great Lakes market conducted by Intervenors such as BP Canada and TGS, qualify them as knowledgeable and sophisticated customers. ANRS claims that these sophisticated entities are able to use various techniques to obtain supplies from multiple sources and lower gas costs, including through the use of marketers. ANRS concludes that this demonstrates ANRS' inability to exercise market power.<sup>374</sup>

236. JIG states that the Initial Decision erred in finding that JIG's arguments regarding affiliate abuse were too speculative. JIG states that it provided evidence of how ANRS and its affiliates would benefit directly if ANRS were granted market-based rate authority by providing the potential pathways through which the affiliates and ANRS could benefit. JIG states that these pathways include the ability to: (1) offer combined storage and pipeline capacity at prices and with conditions that are more attractive than other competitors due to the combination of services offered;<sup>375</sup> (2) offer selective discounting for the use of affiliated storage or affiliated transportation facilities, or refusing to offer selective discounting for transportation to non-affiliated storage;<sup>376</sup> and (3) time storage expansions to benefit affiliates, or to harm non-affiliated entities. JIG cites Order No. 678, in which the Commission stated its unwillingness to create situations in which the pipeline, the dominant owner of capacity, does not have an incentive to build new capacity because it or an affiliate can benefit from an artificial shortage of capacity.<sup>377</sup> JIG asserts that these pathways primarily arise in the absence of meaningful separation between the affiliates (i.e., the same personnel operate and market the capacity on behalf of ANRS, ANR Pipeline, and Great Lakes).<sup>378</sup>

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<sup>374</sup> *Id.* 99-100.

<sup>375</sup> JIG Brief on Exceptions at 5 (citing Ex. JIG-1 at 55).

<sup>376</sup> *Id.* 6 (citing Ex. JIG-1 at 56).

<sup>377</sup> *Id.* 7 (citing Order No. 678, FERC Statutes and Regulations ¶ 31,220, at P 70 (2006)).

<sup>378</sup> *Id.* 7 (citing Ex. ANR-185 at 5, ANR-187, and Ex. JSP-1 at 2).

### **Briefs Opposing Exceptions**

237. ANRS states that JIG's affiliate abuse concerns are speculative, illogical, and unsubstantiated. ANRS states that storage providers are offering service today at market-based rates while they or their affiliates are rendering transmission service in interstate commerce. ANRS states that Columbia Gas Transmission, Texas Gas Transmission, and Southern Star Central Gas Pipeline, Inc., have market-based rates for storage authorized under Section 4(f), and that those storage facilities interconnect with their own or affiliated pipelines. ANRS asserts that none of these storage providers has been the subject of a complaint alleging affiliate abuse since receiving authorization to charge market-based rates. ANRS addresses the "potential pathways" argument that JIG alleges could result in affiliate abuse. ANRS asserts that if ANRS, ANR Pipeline, and Great Lakes independently offer their services at separate prices which when viewed in combination are more attractive than other companies, this does not result in affiliate abuse. ANRS states that the only potential for affiliate abuse is if ANRS and its affiliates illegally attempt to tie their services, and that this could even result in below-cost-based rates. ANRS concludes that the Commission has regulations it enforces that require storage and transportation services to be unbundled,<sup>379</sup> and that the Commission's Part 358 regulations prohibit tying arrangements and discrimination.<sup>380</sup> With regard to selective discounting, ANRS states that ANR Pipeline and Great Lakes have an economic incentive not to discriminate through selective discounts against shippers that fail to utilize ANRS' services since it results in a pipeline revenue reduction. Finally, with regard to timing storage expansions to benefit affiliates, ANRS states that JIG provides no evidence to support its assertion.

238. With regard to offering more operational flexibility to affiliates, ANRS states that this type of affiliate abuse is a non-rate term and condition while this case involves only the issue of market-based rates. With regard to offering available capacity first to affiliates, ANRS states that Commission precedent requires pipelines to conduct an open season in a non-discriminatory manner allowing for all shippers to bid on the available capacity.<sup>381</sup> ANRS states that Commission regulations and precedent prohibit affiliated

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<sup>379</sup> ANRS Brief Opposing Exceptions at 10 (citing Ex. ANR-153 at 76:16-77).

<sup>380</sup> *Id.* (citing 18 C.F.R. §§ 358.4, 358.7, 358.8 (2013); Ex. ANR-153 at 80:3-10).

<sup>381</sup> *Id.* 17 (citing to *Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶ 61,128, at 61,392 (2000) and *Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines*, 71 FERC ¶ 61,241, at 61,917 (1995)).

pipelines' joint decision not to build additional pipeline facilities that would access other storage providers connected to ANR Pipeline or Great Lakes.<sup>382</sup> In addition, JIG's claim that ANRS and its affiliates could raise the price of storage on ANRS to such a degree that shippers on ANR Pipeline and/or Great Lakes would be incentivized to take storage and/or transportation from ANR Pipeline or Great Lakes is unsupported.

239. Trial Staff asserts that allegations of affiliate selective discounting by ANR Pipeline or ANR Storage are not a basis for denying ANRS's storage market-based rate application.<sup>383</sup> Trial Staff asserts that ANRS will only be able to raise its storage rates by the amount of the transportation discount on ANR Pipeline, and thus the ANR corporate entity will only achieve total revenue equal to the combined storage and transportation rates prior to the discount.<sup>384</sup> Trial Staff states that otherwise, storage customers in the competitive storage market would seek service elsewhere. Further, Trial Staff asserts that ANR Pipeline would not be able to request a discount adjustment to offset transportation revenue losses until it files a new rate case. Trial Staff states that ANR Pipeline's customers will be aware of any discrimination occurring since ANR Pipeline is required to post on its website the rate being charged under each contract, including discounted rates and disclosure of any affiliate relationship.

240. Trial Staff asserts that, allegations by JIG of timing storage expansions to benefit ANR Pipeline and ANRS storage are not a basis for denying ANRS' market-based rate application.<sup>385</sup> Trial Staff further asserts that, while such a refusal to invest may constitute affiliate abuse by removing access to alternative storage providers, pipelines and storage companies will generally build facilities wherever they believe they can make money. Trial Staff claims that to forgo an investment opportunity in order to force customers to purchase ANRS storage service makes sense only if more money can be earned by the ANR storage affiliates in selling storage. Finally, Trial Staff states that its proposed semi-annual reporting requirements and a three year market-based rate filing will detect and deter any potential affiliate abuse.<sup>386</sup>

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<sup>382</sup> *Id.* 19 (citing *SW. Pub. Serv. Co. v. Red River Pipeline*, 74 FERC ¶ 61,133, at 61,475 (1996) and *Panhandle Eastern Pipe Line Co.*, 91 FERC ¶ 61,037, at 61,141 (2000)).

<sup>383</sup> Trial Staff Brief Opposing Exceptions at 12.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* 21.

<sup>386</sup> *Id.* 22-24.

241. JIG states that the Initial Decision did not err in its analysis of other relevant factors and that all evidence was considered in his decision to deny ANRS's request for market-based rates.<sup>387</sup> First, JIG states that the Initial Decision's conclusion that it would be speculative to determine the effect of changes in the natural gas industry on the Great Lakes market is supported by reference to the totality of the evidence in the record.<sup>388</sup> Second, JIG states that the Initial Decision's rejection of replacement capacity as grounds for finding ANRS lacks market power was reasonable. JIG asserts that ANRS does not cite any instance in which replacement capacity has been found to be adequate to ensure that a pipeline with a dominant market position will not abuse that power.<sup>389</sup> Third, JIG states that the Initial Decision correctly found that ANRS' ease of market entry was unpersuasive. JIG asserts that the geographic market in question has seen virtually no new entrants in recent years other than TransCanada itself, the dominant market participant and the owner of both ANRS and ANR Pipeline.<sup>390</sup> Fourth, JIG states the fact that ANRS' affiliates will continue to provide storage service at cost-based rates is no reason for the Commission to grant ANRS market-based rates. JIG refers to the *Policy Statement*, where the Commission stated that undue discrimination is especially a concern when an applicant for market-based rates can deal with affiliates.<sup>391</sup> JIG concludes that the Commission considers all affiliates, whether subject to market-based rates or cost-based rates, in its determination of an applicant's market share.<sup>392</sup>

### **Commission Determination**

242. The Commission affirms the Initial Decision. None of the other factors outweigh the results of the market analysis. Entry into the market would unlikely change ANRS' position as the largest provider of gas storage. Changes in the industry are too speculative to have a measurable impact on the market metrics. Further, while the Commission affirms its belief that market-based rates can provide increased efficiency, this is only the case when recipients of market-based rate authority lack market power.

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<sup>387</sup> JIG Brief Opposing Exceptions at 82.

<sup>388</sup> *Id.* 82-84.

<sup>389</sup> *Id.* 85.

<sup>390</sup> *Id.* 86.

<sup>391</sup> *Id.* 87 (citing the *Policy Statement*, 74 FERC ¶ 61,076, at 61,230 (1996)).

<sup>392</sup> *Id.* 87-88.

Finally, the Commission analyzed markets fully, and did not base its findings solely on ANRS' market study. Whether the market study was conservative or not is not relevant.

243. Finally, as the Commission is denying ANRS' application, it need not address disputed assertions of affiliate abuse that might arise if ANRS were granted market-based rate authority.

The Commission orders:

ANRS' application for market-based rate authority is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.