

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 11-1240

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

Beth G. Pacella
Senior Attorney

For Respondent Federal
Energy Regulatory
Commission
Washington, D.C. 20426

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioner's brief.

B. Rulings Under Review

1. *Northern Natural Gas Co.*, 133 FERC ¶ 61,210 (2010), JA 1 (“First Challenged Order”); and
2. *Northern Natural Gas Co.*, 135 FERC ¶ 61,085 (2011), JA 5 (“Rehearing Order”);

C. Related Cases

This case has not previously been before this Court or any other court.

There are no related cases pending judicial review.

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

April 4, 2012

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUE.....	1
STATUTORY AND REGULATORY PROVISIONS.....	2
INTRODUCTION.....	2
STATEMENT OF FACTS.....	3
I. Events Leading To The Challenged Orders.....	3
A. Enactment of Natural Gas Act Section 4(f).....	3
B. 2006 Declaratory Order Granting Northern Market-Based Rates For Initial Sales Of Expansion Capacity.....	5
C. Northern’s Request For A Certificate Authorizing It To Expand Its Storage Capacity.....	7
D. Northern’s Proposed Service Agreement For 2008 Market-Based Rate Customers.....	8
E. Northern’s Request To Extend Its NGA Section 4(f) Market-Based Rate Authority To Resales.....	12
II. The Challenged Orders.....	13
SUMMARY OF ARGUMENT.....	15
ARGUMENT.....	16
I. Standard of Review.....	16
II. FERC Reasonably Interpreted NGA Section 4(f).....	18
A. FERC’s Interpretation Of NGA § 4(f) Is Consistent With The Statutory Language And Congressional Intent.....	18

TABLE OF CONTENTS

PAGE

B. FERC Did Not Interpret Whether NGA § 4(f) Permitted
Market-Based Rates To Be Extended Post-Construction
Until The Challenged Orders.....25

III. FERC Reasonably Found That Its Interpretation Of NGA §4(f)
Should Apply Here.....29

CONCLUSION.....33

TABLE OF AUTHORITIES

	PAGE
COURT CASES:	
<i>Alcoa Inc. v. FERC</i> , 564 F.3d 1342 (D.C. Cir. 2009).....	17
<i>AT&T v. FCC</i> , 454 F.3d 329 (D.C. Cir. 2006).....	29, 31, 32
* <i>Chevron U.S.A. Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984).....	17, 20
<i>Clark-Cowlitz Joint Operating Agency v. FERC</i> , 826 F.2d 1074 (D.C. Cir. 1987) (en banc).....	29
<i>Elizabethtown Gas Co. v. FERC</i> , 10 F.3d 866 (D.C. Cir. 1993).....	18
<i>ExxonMobil Gas Mktg. Co. v. FERC</i> , 297 F.3d 1071 (D.C. Cir. 2002).....	17
<i>Intermountain Mun. Gas Agency v. FERC</i> , 326 F.3d 1281 (D.C. Cir. 2003).....	17
<i>Interstate Natural Gas Ass’n v. FERC</i> , 617 F.3d 504 (D.C. Cir. 2010).....	24
<i>Pub. Serv. Co. of Colo. v. FERC</i> , 91 F.3d 1478 (D.C. Cir. 1996).....	29-32
<i>Qwest Servs. Corp. v. FCC</i> , 509 F.3d 531 (D.C. Cir. 2007).....	29, 30

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGE

COURT CASES:

**Sacramento Mun. Util. Dist. v. FERC*,
616 F.3d 520 (D.C. Cir. 2010).....17, 29

Williams Natural Gas Co. v. FERC,
3 F.3d 1544 (D.C. Cir. 1993).....30

ADMINISTRATIVE CASES:

Alternatives to Traditional Cost-of -Service Ratemaking for Natural Gas Pipelines,
74 FERC ¶ 61,076, *reh’g denied*, 75 FERC ¶ 61,024 (1996),
petitions denied and dismissed sub nom. Burlington Res. Oil & Gas Co. v. FERC, 1998 U.S. App. LEXIS 20697 (D.C. Cir. July 20, 1998).....3

Columbia Gas Transmission Corp.,
126 FERC ¶ 61,237 (2009).....12, 21

Northern Natural Gas Co.,
122 FERC ¶ 61,227, *order on reh’g*,
122 FERC ¶ 61,270 (2008).....7, 8, 31

Northern Natural Gas Co.,
117 FERC ¶ 61,191 (2006), *order on reh’g*,
119 FERC ¶ 61,072 (2007).....6, 11, 14, 22, 25, 26, 31

Northern Natural Gas Co.,
120 FERC ¶ 61,233 (2007).....10, 11, 14-15, 18, 26, 27, 32

Northern Natural Gas Co.,
132 FERC ¶ 61,021 (2010).....13

Northern Natural Gas Co.,
133 FERC ¶ 61,210 (2010), *order on reh’g*,
135 FERC ¶ 61,085 (2011).....2, 13-15, 19-25, 27-31

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES:

Rate Regulation of Certain Natural Gas Storage Facilities,
115 FERC ¶ 61,343, *order on reh'g*,
117 FERC ¶ 61,190 (2006).....3, 4, 23

Southern Star Central Gas Pipeline,
131 FERC ¶ 61,154 (2010).....12, 21

Texas Gas Transmission, LLC,
122 FERC ¶ 61,190 (2009).....12, 21

STATUTES:

Natural Gas Act

Section 4(f), 15 U.S.C. § 717c(f).....1-5, 8-10, 12-20, 22-30, 32

Section 7(c), 15 U.S.C. § 717f(c).....4

REGULATIONS:

18 C.F.R. § 284.501.....4

18 C.F.R. § 284.502.....4

18 C.F.R. § 284.503.....3, 18, 29

18 C.F.R. § 284.505.....4, 23

LEGISLATIVE HISTORY:

S. Rep. No. 109-78 (2005).....19

GLOSSARY

2006 Declaratory Order	<i>Northern Natural Gas Co.</i> , 117 FERC 61,191 (2006)
2007 Service Agreement Order	<i>Northern Natural Gas Co.</i> , 120 FERC ¶ 61,233 (2007)
2008 Certificate Order	<i>Northern Natural Gas Co.</i> , 122 FERC ¶ 61,227 (2008)
Commission	Federal Energy Regulatory Commission
Declaratory Rehearing Order	<i>Northern Natural Gas Co.</i> , 119 FERC ¶ 61,072 (2007)
First Challenged Order	<i>Northern Natural Gas Co.</i> , 133 FERC ¶ 61,210 (2010)
NGA	Natural Gas Act
Northern	Petitioner Northern Natural Gas Company
Northern Natural	Petitioner Northern Natural Gas Company
Order No. 678	<i>Rate Regulation of Certain Natural Gas Storage Facilities</i> , 115 FERC ¶ 61,343 (2006)
Order No. 678-A	<i>Rate Regulation of Certain Natural Gas Storage Facilities</i> , 117 FERC ¶ 61,190 (2006)
Rehearing Order	<i>Northern Natural Gas Co.</i> , 135 FERC ¶ 61,085 (2011)
Xcel	Xcel Energy Services Inc.

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 11-1240

**NORTHERN NATURAL GAS COMPANY,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably interpreted a recent amendment to the Natural Gas Act (“NGA”), 15 U.S.C. § 717c(f), finding that it did not permit the Commission to grant Northern Natural Gas Company’s (“Northern” or “Northern Natural”) request to extend its market-based rate authority for already-constructed storage capacity.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum.

INTRODUCTION

In 2005, to encourage the construction of new natural gas storage capacity, Congress added section 4(f) to the Natural Gas Act, 15 U.S.C. § 717c(f), which allows the Commission, in certain circumstances, to grant a natural gas storage provider authority to sell storage service at market-based rates even if that provider has market power.

This proceeding involves the Commission's interpretation, for the first time, whether NGA § 4(f) permits the Commission to grant a pipeline's post-construction request to extend its market-based rate authority to resales of storage capacity. Based on the language and purpose of that provision, the Commission determined that it did not. *Northern Natural Gas Co.*, 133 FERC ¶ 61,210 (2010) ("First Challenged Order"), *order on reh'g*, 135 FERC ¶ 61,085 (2011) ("Rehearing Order").

STATEMENT OF FACTS

I. Events Leading To The Challenged Orders

A. Enactment of Natural Gas Act Section 4(f)

Originally, a natural gas storage service provider could negotiate market-based rates only if it demonstrated, and the Commission found, that it lacked significant market power. *See Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 at 61,227, *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions denied and dismissed sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 1998 U.S. App. LEXIS 20697 (D.C. Cir. July 20, 1998); 18 C.F.R. § 284.503 (market-power determination regulation).

In 2005, however, Congress enacted NGA § 4(f), 15 U.S.C. § 717c(f), which allows the Commission to authorize market-based rates for storage service associated with “new storage capacity related to a specific facility placed in service” after 2005, even if the storage provider is unable to show that it lacks market power. When it does so, the Commission must be satisfied that “market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services, and that customers are adequately protected.” *Rate Regulation of Certain Natural Gas Storage Facilities*, 115 FERC ¶ 61,343 P 2, JA 155 (“Order No. 678”) (quoting statute), *order on reh'g*, 117 FERC ¶ 61,190 (2006) (“Order No. 678-A”); *see also* Order No. 678 P

187, JA 193 (“an applicant can choose whether to file a market power study under the traditional approach for obtaining market-based rates or by submitting an application under the provisions of section 4(f) that does not require a showing of a lack of market power but requires the applicant to meet other requirements”).

In Order No. 678, the Commission promulgated regulations (18 C.F.R. §§ 284.501, 284.502, 284.505) to implement new NGA § 4(f). Order No. 678 P 1, JA 155. The Commission explained that it was “amending its regulatory policies in the Final Rule in order to facilitate the development of new natural gas storage capacity to ensure that adequate storage capacity will be available to meet anticipated market demand and to mitigate natural gas price volatility, while continuing to protect consumers from the exercise of market power.” *Id.* P 10, JA 158; *see also id.* P 167, JA 190 (noting that the “Commission’s primary goal here,” consistent with the intent of NGA § 4(f), is to provide an “incentive to build new storage infrastructure”).

“In order to receive authorization to charge market-based rates under section 4(f),” the Commission explained, “each applicant must make a showing as to why market-based rates are necessary to encourage the construction of the storage capacity.” Order No. 678 P 129, JA 182; *see also id.* P 130, JA 183 (“The statute requires that the Commission make an affirmative finding that market-based rates are necessary to encourage the construction of storage”); *id.* P 128, JA 182 (“[T]he

Commission’s finding that market-based rates are in the public interest will reflect its consideration of all aspects of 4(f) proposals, including . . . the strength of the applicant’s showing that the facilities would not be built but for market-based rate treatment.”).

B. 2006 Declaratory Order Granting Northern Market-Based Rates For Initial Sales Of Expansion Capacity

In 2006, Northern conducted an open season seeking bids to ascertain whether there was customer interest in Northern expanding its storage capacity. FERC Docket No. RP06-437, Northern’s Petition for Declaratory Order at 2, JA 207. The open season resulted in binding precedent agreements for all of the expansion capacity for 20 year terms. *Id.* at 24, 32, JA 229, 237.

Subsequently, on July 17, 2006, Northern filed a petition for declaratory order seeking market-based rate authority for the planned 2008 expansion of its storage facility near Redfield, Iowa. Northern explained that its prospective storage expansion customers were “willing to pay market-based rates for the terms reflected in their binding precedent agreements and, in exchange, Northern will make the required investment and thereby assume the operational risk inherent in the 2008 [storage] [e]xpansion.” *Id.* at 31-32, JA 236-37. Northern also explained that, “[g]iven the unique facts involved in the 2008 [storage] [e]xpansion project, including the fact the unit cost of the expansion is expected to exceed Northern’s existing cost-based [storage] cycle rate of \$0.74 per Dth, the rate certainty that has

been provided and the risk Northern has accepted, the market-based rates bid by the customers [we]re necessary for Northern to proceed with the proposed project.”

Id. at 42, JA 247.

On November 16, 2006, the Commission granted Northern’s petition, “find[ing] that Northern Natural m[et] the criteria necessary to negotiate market-based rates for the shippers that submitted winning bids in the 2006 Open Season and that signed precedent agreements, for the reasons set forth [in the order].” *Northern Natural Gas Co.*, 117 FERC ¶ 61,191 P 9, JA 287 (2006) (“2006 Declaratory Order”), *order on reh’g*, 119 FERC ¶ 61,072 (2007) (“Declaratory Rehearing Order”). Noting that “Northern Natural proposed market-based rates only for the rates in the precedent agreements signed during the open season,” the Commission held that “the use of market-based rates does not apply to sales of this storage capacity outside of these precedent agreements.” 2006 Declaratory Order n.4, JA 288; *see also id.* P 1, JA 286 (same); Declaratory Rehearing Order P 1, JA 293 (same).

Several parties sought rehearing of the 2006 Declaratory Order, but Northern did not. Declaratory Rehearing Order PP 1, 4, JA 293. None of the issues raised on rehearing addressed the Commission’s holding that Northern’s market-based rates authorization was limited to sales of the expansion storage capacity through the submitted precedent agreements. *See id.* PP 4-7, JA 293-94.

C. Northern’s Request For A Certificate Authorizing It To Expand Its Storage Capacity

On March 16, 2007, Northern filed its request for a certificate of public convenience and necessity under NGA § 7(c), 15 U.S.C. § 717f(c), to enable it to expand its Redfield storage capacity. Northern “request[ed] that the Commission issue an order granting approval for the proposed storage expansion as expeditiously as possible . . . so that Northern may initiate modifications with service to commence on June 1, 2008, and so that Northern may complete the remainder of the modifications to provide for peak withdrawal capabilities by November 1, 2008.” FERC Docket No. CP07-108, Certificate Application at 1-2, JA 345-46. Northern further noted that it “ha[d] executed precedent agreements for a total of 8.0 Bcf of [storage] capacity,” and that it would “provide this service at market-based rates pursuant to the authority granted by the Commission in” the 2006 Declaratory Order proceeding. *Id.* at 8, JA 352.

On March 12, 2008, the Commission granted Northern’s request for a certificate to expand its storage capacity. *Northern Natural Gas Co.*, 122 FERC ¶ 61,227 P 1 (“2008 Certificate Order”), JA 372, *order on reh’g*, 122 FERC ¶ 61,270 (2008). The 2008 Certificate Order reiterated the limited nature of Northern’s market-based rate authority, noting that the 2006 Declaratory Order had not “authoriz[ed] Northern to charge market-based rates for any subsequent sales of the expansion storage capacity.” 2008 Certificate Order P 26 & n.16, JA 375. *See*

also R.1 (Northern’s Request to Extend its NGA § 4(f) Market-Based Rate Authority) Transmittal Letter at 1-2, JA 10-11 (acknowledging that the 2008 Certificate Order authorized Northern “to sell the incremental 8 Bcf of [storage] service with market-based rates to the shippers currently listed on [Tariff] Sheet No. 55A for terms of 20 years,” and that “the authorization for market-based rates applied to the shipper contracts entered into as part of the 8 Bcf expansion and did not extend to resale of that capacity”).

Northern filed a request for clarification or rehearing of two non-market-based rate matters in the 2008 Certificate Order, stating that Northern was “at a definitive decision point (i.e., ‘go or no go’),” and required the requested clarifications “in order to accept the certificate and move forward with the project.” 2008 Certificate Order Clarification Request at 1, JA 381. Northern did not seek clarification or rehearing regarding the 2008 Certificate Order’s reiteration of the limited nature of its market-based rate authority.

The Commission granted the requested clarifications on March 24, 2008, *Northern*, 122 FERC ¶ 61,270, JA 394, and Northern accepted the certificate authorizing its storage expansion the next day, JA 396.

D. Northern’s Proposed Service Agreement For 2008 Market-Based Rate Customers

In the meantime, on August 14, 2007, Northern filed for Commission approval a service agreement proposed “specifically for the 2008 market-based

rate [storage] customers.” Service Agreement Filing at 2, JA 301. Northern stated that, “[u]pon approval of the proposed pro-forma service agreement, Northern will tender market-based rate service agreements to each party that was awarded capacity in the 2006 open season,” and that “[e]xecution of the agreements in advance of Commission authorization will allow Northern to proceed with construction immediately after acceptance of the certificate granted by the Commission.” *Id.* Northern also noted that the proposed service agreement “provide[d] that the shipper has a right of first refusal for the capacity stated in the agreement . . . subject to any rate authority applicable at the time of contract expiration.” *Id.* at 3, JA 302.

Parties protested the proposed right of first refusal provision, contending that “[i]t does not ensure that customers will be able to pay the maximum recourse rate then in effect for [storage] service. Instead, it leaves the door open for Northern to request an extension of the market-based rates for service to be rendered . . . some 20 years after Northern has made the decision to expand the Redfield storage field.” Xcel Energy Services Inc.’s (“Xcel”) Protest at 10, JA 320. Moreover, the protesters pointed out, “the sole purpose of Section 4(f) is to encourage the construction of facilities. It was not intended to serve as a vehicle for monopoly service providers to continue charging market-based rates for a period longer than needed to ensure that construction actually occurs.” *Id.*

Northern's September 6, 2007 answer to the protests acknowledged that it "did not request and the Commission did not grant market-based rate authority for any term beyond the initial term of the agreements." Protest Answer at 3, JA 333. Moreover, in response to the protestors' contention that NGA § 4(f) does not authorize Northern to request market-based rate authority in the future for any term beyond the initial term of the agreements, Northern stated that "[w]hether Section 4(f) would authorize such authority is not an issue in this proceeding." *Id.* Northern explained that the 2008 expansion customers all entered into "very long-term agreements," and that, "during the term of their agreements, the Commission's [right of first refusal] policy and/or rate policy may change." *Id.* at 4, JA 334. Thus, Northern intended the right of first refusal sentence to provide expansion customers the right to retain their firm storage capacity at the end of their agreements "at whatever rate is applicable at that time." *Id.* at 3-4, JA 333-34.

On September 13, 2007, after considering the protests and Northern's answer, the Commission accepted the proposed service agreement. *Northern Natural Gas Co.*, 120 FERC ¶ 61,233 PP 7-16 (2007) ("2007 Service Agreement Order"), JA 338-39. The Commission reiterated that, while the 2006 Declaratory Order found "Northern met the criteria necessary to charge market-based rates under section 4(f) of the NGA and the implementing regulations, the Commission

also limited Northern’s market-based rate authority in the declaratory order, stating that Northern is not permitted to charge market-based rates beyond the primary terms of the relevant service agreements.” *Id.* at P 16, JA 339; *see also id.* at P 3, JA 338 (explaining that the 2006 Declaratory Order at P 22, JA 290, clarified that Northern was not allowed “to charge market-based rates for any subsequent sales of the expansion storage capacity, whether that be upon contract expiration, bankruptcy, or any other event leading to turned back capacity.”).

As to the protestors’ right of first refusal concerns, the Commission explained that, “[b]y making its [right of first refusal] provision subject to the rate authority applicable at the end of the contract, the Commission underst[ood] that Northern [was] recognizing that the type of rate authority in effect at the expiration of the contract will determine the type of [right of first refusal] the customers will receive.” *Id.* at P 18, JA 339. If the rate at the end of the contract term would be the maximum rate, the storage expansion customer would be entitled to a right of first refusal at the maximum recourse rate. *Id.*, JA 340. “However, if sometime before the expiration of the contract, Northern proposes additional protections against the exercise of market power relating to the sale of capacity after the expiration of the primary term of the service agreements, the Commission will determine at that time whether the protections are adequate and the extent to which market-based rates should apply beyond the primary term of the service agreement.

If Northern should satisfy the requirements for extending market-based rates, [the storage expansion customer] would not be entitled to a [maximum recourse rate] [right of first refusal].” *Id.*

No party sought clarification or rehearing of the 2007 Service Agreement Order.

E. Northern’s Request To Extend Its NGA Section 4(f) Market-Based Rate Authority To Resales

On June 11, 2010, Northern filed a request to extend its NGA § 4(f) market-based rate authority. R. 1, JA 10. Northern explained that it wanted NGA § 4(f) market-based rate authority “for the resale of market-based rate capacity” that “becomes available through expiration of existing market-based rates [storage] service agreements or upon bankruptcy or another event leading to turn back of the capacity.” *Id.*, Transmittal Letter at 2, JA 11. Northern stated that it “propose[d] to protect potential shippers interested in the market-based rate capacity by establishing transparent open season procedures for the remarketing of this capacity and by establishing a reasonable reserve price.” *Id.* In support of its request, Northern cited to several orders in which the Commission had approved pipelines’ pre-construction requests for market-based rate authority for both initial sales and resales. *Id.* at 2 n.3, JA 11 (citing *Southern Star Central Gas Pipeline*, 131 FERC ¶ 61,154 (2010); *Columbia Gas Transmission Corp.*, 126 FERC ¶ 61,237 (2009); *Texas Gas Transmission, LLC*, 122 FERC ¶ 61,190 (2009)).

II. The Challenged Orders

In the challenged orders, the Commission found that Northern could not extend its market-based rate authority under NGA § 4(f). First Challenged Order PP 2, 4, 9-11, JA 1-3; Rehearing Order PP 1, 3-4, 11-17, JA 5-8. As the Commission explained, “Congress passed section 4(f) to encourage the development of storage that would not be developed without market-based rates. Congress was not establishing a mechanism by which pipelines could seek market-based rates for already constructed storage.” Rehearing Order P 12, JA 7. Thus, the Commission determined that NGA “section 4(f) applies only to ‘new’ storage capacity and applies only when the pipeline can demonstrate that market-based rates are necessary to encourage the development of new storage infrastructure.” Rehearing Order P 17, JA 8 (quoting NGA § 4(f)); *see also* First Challenged Order P 11, JA 3 (same). “Because Northern Natural’s request for market-based rates for any resales of the expansion capacity was made after the storage project was constructed, the request cannot meet these threshold requirements under section 4(f) for authority to charge market-based rates.” Rehearing Order P 17, JA 8; *see also id.* PP 12, 14, JA 7-8 (same).

The Commission also found no merit to Northern’s contention (R.29, Rehearing Request at 11-12, JA 150-51) that the Commission’s interpretation of

NGA § 4(f) should not apply here. Rehearing Order PP 19-20, JA 9. Northern asserted that it might not have gone forward with construction if it had known at the time of the 2007 Service Agreement Order that the Commission would interpret NGA § 4(f) to require pipelines to request resale market-based rate authority before construction. Rehearing Request at 11-12, JA 150-51.

As the Commission pointed out, however, the 2006 Declaratory Order explicitly provided Northern limited market-based rate authority only for initial sales of the expanded storage capacity. Rehearing Order P 20, JA 9 (noting that “the 2006 Declaratory Order made abundantly clear that Northern Natural was not authorized to charge market-based rates upon contract expiration.”) (citing 2006 Declaratory Order, 117 FERC at P 9 & n.4, JA 287). The 2007 Service Agreement Order reiterated this, “specifically recogniz[ing] that the 2006 Declaratory Order had not permitted market-based rates upon contract expiration” Rehearing Order P 8, JA 6 (citing 2007 Service Agreement Order n.7, JA 340 (“[T]he Commission’s actions in the declaratory order do not extend to permitting Northern to charge market-based rates for any subsequent sales of the expansion storage capacity.”)).

Moreover, the Commission explained, the 2007 Service Agreement Order “did not directly address the extension of market-based rates,” and did not “analyze whether such a request would be permissible under section 4(f).” Rehearing Order

P 8, JA 7. “Rather, that Order dealt only with the question of whether a Right of First Refusal (ROFR) would attach to the existing contracts at the expiration of those contracts.” *Id.* “The [2007 Service Agreement Order] addressed a possible extension of market-based rates only by acknowledging . . . that if Northern Natural had obtained market-based rates for any post-initial-contract capacity, the Commission would determine at that point whether the [right of first refusal] would apply.” *Id.* In any event, the Commission added, “[e]ven if the [2007 Service Agreement Order] could be interpreted to authorize a possible extension of market-based rates, [it] did not analyze whether such rates would be available under section 4(f).” *Id.*

SUMMARY OF ARGUMENT

The Commission understandably rejected Northern’s request to extend its market-based rate authority because it failed to satisfy the requirements, and advance the purpose, of section 4(f) of the Natural Gas Act, 15 U.S.C. § 717c(f). That provision, added to the NGA in 2005, allows the Commission to grant market-based rate authority for storage service when the storage provider is unwilling or unable to demonstrate that it lacks market power, but only in very limited circumstances. Specifically, the proponent must show, and the Commission must determine, among other things, that market-based rates are in the public interest and necessary to encourage the construction of new storage

capacity. Northern's request to extend its market-based rate authority to resales, made long after it constructed the storage capacity, neither did nor could meet these statutory requirements. The Commission cannot be faulted for acting to carry out the statutory language and purpose; its action must be sustained.

Northern claims that the Commission previously analyzed this issue in its 2007 Service Agreement Order. But, as the Commission explained, that order did not address whether NGA § 4(f) allows for post-construction extension of market-based rates. Rather, that order focused on a different issue concerning Northern's right of first refusal proposal.

Northern's contention that the Commission's interpretation of NGA § 4(f) should apply only prospectively fails as well. Under this Court's precedent, a first-time interpretation of a statutory provision is to be applied in the proceeding in which it is made. Since the Commission interpreted whether NGA § 4(f) allows the Commission to approve post-construction requests to extend market-based rate authority for the first time in the challenged orders, the Commission's determination that its interpretation should apply here was appropriate.

ARGUMENT

I. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard and upholds FERC's factual findings if supported

by substantial evidence. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010). FERC's orders will be affirmed "so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Id.* (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (alterations and omission by Court)).

Review of the Commission's interpretation of a provision of the Natural Gas Act that it administers (here, NGA § 4(f), 15 U.S.C. § 717c(f)) is governed by the familiar two-step analysis set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). See *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1284 (D.C. Cir. 2003); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The Court also gives substantial deference to FERC's interpretation of its own orders. *Sacramento*, 616 F.3d at 528.

II. FERC Reasonably Interpreted NGA Section 4(f)

Northern contends that the Commission's interpretation of NGA § 4(f) is unreasonable because it purportedly conflicts with the statutory language and intent of Congress as well as with the 2007 Service Agreement Order. Br. 37-51. Northern's contention is mistaken.

A. FERC's Interpretation Of NGA § 4(f) Is Consistent With The Statutory Language And Congressional Intent

For years, the Commission has allowed natural gas storage providers to charge market-based rates for storage service *if* they can demonstrate that they lack market power. *See* 18 C.F.R. § 284.503 and *supra* pp. 3-4. Courts have held that market-based rates, as an alternative to traditional cost-based rates, offer an acceptable measure of "just and reasonable" rates under section 4 of the Natural Gas Act, 15 U.S.C. § 717c, but only if consumers are protected against the exploitation of market power. *See, e.g., Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870-71 (D.C. Cir. 1993) (pipeline merchant sales service).

In 2005, Congress enacted NGA § 4(f), providing an exception to allow a natural gas storage provider to obtain market-based rate authority without showing that it lacks market power. But to obtain such special authority, the Commission must be assured that certain special criteria are met. Thus:

[T]he Commission may authorize a natural gas company . . . to provide storage and storage-related services at market-based rates **for new storage capacity** related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that -- (A) market-based rates are in the public interest and **necessary to encourage the construction of the storage capacity** in the area needing storage services; and (B) customers are adequately protected.

15 U.S.C. § 717c(f)(1) (emphases added). The legislative history of NGA § 4(f) confirms that it is intended to “promote[] investment in needed storage[.]” S. Rep. No. 109-78, at 3 (2005). *See also* Northern Br. 6 (same; further explaining that NGA § 4(f) “was designed to encourage the construction of new storage capacity”); Rehearing Order P 12, JA 7 (explaining that “Congress passed section 4(f) to encourage the development of storage that would not be developed without market-based rates.”).

The Commission reasonably determined, therefore, based on the language and purpose of the provision, that “section 4(f) applies only to ‘new’ storage capacity and applies only when the pipeline can demonstrate that market-based rates are necessary to encourage the development of the new storage infrastructure.” Rehearing Order P 17, JA 8; *see also id.* P 12, JA 7 (same); First Challenged Order P 11, JA 3 (same). Whether the Court finds NGA § 4(f)’s intent

plain or ambiguous,¹ the Commission's interpretation of that provision gives effect to its language and intent, is reasonable, and should be upheld. *Chevron*, 467 U.S. at 842-43.

The Commission also reasonably determined, despite Northern's claims to the contrary (Br. 42-48), that Northern's post-construction request for NGA § 4(f) market-based rate authority for resales of the 2008 expansion storage capacity could not meet these threshold NGA § 4(f) requirements. Rehearing Order PP 14, 15, 17, JA 7-8; First Challenged Order P 11, JA 3. Since Northern had already constructed the storage capacity when it filed its request for market-based rate resale authority, Northern could not make the statutorily required showings that new storage capacity was being constructed or that market-based rates were necessary to encourage Northern to construct the storage capacity. Rehearing Order PP 14, 17, JA 7, 8; First Challenged Order P 11, JA 3.

The Commission explained that other pipelines stated at the outset of their NGA § 4(f) proceedings that they needed market-based rate authority for both initial sales and resales of proposed storage capacity to provide them with the incentive to construct the new capacity (and also proposed consumer protection

¹ Northern asserts that Congress has not spoken to the precise question at issue, so *Chevron* step two applies. Br. 34, 47. If so, the Court must respect the Commission's reasonable interpretation of this statutory provision, which the Commission administers. *Chevron*, 467 U.S. at 843.

provisions for both types of sales before construction).² In contrast, Northern stated that it needed market-based rate authority only for initial sales of the expansion storage capacity to provide it with the incentive to construct. Rehearing Order P 16, JA 8; *see also id.* P 13 & n.14, JA 7 (quoting Northern’s Petition for Declaratory Order 31-32, JA 236-37) (“The prospective [storage] customers are willing to pay market-based rates for the terms reflected in their binding precedent agreements and, in exchange, Northern will make the required investment and thereby assume the operational risk inherent in the 2008 [storage] Expansion.”); Northern’s Petition for Declaratory Order 42, JA 247 (“Given the unique facts involved in the 2008 [storage] Expansion project, including the fact the unit cost of the expansion is expected to exceed Northern’s existing cost-based [storage] cycle rate of \$0.74 per Dth, the rate certainty that has been provided and the risk Northern has accepted, the market-based rates bid by the customers are necessary for Northern to proceed with the proposed project.”); First Challenged

² Rehearing Order P 16 & n.18, JA 8 (citing *Southern Star*, 131 FERC ¶ 61,154 PP 9, 41-43); *Columbia Gas*, 126 FERC ¶ 61,237 PP 32-38; *Texas Gas*, 122 FERC ¶ 61,190 PP 38-40). Northern attempts to undercut the Commission’s citation to these cases by pointing out that, unlike Northern, those pipelines had unsubscribed capacity and, therefore, needed to propose customer protection provisions at the outset in order to sell the remaining unsubscribed capacity at market-based rates. Br. 44. While that is true, Northern’s point has nothing to do with the basis on which the Commission cited those cases -- that those pipelines also requested market-based rate authority for resales at the outset, prior to construction.

Order P 4 & nn.10-11, JA 2 (“In its request for a declaratory order Northern Natural did not propose as necessary, and the Commission did not grant, market-based rates under section 4(f) that would apply to the resale of the Redfield storage capacity.”) (citing 2006 Declaratory Order n.4, JA 288, P 22, JA 290).

Northern argues that a post-construction request for market-based rate authority for resales could establish, belatedly, that market-based rate authority was necessary to encourage the pipeline to construct the storage capacity in the first place. Br. 47-48. Northern does not explain how this could be so, and, as already discussed, the Commission reasonably found otherwise. Rehearing Order PP 14, 17, JA 7-8; First Challenged Order P 11, JA 3.

Northern’s challenge to the Commission’s determination that it cannot grant a request to extend market-based rate authority for already-constructed capacity because that capacity is not “new,” as required under NGA § 4(f), Br. 48, fails as well. As the Commission explained, “Congress passed section 4(f) to encourage the development of storage that would not be developed without market-based rates. Congress was not establishing a mechanism by which pipelines could seek market-based rates for already constructed storage.” Rehearing Order P 12, JA 7.

Next, Northern contends that the Commission’s statement that Northern presented only a customer protection plan without any other justification

supporting its request for resale market-based rate authority (Rehearing Order P 17, JA 8) shows that NGA § 4(f) does not bar post-construction requests for market-based rate authority. Br. 49-50. In fact, however, all that statement shows is that, even if NGA § 4(f) permitted post-construction requests for market-based rate authority, Northern’s request still could not be approved. While Northern’s request included necessary customer protection proposals,³ it did not even attempt to show (as required by both NGA § 4(f)(1)(A) and 18 C.F.R. § 284.505(a)(1)) that the proposed market-based rates were “in the public interest and necessary to encourage the construction of the storage capacity” *See* Order No. 678 P 125, JA 182 (“In order to authorize market-based rates under section 4(f), the Commission must determine that: (1) market-based rates are in the public interest; (2) market-based rates are necessary to encourage the construction of the storage capacity; and (3) the area in which the storage project is proposed needs storage services;” “The Commission will expect each applicant to address each of these requirements in its applications explaining and supporting its contentions with respect to each element.”).

³ *See* NGA § 4(f)(1)(B) (requiring the Commission to find that “customers are adequately protected”); 18 C.F.R. § 284.505(a)(2) (providing that an applicant “must provide a means of protecting customers from the potential exercise of market power”).

Northern further contends that NGA § 4(f) and the Commission’s regulations do not bar the Commission from considering, after construction, “the customer protection issue for future resales of the new capacity.” Br. 42-43; *see also* Br. 45 (same). The Commission agreed with Northern on this point in circumstances where the Commission had granted market-based rate authority for storage capacity resales prior to construction and the pipeline subsequently filed to revise aspects of its consumer protections. First Challenged Order n.17, JA 3. By contrast, in the circumstances presented here, where the pipeline files after construction for resale market-based rate authority, Northern’s contention ignores that the Commission cannot approve NGA § 4(f) market-based rate authority unless the pipeline also satisfies the statutory and regulatory requirements that the proposed market-based rates are in the public interest⁴ and necessary to encourage construction of the storage capacity, which Northern did not attempt to do here. Rehearing Order PP 12, 17, JA 7, 8; First Challenged Order P 11, JA 3.

⁴ The Commission explained that “[t]here may be good reasons for approving market-based rates for initial fully subscribed auctions and not approving market-based rates for subsequent resales.” Rehearing Order n.19, JA 8. “While the initial auction may protect shippers during an open season, authorizing market-based rates for resales when a pipeline has market power may provide an incentive for the pipeline to limit construction of future projects in order to ensure that scarcity pushes up the price for the resale.” *Id.* Cf. *Interstate Natural Gas Ass’n v. FERC*, 617 F.3d 504, 510-11 (D.C. Cir. 2010) (affirming Commission decision to deny market-based rates where pipeline “might withhold construction of new capacity to take advantage of the opportunity to earn scarcity rents”).

B. FERC Did Not Interpret Whether NGA § 4(f) Permitted Market-Based Rates To Be Extended Post-Construction Until The Challenged Orders

From the outset, the Commission limited its approval of Northern's original request for NGA § 4(f) authority to the particular facts of that request: "Northern Natural proposed market-based rates only for the rates in the precedent agreements signed during the open season and, therefore, the use of market-based rates does not apply to sales of this storage capacity outside of these precedent agreements." 2006 Declaratory Order n.4, JA 288. Northern now argues that the Commission somehow repudiated this reservation by interpreting NGA § 4(f) in its 2007 Service Agreement Order, and that its interpretation of that provision in the challenged orders conflicts with its 2007 interpretation. Br. 37-42. In fact, however, the Commission did not analyze and interpret whether Northern could extend its initial NGA § 4(f) market-based rate authority to resales until the challenged orders. Rehearing Order PP 8-10, JA 6-7.

As already discussed, *supra* pp. 8-12, the 2007 Service Agreement Order addressed a filing seeking approval of a pro-forma service agreement Northern proposed to use for its market-based rate transactions. Service Agreement Filing 2, JA 301; 2007 Service Agreement Order P 1, JA 337. Parties protested the proposed service agreement's right of first refusal provision, arguing that it would allow Northern to request an extension of market-based rates post-construction in

contravention of NGA § 4(f). Xcel Protest 10, JA 320. Northern answered that protest, stating that “[w]hether Section 4(f) would authorize such authority is not an issue in this proceeding,” and explaining that “[b]y adding the [right of first refusal] [s]entence, Northern was merely providing the expansion shippers the right to retain their firm storage capacity at the end of their agreements, at whatever rate is applicable at that time.” Protest Answer 3-4, JA 333-34. Northern further explained that “[t]he 2008 expansion shippers all entered into very long-term agreements,” and that “[d]uring the term of their agreements, the Commission’s [right of first refusal] policy and/or rate policy may change.”⁵ *Id.* at 4, JA 334.

In accepting the proposed service agreement, the Commission reiterated that Northern had been granted market-based rate authority only for the initial sales of its expansion storage capacity. 2007 Service Agreement Order PP 3, 16, JA 338, 339 (citing 2006 Declaratory Order at P 22, JA 290). Furthermore, in response to the protestors’ right of first refusal concerns, the Commission stated that, “[b]y making its [right of first refusal] provision subject to the rate authority applicable

⁵ Northern’s assertion on brief that it proposed the right of first refusal language “because it recognized that it had the opportunity to seek market-based rates for the Redfield storage expansion capacity for the period after the expiration of the initial 20-year contracts if it filed customer protections under Section 4(f) at some future point in time prior to contract expiration,” Br. 16 n.12, conflicts with Northern’s contemporaneous explanation.

at the end of the contract, the Commission underst[ood] that Northern [was] recognizing that the type of rate authority in effect at the expiration of the contract will determine the type of [right of first refusal] the customers will receive.” *Id.* at P 18, JA 339-40. If the rate at the end of the contract term would be the maximum rate, the storage expansion customer would be entitled to a right of first refusal at the maximum recourse rate. *Id.*, JA 340. “However, if sometime before the expiration of the contract, Northern proposes additional protections against the exercise of market power relating to the sale of capacity after the expiration of the primary term of the service agreements, the Commission will determine at that time whether the protections are adequate and the extent to which market-based rates should apply beyond the primary term of the service agreement.” *Id.* The Commission’s discussion in the 2007 Service Agreement Order did not include any analysis of NGA § 4(f)’s language or purpose.

As the challenged orders reasonably explained, therefore, the 2007 Service Agreement Order “did not directly address the extension of market-based rates.” Rehearing Order P 8, JA 6. “Rather, that Order dealt only with the question of whether a Right Of First Refusal (ROFR) would attach to the existing contracts at the expiration of those contracts,” and “addressed a possible extension of market-based rates only by acknowledging . . . that if Northern Natural had obtained market-based rates for any post-initial-contract capacity, the Commission would

determine at that point whether the [right of first refusal] would apply.” *Id.*; *see also id.* P 10, JA 7 (“The issue of whether Northern Natural could extend market-based rates upon contract expiration was, at best, peripheral to the consideration of the proposed tariff provisions”).

Moreover, the Commission pointed out, the 2007 Service Agreement Order did not “analyze whether such a request [i.e., a post-construction request to extend market-based rates authority to resales] would be permissible under section 4(f).” Rehearing Order P 8, JA 7. This is not surprising, since Northern itself told the Commission during the 2007 Service Agreement proceeding that “[w]hether Section 4(f) would authorize such authority is not an issue in this proceeding.” Protest Answer 3, JA 333.

Northern argues that the 2007 Service Agreement Order must have analyzed and decided the NGA § 4(f) issue because otherwise Xcel would have opposed the instant filing on that basis. Br. 38-39, 41-42. Of course, a party may decide not to take a position or make an argument for any number of reasons, and the Court should not ascribe a particular motivation to a party’s silence, much less adopt a negative inference that best fits the petitioner’s theory of the case. This is particularly true here, where the record reveals that Xcel may now want Northern to be able to extend its NGA § 4(f) market-based rate authority to resales so that Xcel can have “the opportunity to share, through capacity releases in the upside

potential of market-based rates.” R.12, Xcel’s Comments 17, JA 63; *see also id.* 16-18 (same), JA 62-64.

The Commission’s reasonable interpretation of its 2007 Service Agreement Order, not Northern’s contrary interpretation, deserves deference and should be upheld. *Sacramento*, 616 F.3d at 528. If Northern persists in seeking market-based rates for resales of its already-constructed storage capacity, it may proceed in the traditional way, *see* 18 C.F.R. § 284.503, by showing that it lacks, or has sufficiently mitigated, substantial market power. Rehearing Order n.15, JA 8.

III. FERC Reasonably Found That Its Interpretation Of NGA § 4(f) Should Apply Here

“The general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it.” *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc). In fact, there is a “presumption of retroactivity for adjudications.” *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007); *see also AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (“Retroactivity is the norm in agency adjudications”).

Accordingly, “when there is a ‘substitution of new law for old law that was reasonably clear,’ the new rule may justifiably be given prospectively-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’” *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir.

1996) (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). “By contrast, retroactive effect is appropriate for ‘new applications of [existing] law, clarifications, and additions.’” *Pub. Serv. Co.*, 91 F.3d at 1488 (quoting *Williams*, 3 F.3d at 1554) (alteration by Court).

As already discussed, the Commission analyzed whether NGA § 4(f) permitted the Commission to grant a post-construction request for market-based rate authority for the first time in the challenged orders. Thus, consistent with this Court’s precedent, the Commission reasonably determined that its interpretation should apply in this case.

Moreover, as the Commission found (Rehearing Order P 20, JA 9), Northern’s claim that the interpretation should apply only prospectively because Northern detrimentally relied on the Commission’s purported interpretation of NGA § 4(f) in the 2007 Service Agreement Order, Br. 51-55, cannot stand. Northern cannot show, as it must, that it could reasonably rely on the Commission’s statements in the 2007 Service Agreement Order as clearly interpreting NGA § 4(f) in its favor. *Qwest*, 509 F.3d at 540 (explaining that “settled expectations” are those “on which a party might reasonably place reliance;” “for reliance to establish manifest injustice, it must be reasonable – reasonably based on settled law contrary to the rule established in the adjudication. The mere possibility that a party may have relied on its own (rather convenient)

assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when the law is finally clarified.”); *AT&T*, 454 F.3d at 332 (petitioner must point “to a settled rule on which it reasonably relied”); *Pub. Serv. Co. of Colo.*, 91 F.3d at 1490 (detrimental reliance must be reasonable).

In fact, any such reliance would have been unreasonable. The 2006 Declaratory Order “made abundantly clear that Northern Natural was not authorized to charge market-based rates upon contract expiration.” Rehearing Order P 10, JA 7 (citing 2006 Declaratory Order P 9 & n.4, JA 287-88). Northern did not mention any notion of extending its market-based rate authority in the 2008 certificate proceeding. Rather, it simply “request[ed] that the Commission issue an order granting approval for the proposed storage expansion as expeditiously as possible,” and stated that Northern would provide “service at market-based rates pursuant to the authority granted by the Commission” in the 2006 Declaratory Order proceeding. Certificate Application at 1-2, 8, JA 345-46, 352.

Then, when the order granting Northern’s certificate to expand its storage capacity reiterated the limited nature of Northern’s market-based rate authority, 2008 Certificate Order P 26 & n.16, JA 375, Northern sought clarification or rehearing on other issues, but not on that issue. 2008 Certificate Order, 122 FERC ¶ 61,227, *order on reh’g*, 122 FERC ¶ 61,270. Furthermore, Northern told the

Commission during the 2007 Service Agreement proceeding that whether Northern could extend its NGA § 4(f) market-based rate authority post-construction was not an issue in that proceeding (Protest Answer 3, JA 333), and, consequently, the Commission's discussion in that order (2007 Service Agreement Order PP 16-19, JA 339-40) does not include any analysis of NGA § 4(f)'s language or purpose.

In these circumstances, Northern's "reliance would have been foolhardy," *Pub. Serv. Co.*, 91 F.3d at 1490, and it would have been "taking its chances," *AT&T*, 454 F.3d at 333.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6048
Fax: 202-273-0901
E-mail: beth.pacella@ferc.gov

April 4, 2012

Northern Natural Gas Company v. FERC,
D.C. Cir. No. 11-1240

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 7,273 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6600
FAX: (202) 273-0901
beth.pacella@ferc.gov

April 4, 2012

ADDENDUM

STATUTES AND REGULATIONS

TABLE OF CONTENTS

	PAGE
Natural Gas Act, Section 4(f), 15 U.S.C. § 717c(f).....	A-2
Natural Gas Act, Section 7(c), 15 U.S.C. § 717f(c).....	A-4
18 C.F.R. § 284.501.....	A-7
18 C.F.R. § 284.502.....	A-7
18 C.F.R. § 285.503.....	A-8
18 C.F.R. § 285.504.....	A-9
18 C.F.R. § 285.505.....	A-9

ization to construct an LNG terminal and encourage applicants to cooperate with State and local officials.

(b) State consultation

The Governor of a State in which an LNG terminal is proposed to be located shall designate the appropriate State agency for the purposes of consulting with the Commission regarding an application under section 717b of this title. The Commission shall consult with such State agency regarding State and local safety considerations prior to issuing an order pursuant to section 717b of this title. For the purposes of this section, State and local safety considerations include—

- (1) the kind and use of the facility;
- (2) the existing and projected population and demographic characteristics of the location;
- (3) the existing and proposed land use near the location;
- (4) the natural and physical aspects of the location;
- (5) the emergency response capabilities near the facility location; and
- (6) the need to encourage remote siting.

(c) Advisory report

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) of this section in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant

agrees to provide to any State and local agencies with responsibility for security and safety—

- (A) at the LNG terminal; and
- (B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, §3A, as added Pub. L. 109–58, title III, §311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in

force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8,

2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, §4, 52 Stat. 822; Pub. L. 87-454, May 21, 1962, 76 Stat. 72; Pub. L. 109-58, title III, §312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95-621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109-58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87-454 inserted “or gas distributing company” after “State commission”, and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102-104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102-486, title IV, §408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c-1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, §4A, as added Pub. L. 109-58, title III, §315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may

by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section

and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission

in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95-617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100-474, §2, Oct. 6, 1988, 102 Stat. 2302.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100-474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95-617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95-617, §608(b)(2), substituted “subsection (c)(1)” for “subsection (c)”.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 3 of Pub. L. 100-474 provided that: “The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].”

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal

Federal Energy Regulatory Commission

Pt. 284

⁴ Mathematically the price difference ratio is $P_2 - P_1 / P_1$; Where P_2 = the price of fuel oil or coal and P_1 = the price of natural gas. The ratio indicates the percent difference between natural gas and alternate fuel prices. For example in January 1980 electric utilities reported that in that month they paid 1.897 times more (189.7 percent) for No. 2 fuel oil than they paid for natural gas. As determined in Docket No. RM79-40 NOPR issued June 3, 1980, corrected for clerical/typographical error.

[Order 55-B, 45 FR 54740, Aug. 18, 1980]

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

Subpart A—General Provisions and Conditions

Sec.

- 284.1 Definitions.
- 284.2 Refunds and interest.
- 284.3 Jurisdiction under the Natural Gas Act.
- 284.4 Reporting.
- 284.5 Further terms and conditions.
- 284.6 Rate interpretations.
- 284.7 Firm transportation service.
- 284.8 Release of firm capacity on interstate pipelines.
- 284.9 Interruptible transportation service.
- 284.10 Rates.
- 284.11 Environmental compliance.
- 284.12 Standards for pipeline business operations and communications.
- 284.13 Reporting requirements for interstate pipelines.
- 284.14 Posting requirements of major non-interstate pipelines.

Subpart B—Certain Transportation by Interstate Pipelines

- 284.101 Applicability.
- 284.102 Transportation by interstate pipelines.
- 284.103-284.106 [Reserved]

Subpart C—Certain Transportation by Intrastate Pipelines

- 284.121 Applicability.
- 284.122 Transportation by intrastate pipelines.
- 284.123 Rates and charges.
- 284.124 Terms and conditions.
- 284.125 [Reserved]
- 284.126 Reporting requirements.

Subpart D—Certain Sales by Intrastate Pipelines

- 284.141 Applicability.
- 284.142 Sales by intrastate pipelines.
- 284.143-284.148 [Reserved]

Subparts E-F [Reserved]

Subpart G—Blanket Certificates Authorizing Certain Transportation by Interstate Pipelines on Behalf of Others and Services by Local Distribution Companies

- 284.221 General rule; transportation by interstate pipelines on behalf of others.
- 284.222 [Reserved]
- 284.223 Transportation by interstate pipelines on behalf of shippers.
- 284.224 Certain transportation and sales by local distribution companies.
- 284.225-284.226 [Reserved]
- 284.227 Certain transportation by intrastate pipelines.

Subpart H [Reserved]

Subpart I—Emergency Natural Gas Sale, Transportation, and Exchange Transactions

- 284.261 Purpose.
- 284.262 Definitions.
- 284.263 Exemption from section 7 of Natural Gas Act and certain regulatory conditions.
- 284.264 Terms and conditions.
- 284.265 Cost recovery by interstate pipeline.
- 284.266 Rates and charges for interstate pipelines.
- 284.267 Intrastate pipeline emergency transportation rates.
- 284.268 Local distribution company emergency transportation rates.
- 284.269 Intrastate pipeline and local distribution company emergency sales rates.
- 284.270 Reporting requirements.
- 284.271 Waiver.

Subpart J—Blanket Certificates Authorizing Certain Natural Gas Sales by Interstate Pipelines

- 284.281 Applicability.
- 284.282 Definitions.
- 284.283 Point of unbundling.
- 284.284 Blanket certificates for unbundled sales services.
- 284.285 Pregrant of abandonment of unbundled sales services.
- 284.286 Standards of conduct for unbundled sales service.
- 284.287 Implementation and effective date.

§ 284.403

(c)(1) The authorization granted in paragraph (a) of this section will become effective for an affiliated marketer with respect to transactions involving affiliated pipelines when an affiliated pipeline receives its blanket certificate pursuant to § 284.284.

(2) Should a marketer be affiliated with more than one pipeline, the authorization granted in paragraph (a) of this section will not be effective for transactions involving other affiliated interstate pipelines until such other pipelines' meet the criterion set forth in paragraph (c)(1) of this section. The authorization granted in paragraph (a) of this section is not extended to affiliates of persons who transport gas in interstate commerce and who do not have a tariff on file with the Commission under part 284 of this subchapter with respect to transactions involving that person.

(d) Abandonment of the sales service authorized in paragraph (a) of this section is authorized pursuant to section 7(b) of the Natural Gas Act upon the expiration of the contractual term or upon termination of each individual sales arrangement.

[Order 547, 57 FR 57959, Dec. 8, 1992, as amended by Order 581, 60 FR 53074, Oct. 11, 1995; Order 644, 68 FR 66337, Nov. 26, 2003]

§ 284.403 Code of conduct for persons holding blanket marketing certificates.

(a) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement on Natural Gas and Electric Price Indices*, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller must notify the Commission as part of its FERC Form No. 552 annual reporting requirement in § 260.401 of this chapter whether it reports its transactions to publishers of electricity and natural gas indices. In addition, Seller shall adhere to any other standards and require-

18 CFR Ch. I (4-1-11 Edition)

ments for price reporting as the Commission may order.

(b) A blanket marketing certificate holder shall retain, for a period of five years, all data and information upon which it billed the prices it charged for the natural gas sold pursuant to its market based sales certificate or the prices it reported for use in price indices.

[Order 644, 68 FR 66337, Nov. 26, 2003, as amended by Order 673, 71 FR 9716, Feb. 27, 2006; Order 677, 71 FR 30287, May 26, 2006; 73 FR 1032, Jan. 4, 2008; 73 FR 55739, Sept. 26, 2008]

Subpart M—Applications for Market-Based Rates for Storage

SOURCE: Order 678, 71 FR 36636, July 27, 2006, unless otherwise noted.

§ 284.501 Applicability.

Any pipeline or storage service provider that provides or will provide service under subparts B, C, or G of this part, and that wishes to provide storage and storage-related services at market-based rates must conform to the requirements in subpart M.

§ 284.502 Procedures for applying for market-based rates.

(a) Applications for market-based rates may be filed with certificate applications. Service, notice, intervention, and protest procedures for such filings will conform with those applicable to the certificate application.

(b) With respect to applications not filed as part of certificate applications,

(1) Applicants providing service under subpart B or subpart G of this part must file a request for declaratory order and comply with the service and filing requirements of part 154 of this chapter. Interventions and protests to applications for market-based rates must be filed within 30 days of the application unless the notice issued by the Commission provides otherwise. An applicant providing service under subpart B or subpart G of this part cannot charge market-based rates under this subpart of this part until its application has been accepted by the Commission. Once accepted, the applicant can make the appropriate filing necessary

to set its market-based rates into effect.

(2) Applicants providing service under subpart C of this part must file in accordance with the requirements of that subpart.

§ 284.503 Market-power determination.

An applicant may apply for market-based rates by filing a request for a market-power determination that complies with the following:

(a) The applicant must set forth its specific request and adequately demonstrate that it lacks market power in the market to be served, and must include an executive summary of its statement of position and a statement of material facts in addition to its complete statement of position. The statement of material facts must include citation to the supporting statements, exhibits, affidavits, and prepared testimony.

(b) The applicant must include with its application the following information:

(1) *Statement A—geographic market.* This statement must describe the geographic markets for storage services in which the applicant seeks to establish that it lacks significant market power. It must include the market related to the service for which it proposes to charge market-based rates. The statement must explain why the applicant's method for selecting the geographic markets is appropriate.

(2) *Statement B—product market.* This statement must identify the product market or markets for which the applicant seeks to establish that it lacks significant market power. The statement must explain why the particular product definition is appropriate.

(3) *Statement C—the applicant's facilities and services.* This statement must describe the applicant's own facilities and services, and those of all parent, subsidiary, or affiliated companies, in the relevant markets identified in Statements A and B in paragraphs (b)(1) and (2) of this section. The statement must include all pertinent data about the storage facilities and services.

(4) *Statement D—competitive alternatives.* This statement must describe available alternatives in competition

with the applicant in the relevant markets and other competition constraining the applicant's rates in those markets. Such proposed alternatives may include an appropriate combination of other storage, local gas supply, LNG, financial instruments and pipeline capacity. These alternatives must be shown to be reasonably available as a substitute in the area to be served soon enough, at a price low enough, and with a quality high enough to be a reasonable alternative to the applicant's services. Capacity (transportation, storage, LNG, or production) owned or controlled by the applicant and affiliates of the applicant in the relevant market shall be clearly and fully identified and may not be considered as alternatives competing with the applicant. Rather, the capacity of an applicant's affiliates is to be included in the market share calculated for the applicant. To the extent available, the statement must include all pertinent data about storage or other alternatives and other constraining competition.

(5) *Statement E—potential competition.* This statement must describe potential competition in the relevant markets. To the extent available, the statement must include data about the potential competitors, including their costs, and their distance in miles from the applicant's facilities and major consuming markets. This statement must also describe any relevant barriers to entry and the applicant's assessment of whether ease of entry is an effective counter to attempts to exercise market power in the relevant markets.

(6) *Statement F—maps.* This statement must consist of maps showing the applicant's principal facilities, pipelines to which the applicant intends to interconnect and other pipelines within the area to be served, the direction of flow of each line, the location of the alternatives to the applicant's service offerings, including their distance in miles from the applicant's facility. The statement must include a general system map and maps by geographic markets. The information required by this statement may be on separate pages.

(7) *Statement G—market-power measures.* This statement must set forth the

§ 284.504

18 CFR Ch. I (4-1-11 Edition)

calculation of the market concentration of the relevant markets using the Herfindahl-Hirschman Index. The statement must also set forth the applicant's market share, inclusive of affiliated service offerings, in the markets to be served. The statement must also set forth the calculation of other market-power measures relied on by the applicant. The statement must include complete particulars about the applicant's calculations.

(8) *Statement H—other factors.* This statement must describe any other factors that bear on the issue of whether the applicant lacks significant market power in the relevant markets. The description must explain why those other factors are pertinent.

(9) *Statement I—prepared testimony.* This statement must include the proposed testimony in support of the application and will serve as the applicant's case-in-chief, if the Commission sets the application for hearing. The proposed witness must subscribe to the testimony and swear that all statements of fact contained in the proposed testimony are true and correct to the best of his or her knowledge, information, and belief.

§ 284.504 Standard requirements for market-power authorizations.

(a) Applicants granted the authority to charge market-based rates under § 284.503 that provide cost-based service(s) must separately account for all costs and revenues associated with facilities used to provide the market-based services. When it files to change its cost-based rates, applicant must provide a summary of the costs and revenues associated with market-based rates with applicable cross references to §§ 154.312 and 154.313 of this chapter. The summary statement must provide the formulae and explain the bases used in the allocation of common costs between the applicant's cost-based services and its market-based services.

(b) A storage service provider granted the authority to charge market-based rates under § 284.503 is required to notify the Commission within 10 days of acquiring knowledge of significant changes occurring in its market power status. Such notification should include a detailed description of the new

facilities/services and their relationship to the storage service provider. Significant changes include, but are not limited to:

- (1) The storage provider expanding its storage capacity beyond the amount authorized in this proceeding;
- (2) The storage provider acquiring transportation facilities or additional storage capacity;
- (3) An affiliate providing storage or transportation services in the same market area; and
- (4) The storage provider or an affiliate acquiring an interest in or is acquired by an interstate pipeline.

§ 284.505 Market-based rates for storage providers without a market-power determination.

(a) Any storage service provider seeking market-based rates for storage capacity, pursuant to the authority of section 4(f) of the Natural Gas Act, related to a specific facility put into service after August 8, 2005, may apply for market-based rates by complying with the following requirements:

- (1) The storage service provider must demonstrate that market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and
 - (2) The storage service provider must provide a means of protecting customers from the potential exercise of market power.
- (b) Any storage service provider seeking market-based rates for storage capacity pursuant to this section will be presumed by the Commission to have market power.

PART 286—ACCOUNTS, RECORDS, MEMORANDA AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

- Sec.
- 286.101 Application for stay.
- 286.102 Application for rehearing.

DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

- 286.103 Notice to audited person.
- 286.104 Response to notification.
- 286.105 Shortened procedure.
- 286.106 Form and style.
- 286.107 Verification.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 4th day of April 2012, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Carolyn Y. Thompson
Jones Day
51 Louisiana Ave., NW
Washington, DC 20001-2113

EMAIL

Dorothy R. Dorman
J. Gregory Porter
Northern Natural Gas Company
PO Box 3330
Omaha, NE 68103-0330

US MAIL

Frank X. Kelly
Steve Stojic
Gallagher, Boland and Meiburger, LLP
818 18th Street, NW, Suite 800
Washington, DC 20006-3520

EMAIL

Robert I. White
Squire Sanders (US) LLP
1200 19th St., NW, Suite 300
Washington, DC 20036

EMAIL

Thomas C. Gorak
Gorak & Bay, LLC
1161 Ikena Circle
Honolulu, HI 96821-3218

EMAIL

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov